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Arbitration and Conciliation Act, 1996–Section 34– Dispute as to termination of contract– Jurisdiction of arbitrator– Held, arbitrator has jurisdiction to determine whether termination of contract by department was valid or illegal and qua it contractor being entitled to monetary compensation on that ground. (Para 3) Title: M/s J. K. Exim Pvt. Ltd. vs. Director of Women & Child Development, H.P. & another, Page- 1134

Arbitration and Conciliation Act, 1996– Section 34– Objections to award– Claimant alleging loss of profits and overheads on account of prolongation of contract– 'Hudson formula'– Whether can be applied without claimant leading any evidence qua loss? Contractor could not initiate construction work for years together because of non-handing over of site to him on account of ownership issues of land– Finally department abandoning work and intimating contractor about it– Arbitrator denying his claim toward loss of profits and overheads on account of prolongation of contract– Objections thereto– Claimant contending that once prolongation of contract is admitted , he is entitled for loss of profits and overheads and he was not required to prove actual damage– Held, construction site could not be handed over to claimant because approach to site was through land of BBMB– Dispute arose within a month of award of work to contractor– No evidence adduced regarding deployment of men and machinery at spot by contractor– No proof of damage suffered by him on account of prolongation of contract– No such claim without any proof of actual damage can be granted merely on basis of 'Hudson formula'– Petition dismissed. (Para 5) Title: Tarun Mahindroo vs. H.P. Power Corporation Limited, Page- 1219

Arbitration and Conciliation Act, 1996– Section 34– Award– Objections thereto– Maintainability– Held, Arbitrator had complied with principles of natural justice before announcing award– Award ex-facie not arbitrary or suffering from any vices as encapsulated in judgment titleled Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49- It is a reasonable award and is accordingly validated– Objections dismissed. (Paras 10 & 11) Title: Himachal Pradesh State Electricity Board Ltd. vs. HCL Infotech Limited, Page- 1351

ArbitrationandConciliationAct,1996 (Act)– Section 34– **Code of Civil Procedure, 1908**– Order XXI Rule 11– Execution of award– Filing of objections to award under Section 34 of Act– Effect– Held, mere filing of objections to award under Section 34 of Act would not amount to staying of execution of said award– Specific order in this regard is required to be passed. (Para 5) Title: Kalyan Chauhan vs. The Executive Engineer & others, Page- 1218

Arbitration and Conciliation Act, 1996(New Act)– Section 34(3)– **Arbitration Act, 1940 (Old Act)**– Section 15– Objections to award– New Act vis-a-vis Old Act- Applicability– Held, when arbitration proceedings had commenced under Old Act, then in absence of consent of parties that arbitration proceedings would be governed by New Act, the provisions of Old Act will apply for all intents and purposes– Objections under Section 34 (3) of New Act to such an award are not maintainable– Rather objections, if any, are to be filed and adjudicated upon as per provisions of Old Act. (Para 10) Title: M/s S.B. Trading Co. vs. The State of HP and another, Page- 585

Arms Act, 1959– Section 2(1) (b)– Ammunition– 'Cartridges', whether is an ammunition? Held, cartridge is an ammunition within meaning of Section 2(1) (b) of Act– Therefore, sale

of cartridges by licenced Arms dealer without verifying licence of purchaser amounts to offence under Section 25 of Act. (Para 9) Title: Baljesh Rai @ Brijesh Kumar vs. State of H.P., Page- 1245

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Building and other Construction Act, 1996– Section 12– Registration of beneficiary, whether can be provisional? - Held, there is no stipulation under Act which provides for provisional registration of beneficiary– Once petitioner admittedly is registered as beneficiary, benefits accruing under Act cannot be denied to her on ground that such registration was provisional.(Para 11)Title: Soma Devi vs. The State of H.P. and others, Page- 343

'C'

CCS (CCA) Rules, 1965- Disciplinary proceedings on court orders– Effect– Held, direction issued by court while hearing criminal appeal to initiate disciplinary proceedings for major penalty cannot be taken to be a finding of guilt of the delinquent– If same it is to be taken as findings of guilt, then there is no necessity to hold disciplinary proceedings at all.(Para 18) Title: O.C. Thakur vs. Central Administrative Tribunal & others, Page- 206

Central Civil Service (CCA) Rules, 1965–Rule 15 (2)– Disagreement of disciplinary authority with report of inquiry officer– Procedure thereafter- Held, disciplinary authority must record in writing its reasons qua such disagreement tentatively and serve the delinquent therewith before taking final decision– Delinquent is required to be given due opportunity of being heard by disciplinary authority before taking final decision in the matter– Report of inquiry officer exonerating the delinquent is required to be served upon him so that he has opportunity to persuade disciplinary authority to accept report submitted by inquiry officer- Forming of opinion by disciplinary authority that charges stand proved without affording opportunity of being heard to delinquent is improper– So also when such reasons are not based on evidence adduced before inquiring authority. (Paras 9 & 10) Title: State of H.P. vs. Dr. Suresh Sankhayan, Page- 854

Code of Civil Procedure, 1908-Section 24– Transfer of matrimonial dispute– Guiding principles- Held, it is convenience of wife that is required to be considered over and above inconvenience of husband– Petitioner wife found residing with her parents at Kullu, hvaing no source of income– She has to look after minor daughter also– Petition for restitution of conjugal rights filed by husband in a court at Palampur in district Kangra transferred to Court of District Judge, Kullu. (Para 4) Title: Ranjna Bhardwaj vs. Rajneesh Bhardwaj, Page- 1260

Code of Civil Procedure, 1908-Section 47– Decree of permanent prohibitory injunction– Execution of– Whether judgment debtor can be asked by way of mandatory injunction to remove obstruction caused by him on path- Executing court directing judgment debtor (JD) to remove stones stacked by him over path– Petition against– JD submitting that in execution of decree of prohibitory injunction, he cannot be asked to remove stones kept on path since there was no decree of mandatory injunction against him– Held, necessary effect of decree of permanent prohibitory injunction is that any obstruction raised upon suit path being amenable for removal by JD– Court is to ensure vigor of conclusive and binding decree

of prohibitory injunction and not to render it nugatory and redundant. (Para 3) Title: Karam Singh & others vs. Tek Chand & another, Page- 84

Code of Civil Procedure, 1908– Section 47– Decree of declaration and injunction– Decree holders granted right in temple offerings -Execution of– Objection thereto– Judgment debtor objecting to execution of decree which attained finality by way of judgment of Hon'ble Supreme Court, on ground that decree was obtained by plying fraud and trial court had no jurisdiction in the matter– Held, executing court cannot go behind decree– Objections regarding jurisdiction and fraud cannot be raised under Section 47 of Code– Judgment debtor ought to have taken these objections in appeal– Order of executing court dismissing objections upheld- Petition dismissed. (Paras 11 & 12) Title: Balram and others vs. Gurdei and another, Page- 599

Code of Civil Procedure, 1908– Section 47– Order XXI Rule 17 (4)- Execution of decree– Objection thereto– Maintainability - Executing court summarily dismissing objections of wife and son of judgment debtor raised to the execution of decree of specific performance of agreement to sell to effect that land was ancestral in hands of judgment debtor and he was debarred from selling it– Petition against– Held, jurisdiction of executing court is limited and narrow and it cannot be equated with jurisdiction of court of appeal or review - Right to raise objections does not mean that objector can re-open the matter– Only such objections may be raised which are apparent on face of record and show that decree was void ab initio or it is otherwise unexecutable– Objections raised do not pertain to lack of jurisdiction of court or unexecutability of decree– Petition dismissed. (Paras 6 & 7) Title: Master Jagmohan (Minor) & others vs. Amar Chand, Page-1

Code of Civil Procedure, 1908– Section 151– Inherent powers- Application requiring interpretation/clarification of terms and conditions of compromise decree– Sustainability– Landlords and tenants entering into compromise qua transfer of vacant and peaceful possession of rented accommodation being used by tenants for running a restaurant– At execution stage, workers and employees of tenants obstructing in removal of articles of tenants disabling them to hand over vacant possession to landlords– Application seeking clarification of terms of compromise filed by landlords, tenants as well as working staff – Working staff claiming dues under labour laws from tenants and praying that possession cannot be delivered till payment of their dues is made– Held, dispute was between landlords and tenants and terms of compromise effected in that litigation are to be interpreted in that context– Liabilities created by any party (landlord/ tenants) qua third party are to be cleared by that party only - Claim of staff/workers already pending before Labour Officer– Their claim under labour laws does not create any right of workers in suit premises– They cannot obstruct delivery of possession to landlords- SHO Police station Sadar, Shimla directed to ensure handing over of possession to landlords in presence of parties– Applications disposed of. (Paras 18 to 22) Title: Renu Baljee and others vs. Shiv Charan & others, Page- 556

Code of civil Procedure, 1908– Section 151– Inherent powers– Exercise of- Grant of police help for ensuring compliance with interim stay order– Held, ad interim stay order has same force as of a final order– Party cannot refuse to abide an ad interim order simply on ground that it is only an ad interim direction– On prima facie proof of disobedience of such order, court can grant police assistance for its compliance. (Para 9) Title: Vidya Devi and others vs. Khayali Ram, Page- 596

Code of Civil Procedure, 1908– Section 151– Inherent powers- Extension of time to conclude arbitration proceedings– Justification– Held, proceedings pending before Arbitrator since long– Time to conclude proceedings extended twice in past– Arbitrator also not examining evidence of one of party though present and fixing matter for arguments– His conduct created doubt with respect to his impartiality– Application seeking extension of time dismissed with liberty to parties to initiate process for appointment of another arbitrator. (Paras 9 & 11) Title: Beas Valley Power Corporation Ltd. vs. M/s Continental Construction Projects Ltd., Page- 1240

Code of Civil procedure, 1908– Order 1 Rule 10– Order XLI Rule 27– Additional evidence at appellate stage– Permissibility– Lower courts concurrently holding plaintiff's right to get her land irrigated throw water channel located in defendants land– RSA– Defendants filing application for adducing revenue record showing that plaintiff had no right or interest in land for which irrigation rights were claimed– Held, material on record does not indicate whether judgment in favour of plaintiff was judgment in rem or judgment in personam in which case, her assignees will not be having any right of irrigation- Decrees set aside– Matter remanded to trial court with direction to take additional evidence of defendants and then provide opportunity to plaintiff to lead evidence in rebuttal– If plaintiff had no right or interest subsisting in such land, it shall be open to assignees to move appropriate application for their impleadment in the lis. (Paras 8 & 9) Title: Kamal Chand and others vs. Jagiro, Page-19

Code of Civil Procedure,1908- Order III Rule 4- Order XLI Rule 23-Concession made by counsel before court– Whether can be challenged? Held, first appellate court framed three additional issues and remitted matter to trial court to return its findings on them– Order passed by court with consent of counsel of both parties– When order was passed with consent of counsel of both parties, it is not open to parties to challenge that order by way of appeal and contend that appellate court itself should have decided the matter instead of remanding it to trial court– Appeal dismissed. (Para 8) Title: Ram Parkash vs. Surinder Kumar & Others, Page- 703

Code of Civil Procedure, 1908– Order VI Rule 17– Amendment of pleadings– Essential conditions– Held, first and foremost party seeking amendment in pleadings has to cross hurdle of due diligence– It has to satisfy that proposed amendment could not be incorporated in pleadings earlier despite due diligence– It is only after this hurdle is crossed by party, the court enters into issue whether proposed amendment is necessary for purpose of adjudication of lis or not. (Para 13) Title: Chhotu Ram alias Chhotu Khan (since deceased) through his legal representatives Sittar Mohammad and others vs. Raunki Ram (since deceased) through his legal representatives Imtiaz Mohammad and others, Page- 1304

Code of Civil Procedure, 1908– Order VII Rule 14 (3)**-** Production of documents at later stage – Essential requirements– Held, plaintiff can produce additional documents at later stage of trial only on satisfying court that despite exercise of due diligence, he could not produce them earlier or same were not within his knowledge.(Para 15) Title: Veena Sood vs. Ramesh Kumar Sood and another, Page- 68

Code of Civil Procedure, 1908- Order VIII Rule 1A(3) –Additional documents– Filing of –Leave of court– Grant of– Trial Court dismissing defendant's application for placing copy of Pariwar register on record at later stage– Petition against– Held, document corroborates version of defendant as pleaded in her written statement– In normal circumstances,

defendant would not have withheld it purposely which indicates that said document was not in her possession or knowledge prior to filing of said application– Document intended to be placed on record would enable court to adjudicate controversy in hand in just and proper manner- Defendant permitted to place on record such document with costs assessed at Rs.11,000/- Petition allowed– Order of trial court set aside. (Paras 5 to 7) Title: Prabhi Devi vs. Shankri Devi, Page- 77

Code of Civil Procedure, 1908– Order XI Rules 1, 2 & 4- Interrogatories, what are and purpose of? Held, interrogatories are questions posed by a party to its adversary with a view to elicit any matter in question– Interrogatories must have reasonably close connection with matter in question– Any material which can be elicited through cross examination of adversary cannot construed to be necessary or relevant for purpose of interrogatories– Nor the purpose of serving interrogatories is to obtain an answer, what will be evidence of other side or what evidence it intends to lead in support of its case? Whether eviction suit is bonafide or not can be got elicited by tenant during cross examination of landlord and his witnesses– Dismissal of application of tenant for serving of interrogatories on landlords qua number of building owned by them in Shimla town, is proper– Petition dismissed. (Paras 4 & 5) Title: Sanjay Sharma and others vs. Sudarshana Devi Sood and another, Page- 820

Code of Civil Procedure, 1908- Order XXI Rule 35– Possession pursuant to final decree– Objections to delivery of possession– Forum of filing- Civil court passing final decree of partition of immovable property on basis of report of Naib Tehsildar and making said report as part of decree– Parties approaching 'Revenue Authorities' for putting them in possession of allotted portions– Feeling dissatisfied with report of field Kanungo, petitioner filing objections to his report before 'Civil court' which dismissed such objections on merit- Petition against– Held, petitioner should have approached Civil court for execution of decree if it was not being executed in accordance with final decree– Similarly Civil court had no jurisdiction whatsoever to entertain and adjudicate so called objections to the report of field Kanungo on merits which he had submitted before Revenue Authorities– Petition allowed– Order of Civil court deciding such objections on merits rather than on maintainability set aside. (Paras 6 & 7) Title: Saroj Kumari vs. Gayatri Devi, Page- 1164

Code of Civil Procedure, 1908– Order XII Rule 6– Judgment on admission – Held, no decree contrary to law can be passed merely on ground of admission of claim of plaintiff by defendant. (Para 14) Title: Kuldeep Singal vs. Rakesh Kumar and others, Page- 1001

Code of Civil Procedure, 1908– Order XVII Rules 1 & 3– Closure of evidence by court– Sustainability- Reiterated, not more than three opportunities should be granted to either of parties to lead evidence– If more opportunities are to be granted then reasons should be assigned by court as why it is showing indulgence to party concerned– More opportunities than three cannot be granted in a mechanical manner- If there is no cogent reason, then right to lead evidence should be closed. (Paras 7to 9) Title: Krishna Thakur and another vs. Surat Ram and another, Page- 592

Code of Civil Procedure, 1908- Order XXI Rule 32 (3)- Decree of permanent prohibitory injunction– Execution– Attachment of immovable property– Held, when decree holder has filed application for sale of attached land within statutory period of six month from date of attachment and disobedience of decree continues, the judgment debtor cannot seek release of said land. (Para 3) Title: Joginder Pal & another vs. Bishambhari Devi & others, Page- 666

Code of Civil Procedure, 1908 – Order XXII Rules 1 & 2 – Order of court in ignorance of death of a party – Nature of order – Held, any order passed by court when party to a lis was already dead is void. (Pars 7) Title: Kirpu and others vs. Shiv Ram and others, Page- 974

Code of Civil Procedure, 1908- Order XXII Rule 4 (4)– Application seeking exemption from bringing on record legal representatives of deceased defendant– Disposal of– Held, order of trial court dismissing such application is not supported by any reason– Order of trial court in rejecting or allowing such application should have been reasoned one– Petition allowed– Order set aside -Matter remanded. (Para 3) Title: Jiwan Lal and another vs. Shiv Ram and others, Page- 72

Code of Civil Procedure, 1908- Order XXIII Rule 3- Compromise of suit- Parties real brothers- They settled dispute between them and mutually partitioned suit property by metes and bounds- Compromise arrived at between them placed on record and made part of decree– Suit disposed of as compromised.(Para 2) Title: Sardar Harjit Singh Kochhar vs. Sardar Manjit Singh Kochhar, Page- 118

Code of Civil Procedure, 1908– Order XXIII Rule 3– Compromise deed- Plaintiff challenging sale deed executed by defendant no.1 in favour of defendant No.2 on ground that it was he (Plaintiff) who had paid sale consideration to defendant No. 1– Held, compromise deed executed between plaintiff and defendant No.1 was accepted by Hon'ble Delhi High court– Suit land was also subject matter of compromise between them– Compromise not shown to be result of fraud or mis representation– Violation of compromise intentionally by defendant No.1 also not alleged– Prima facie no ground is made out to hold that said sale deed was illegal. (Para 1) Title: M/s Diamond Traxeim Pvt. Ltd. vs. Sunil Kumar Sood & another, Page- 1358

Code of Civil Procedure, 1908- Order XXVI Rule 9-Appointment of Commissioner– Justification – Held, plaintiff claiming right of passage through staircase as well as land of defendant– No boundary dispute exists interse parties. It is for plaintiff to prove right of passage through land/staircase in possession of defendant– No purpose would be served by getting the land demarcated– Trial court justified in dismissing plaintiff's application seeking demarcation of land through local commissioner– Petition dismissed.(Para 6) Title: Mohinder Kumar vs. Sita Devi, Page- 110

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of local commissioner– Stage– Held– When there is a boundary dispute between parties, appointment of local commissioner for demarcation of land will facilitate the court in arriving at just decision of the case- Plaintiff filing suit for possession of part of suit land – Dismissal of application for demarcation of land simply because suit is at stage of final arguments not justified, when no demarcation was carried by revenue authorities on his application– Petition allowed– Application for appointment of local commissioner for demarcation of land allowed. (Paras 12, 13 & 14) Title: Ram Rattan vs. Kamli Devi and others, Page- 171

Code of Civil Procedure, 1908- Order XXVI Rule 9– Local commissioner– Appointment of- Stage and purpose– Held, purpose of appointing local commissioner is to get matter in dispute elucidated– Provision cannot be used as a measure to collect and create evidence in favour of party– Order of trial court regarding appointment of local commissioner at stage when even issues were not settled is illegal as there is nothing at that stage which requires

elucidation by court- Order set aside– Petition allowed.(Paras 9 & 10) Title: Naseeb Deen and another vs. Harnek Singh, Page- 554

Code of Civil Procedure, 1908– Order XXVI Rule 9– Appointment of local commissioner for demarcation of land– Held, purpose of appointment of local commissioner is not to gather evidence in favour of party but to elucidate factual basis that too if court deems it necessary so as to resolve dispute between parties– Demarcation report along with site plan of local commissioner already on record of trial court– Petitioners cannot file another application for appointment of local commissioner for demarcation of land. (Paras 9 & 10) Title: Harbans Singh and another vs. Jagat Ram and others, Page- 589

Code of Civil Procedure, 1908– Order XXVI Rule 9– Local commissioner– Appointment and purpose of- Held, Order XXVI Rule 9 of Code is not a panacea which can be used as a tool whenever litigant feels that he is not in a position to prove his case– It is satisfaction of court that commissioner is required to be appointed for local investigation- This satisfaction cannot be of plaintiff or defendant– Local commissioner cannot be appointed to gather evidence for parties. (Paras 13 to 15) Title: Ram Nath and another vs. Kuldeep Singh and others, Page- 594

Code of Civil Procedure, 1908-Order XXVI Rule 9– Appointment of local commissioner for demarcation of land– Sustainability– Plaintiff alleging encroachment over his land by defendant– Held– Land of third party situated between land of plaintiff and defendant- No boundary dispute inter se parties exists– No material suggesting that plaintiff ever approached revenue authorities for demarcation of land and they refused his request- Local commissioner cannot be appointed to ascertain possession of party and collect evidence for it– Order of trial court dismissing application seeking appointment of local commissioner, upheld– Petition dismissed. (Paras 9 to 11) Title: Anil Kumar vs. Prakash Viz and others, Page- 663

Code of Civil Procedure, 1908- Order XXXIII Rules 1, 2 & 6– Leave to sue as indigent– Whether notice of such application to opposite party and Govt pleader necessary? Trial court permitting plaintiff to sue as an indigent without issuing notice to opposite party and Govt pleader– Petition against– Held, if court comes to conclusion that there is no reason to reject application of party seeking its leave to sue as an indigent, it must issue notice to other party for receiving such evidence– Court must follow procedure as contemplated under Rule 6– Allowing application without issuing notices to opposite party and Government pleader is illegal– Petition allowed– Order set aside– Matter remanded with direction to proceed further in accordance with law. (Para 10) Title: Raj Kumar and another vs. Som Nath, Page- 175

Code of Civil Procedure, 1908– Order XXXIX Rules 1 & 2– Temporary injunction– Grant of– Held, where necessary pleadings and material on record do not suggest existence of prima facie case and balance of convenience in favour of party, it is not entitled for temporary injunction. (Para 5) Title: Prem Singh vs. Kuldeep Singh and another, Page- 812

Code of Civil Procedure, 1908– Order XXXIX Rules 1 & 2– Temporary injunction– Grant of- Plaintiff filing petition against order of trial court declining temporary injunction to him- Held, in previous litigation, plaintiff was denied relief of injunction by court– Second litigation also on same facts-Plaintiff, his brothers and sisters already in possession of land in excess of their shares- Their possession not under any valid family arrangement– Plaintiff

not entitled for temporary injunction. (Paras 2 to 4) Title: Swaroop Thakur vs. Chaman Lal & others, Page- 818

Code of Civil Procedure, 1908 – Order XXXIX Rules 1 & 2– Temporary injunction– Grant of- Requirement of meeting of triple test i.e., prima facie case, balance of convenience and factum of irreparable loss– Absence of- Effect– Tenanted premises damaged in a fire– Tenant trying to effect repairs by relying upon a clause of rent agreement entitling him to carry out internal repairs necessary for carrying out business without damaging structural aspects– Landlord filing injunction application for restraining tenant from carrying out internal repairs during pendency of suit- Tenant laying counter claim and also praying for temporary injunction restraining landlord from interfering in his internal repair work– Trial court directing landlord not to interfere in possession of tenant– But restraining tenant from doing internal repair work– On appeal, appellate court allowing tenant's appeal and permitting him to do necessary internal repair work– Petition against by landlord– Held, premises had destroyed in fire making it unfit for purpose of running business for which it was let out without carrying out renovation work– Clause 4 of agreement envisages factual position of demised premises as existed on date it was leased out to tenant– No material on record suggesting that tenanted premises can still be used for purpose it was let out– As such no interim order restraining landlord from interfering in repair works of tenant could have been passed by first appellate court– Petition allowed– Order of appellate court set aside and of trial court restored. (Paras 19 & 20) Title: Vijay Kumar Aggarwal (deceased) through his LRs. Rajeev Aggarwal and another vs. Ankush Sood, Page- 1116

Code of Civil Procedure, 1908– Order XLI Rules 23 A and 25– Remand of suit– Justifiability – Held, additional issues framed by first appellate court closely inter connected with issues initially framed by trial court– Findings on additional issues one way or other affecting findings on issues already recorded by trial court– Therefore order of wholesale remand of suit after setting aside decree of trial court not unwarranted– Appeal dismissed. (Paras 2 & 3) Title: Vinod Kumar & another vs. Subhash Chand & another, Page- 1181

Code of Criminal Procedure, 1973-Sections 91, 233 & 243– Production of 'document or other thing'- Scope of- Held, scope of Section of 91 of Code is very wide and it can neither be restricted only to documents on which prosecution relies upon nor to stage contemplated by Sections 233 or 243 of Code– Section 91 empowers a court to ensure production of any document or other thing 'necessary or desirable' for purpose of any investigation, inquiry, trial or other proceedings under Code by issuing a summons or written order to those in possession of such material– Sine qua non for an order under this Section is consideration of court that production of document/material concerned is desirable and necessary for purpose of trial, inquiry, investigation etc.- Order of Special Judge directing police to preserve footage of CCTV cameras installed in Police Station, mentioned local banks and call details with location of specified phone numbers, on facts, upheld– Petition dismissed. (Paras 5 & 11) Title: State of Himachal Pradesh vs. Manohar Lal, Page- 1263

Code of Criminal Procedure, 1973 - Section 125(1)–Maintenance– Quantum of– Factors relevant for determination– Held, aim of granting maintenance is to prevent vagrancy to claimant– Maintenance amount should be reasonable, neither low nor excessive and exorbitant– Status of parties, reasonable wants of claimants, income and property of claimants and their liabilities etc., are some of factors which a court must look into while granting monthly maintenance. (Para 6) Title: Mohinder Guer vs. Reena Kumari & others, Page- 275

Code of Criminal Procedure, 1973-Section 125(1)(d)- Interim maintenance– Grant of– Quantum– Challenge thereto– Held- Magistrate granted, interim maintenance to mother at rate of Rs.4000/-p.m. (Rs. 2000/- p.m. from each son) purely on abstract and hypothetical grounds- Order interfered with– Maintenance allowance reduced to Rs. 1500/- p.m. from each son.(Para 9) Title: Sanjeev Kumar vs. Satya Devi & another, Page- 189

Code of Criminal Procedure, 1973- Section 133- Public nuisance, what is? Whether private disputes can be brought before Executive Magistrate? Complainant praying for removal of branches of mango tree belonging to respondent on ground that said tree may fall at any time and cause damage to complainant's house– Executive Magistrate dropping proceedings on ground that it is a private dispute and provisions of Section 133 of Code are not attracted– Sessions Judge allowing revision and directing owner of tree to cut branches which were extending towards complainant's house– Petition against- Held, no evidence on record that tree had become dangerous– Simply to give relief to complainant to enable her to raise second storey of her house after cutting extended branches of tree, is not intendment of Section 133 of code– It is not a case of public nuisance– Petition allowed– Order of Sessions Judge set aside and of Executive Magistrate restored. (Para 7) Title: Durgi Devi vs. State of H.P. and another, Page- 124

Code of Criminal Procedure, 1973 (Code)– Section 154– First information report– Essential requirements and relevancy during trial– Held, no doubt, FIR is not to be an encyclopedia but only first information as to commission of offence intended to set investigating agency into motion, but it is also settled law that evidence led in court during trial must run inconsonance with contents of FIR– Any evidence contrary to genesis of case narrated in FIR is fatal to prosecution case. (Para 23) Title: Sonu and others vs. State of Himachal Pradesh, Page- 192

Code of Criminal Procedure, 1973– Sections 156 (3) and 173– Cancellation report– Protest petition– Disposal of– Magistrate committing protest petition of complainant to court of session without considering it and without issuing summons to accused (R 2 to R 4)- Petition against– Held, role of Magistrate is little more than of a simple post office– He is to decide protest petition if filed and to summon persons to whom he on material on record prima facie finds to be involved in commission of offences- He may also direct further investigation in the matter– Order of Magistrate committing protest petition to court of Session set aside– Matter remanded with direction to proceed in accordance with law.(Para 7) Title: Bharat Bhushan Vaid vs. State of H.P. and others, Page- 106

Code of Criminal Procedure, 1973– Section 173 (8)– Further investigation, when can be ordered? Prosecution filing charge sheet against public notaries without obtaining necessary prosecution sanction from Competent Authority– Filing application under Section 173(8) of Code at charge stage for further investigation so as to obtain and annex prosecution sanction against accused– Trial court dismissing application– Petition against– Held, cognizance of offences alleged in FIR could be taken only after prosecution sanction is accorded by Competent Authority– Otherwise also, investigating officer could have filed prosecution sanction by submitting supplementary charge sheet in the court- Prosecution permitted to do further investigation. (Paras 3 & 4) Title: State of H.P. vs. Sunil Kumar & others, Page- 1141

Code of Criminal Procedure, 1973– Section 190 (b)– Cognizance of offence(s)– Duty of court– Held– Magistrate is not supposed to act as a post office– He is expected to apply his judicial mind to facts and circumstances of case– At time of taking cognizance he though not supposed to evaluate evidence or material on record but it is his duty to see as to whether some evidence against accused is available on record or not. (Para 10) Title: Rajvinder Sharma vs. State of H.P. & another, Page-1186

Code of Criminal Procedure, 1973- Section 195 (1) (a)(i)– **Indian Penal Code, 1860**- Section 177– Contempt of lawful authority of public servant– Cognizance of- Held, cognizance of offence punishable under Section 177 of IPC can be taken only on written complaint of public servant concerned, whose contempt of authority was committed or on complaint of some other public servant to whom such public servant was administratively subordinate - In absence of written complaint of such public servant(s) cognizance is bad in law and conviction and trial will be void at initio. (Paras 6 & 8) Title: Mukesh Kumar vs. State of H.P., Page- 583

Code of Criminal Procedure, 1973– Section 235(2) 353 & 354– Conclusion of sessions trial- Stage- Held, sessions trial comes to an end only after sentence is awarded to the convict– Judgment in criminal case is not complete unless punishment to which he is sentenced is set out therein– There are two stages in trial before Sessions court i.e., stage up to recording a conviction and the stage post conviction up to imposition of sentence– Judgment becomes complete only after both these stages are covered. (Para 11) Title: Lakhbir Singh vs. State of Himachal Pradesh, Page-1166

Code of Criminal Procedure, 1973–Section 256- Dismissal of complaint in default– Justification– Trial court dismissing complaint in default for no-appearance of complainant or his counsel– Appeal against - Held, on facts, complainant was diligent in pursuing his case and remained present almost on all hearings– On relevant date, case was fixed for recording statement of accused under Section 313 of Code– Presence of complainant was not necessary for that purpose– Trial court should not have dismissed complaint in default rather one opportunity should have been granted to complainant or his counsel to appear– Appeal allowed– Complaint ordered to be restored. (Paras 6 to 8) Title: Pooja vs. Sunil Kumar, Page-972

Code of Criminal Procedure, 1973–Section 313– Recording of statement of accused– Manner of- Held, it is obligatory upon court to put all incriminatory evidence and circumstances to accused to enable him to render an explanation, and if required to lead such evidence in defence to rebut such incriminatory circumstance. (Pars 12) Title: State of H.P. vs. Kamlesh Kumar, Page- 953

Code of Criminal Procedure, 1973 (Code)- Sections 320 & 482– Inherent powers– Exercise of- Quashing of FIR pursuant to compromise interse parties– Held, for securing ends of justice if quashing of FIR becomes necessary, it may be quashed but such power must be exercised with utmost care and caution– FIR registered for offence under Section 188 of Indian Penal Code for violating temporary injunction restraining petitioner from raising construction ordered to be quashed pursuant to compromise between parties in mediation proceedings- Power conferred by section 482 is not circumscribed by provisions of Section 320 of Code.(Paras 2, 6 & 7) Title: Ming Chung Dorjee vs. State of H.P. and another, Page-126

Code of Criminal Procedure, 1973- Sections 320 & 482– Inherent powers– Exercise of- Quashing of FIR pursuant to compromise inter se parties – Held, for securing ends of justice if quashing of FIR becomes necessary, it may be quashed but such power must be exercised with utmost care and caution– FIR registered for offences of criminal intimidation and hurt ordered to be quashed pursuant to compromise between parties- Power conferred by Section 482 is not circumscribed by provisions of Section 320 of Code.(Paras 2, 6 & 7) Title: Satish Kumar and another vs. State of H.P. and another, Page- 132

Code of Criminal Procedure 1973–Sections 320 & 482– Inherent powers – Exercise of - Quashing of FIR – Pursuant to compromise – Held, if for purpose of securing ends of justice quashing of FIR becomes necessary, then Section 320 of Code would not be a bar to exercise of power of quashing – Powers under Section 482 of Code have no limits but utmost care and caution must be exercised while invoking such powers. (Para 6) Title: Abhishek Sharma vs. State of H.P. and another, Page- 1234

Code of Criminal Procedure, 1973 –Sections 320 & 482 – Inherent powers – Exercise of – Quashing of FIR, pursuant to compromise – Guiding principles – Held, if for purpose of securing ends of justice quashing of FIR becomes necessary, Section 320 of Code would not be a bar to exercise of power of quashing- Powers under Section 482 of Code have no limits but such powers must be exercised with utmost care and caution. (Para 6) Title: Ashwani Kumar vs. State of H.P. and others, Page- 1248

Code of Criminal Procedure, 1973– Sections 320 & 482– Inherent powers – Exercise of– Quashing of FIR, pursuant to compromise– Guiding principles– Held, if for purpose of securing ends of justice quashing of FIR becomes necessary Section 320 of Code would not be a bar to exercise of power of quashing- Powers under Section 482 of Code have no limits but such powers must be exercised with utmost care and caution. (Para 6) Title: Rajinder Prashad vs. State of H.P. and others, Page-1254

Code of Criminal Procedure, 1973 – Section 363 – Supply of copy of judgment to accused – Stage – Held, judgment in criminal trial is complete only after determination of sentence which is to be imposed upon accused- He is entitled for a copy of judgment only after quantum of sentence is determined by court and not at time of announcing of conviction order. (Para 13) Title: Lakhbir Singh vs. State of Himachal Pradesh, Page- 1166

Code of Criminal Procedure, 1973– Sections 374 (3) & 389 (1)– Appeal against conviction– Suspension of sentence during pendency of appeal, when made conditional on depositing of cheque amount with trial court– Non-compliance of said condition– Consequence– Whether statutory right to appeal can be interfered with? Held, Section 374 (3) of Code nowhere suggests that at time of filing of appeal, appellant can be asked to deposit amount awarded by trial court– Section 389 of Code indicates that court can ask appellant to furnish bonds so that his presence is secured during pendency of appeal and to serve sentence awarded– Right to appeal is statutory right– It cannot be curtailed for insufficiency of amount deposited- Accused already having deposited 50% of cheque amount with trial court, Appellate court directed to decide appeal without insisting accused to deposit remaining 50% of cheque amount. (Paras 3 to 6) Title: Kamal Dev vs. State of Himachal Pradesh & Anr., Page- 523

Code of Criminal Procedure, 1973– Sections 377 & 378 (1)– Appeal by State– Whether death of one of co-accused would result in abatement of appeal as a whole against all of

them? Held, when there is more than one accused, then appeal abates in part and not in full– It will abate only qua accused who is dead– Depending upon role of surviving accused, appeal against surviving accused either continues or becomes infructuous. (Para 12) Title: State of Himachal Pradesh vs. Sanjiv Kumar alias Sanju, Page- 1271

Code of Criminal Procedure, 1973- Section 391- Additional evidence at appellate stage– Adduction of– Grounds– Held, adduction of additional evidence at appellate stage may be allowed only for serving ends of justice– Provision is not intended to remedify negligence or laches of a party– Appellate court cannot allow leading of such evidence at appellate stage where party had opportunity to adduce it before trial court. (Para 14) Title: Gurbachan Singh vs. Himachal Pradesh State Co-Operative Bank Limited, Page- 213

Code of Criminal Procedure,1973- Section 391- Additional evidence at appellate stage– Adduction of– Grounds– Held, adduction of additional evidence at appellate stage may be allowed only for serving ends of justice– Provision is not intended to remedify negligence or laches of a party– Appellate court cannot allow leading of such evidence at appellate stage where party had opportunity to adduce it before trial court. (Para 14) Title: Jagdeep Kumar vs. Himachal Pradesh State Co-Operative Bank Limited, Page- 217

Code of Criminal Procedure, 1973- Sections 397 and 401**-**Interlocutory orders– Revision against– Maintainability– Held, order rejecting accused's application for sending disputed cheques to expert for comparison with his admitted/specimen handwriting is purely interlocutory in nature and revision against it is not maintainable. (Para 11) Title: Surender Sharma vs. Nek Ram Verma, Page- 294

Code of Criminal Procedure 1973– Sections 397 & 401– Bail order– Revision against– Held, order granting bail is purely interlocutory and revision against it is not maintainable. (Para 11) Title: State of Himachal Pradesh vs. Kulwant Singh Katoch, Page- 1023

Code of Criminal Procedure, 1973– Section 438– Pre-arrest bail– Grant of- Circumstances– Petitioner, accused of carrying khair wood in a truck without permit seeking pre-arrest bail– Prosecution resisting his application on ground that he was involved in similar offences in past also– Held, accused not caught at spot while carrying khair wood– He is implicated in the case on statement of co-accused that khair wood was brought from depot of accused– In previous cases guilt of accused yet to be established- Mere pendency of case cannot be a ground to deny bail– Investigation is complete– Conditional pre-arrest bail granted – Petition allowed. (Paras 4 & 5) Title: Kamil Khan vs. State of Himachal Pradesh, Page- 387

Code Criminal Procedure, 1973– Section 438- Pre-arrest bail– Grant of– Principles– Held, object of bail is neither punitive nor preventative– Freedom of Individual cannot be curtailed for an indefinite period– Gravity of offence alone cannot be a decisive ground to deny bail– Rather competing factors are required to be balanced- Petitioner, brother-in-Law of deceased was residing separately at a distance of 90 kms from place of incident– He was not present on date of incident in the house– Investigation is complete- Only report of FSL is awaited– Petitioner joined investigation and his custody is not required for further investigation– Conditional pre-arrest bail granted. (Paras 3, 6, 7 & 13) Title: Rakesh Kumar @ Ricky vs. State of Himachal Pradesh, Page- 392

Code of Criminal Procedure, 1973– Section 438-Pre-arrest bail– Grant of– Accused seeking pre-arrest bail in case registered against him for illicit felling – State resisting bail on ground that accused not revealing names of accomplices who helped him in illicit felling- Held– No eyewitness seeing accused cutting trees in forest– No explanation as how police officials came to know of illicit felling of trees by accused– No reason assigned as why complaint was not filed earlier when commission of offence by accused had come to the notice of forest officials- Bail granted subject to conditions. (Paras 2, 3 & 5) Title: Tara Chand vs. State of Himachal Pradesh, Page-397

Code of Criminal Procedure, 1973–Section 438– Pre-arrest bail– Grant of-Circumstances– Petitioner accused of cheating, criminal breach of trust etc., praying for pre-arrest bail– Held, accused already having joined investigation– Fully cooperated with investigating officer– Nothing more is required to be recovered from her– Investigation is complete– Petition allowed– Pre-arrest bail granted subject to conditions. (Para 3) Title: Sujata Behera vs. State of Himachal Pradesh, Page- 402

Code of Criminal Procedure, 1973–Section 438– Pre-arrest bail– Grant of- Circumstances– Accused involved in illicit transit of Khair wood in trucks in excess of what was permitted under transit permit seeking pre-arrest bail– State contesting petition on ground that accused was involved in commission of serious offences and demarcation of land from where Khair trees were cut, yet to be conducted– Held, on facts, custody of accused not required by investigating agency– Nothing is to be recovered from him- There is no allegation that in case of his release on bail, he will flee away or tamper with prosecution evidence– Petition allowed– Conditional bail granted. (Paras 3 to 6) Title: Jai Singh vs. State of Himachal Pradesh, Page- 432

Code of Criminal Procedure, 1973- Section 438– Pre-arrest bail– Grant of- Circumstances– Petitioner seeking bail in case registered against him for fraud and forgery- Held, on facts, investigation is complete– Custody of accused is not required for further investigation– Pre-arrest bail granted subject to stringent conditions. (Paras 3 to 5 and 11) Title: Raj Kumar vs. State of Himachal Pradesh, Page- 456

Code of Criminal Procedure, 1973- Section 439– **Narcotic Drugs and Psychotropic Substances Act, 1985**–Sections 21 & 29 – Regular bail– Grant of– Held, recovery of carton containing 100 bottles of Kuff, a cough syrup having Codeine Phosphate Triprovidine Hydrochloride contents in them, was recovered from a car– Petitioner was not an occupant of said vehicle– Initially, occupants never told that they were carrying such consignment for and on behalf of petitioner– Custody of petitioner not required for further investigation– He already having joined investigation – Petition allowed and pre-arrest bail granted subject to conditions. (Paras 5 & 6) Title: Rajender Pal vs. State of Himachal Pradesh, Page- 513

Code of Criminal Procedure, 1973- Section 439- Regular bail– Grant of in case involving offence of murder– Allegations of police being that petitioner 'VD' in furtherance of common intention of other co-accused, including his father 'RD' made assault on deceased with swords, knives etc.- And when deceased fell down 'RD' ran over deceased under his vehicle– Held, witnesses examined during investigation not specifically saying about presence of petitioner– Initial investigation even of police doubted involvement of petitioner in crime as they had filed application for his discharge– Before application could be decided, involvement of petitioner in incident shown through supplementary statement of complainant– Complainant retracting his initial version of assault with daggers and swords–

Prosecution case doubtful qua petitioner– Chargesheet stands filed in court– Guilt of accused yet to be decided by trial court– He cannot be allowed to incarcerate in jail for indefinite period– There is no chance of his fleeing away from justice– Petition allowed– Accused granted conditional bail. (Paras 7, 8 & 10) Title: Vinay Dhawan vs. State of Himachal Pradesh, Page- 88

Code of Criminal Procedure, 1973- Section 439–Regular bail– Grant of- Rape case– Held, object of bail is neither punitive nor preventative – Freedom of individual cannot be curtailed for an indefinite period– Gravity of offence alone cannot be a decisive ground to deny bail– Rather competing factors are required to be balanced- Accused 70 years old father in law of prosecutrix– No reason given for delayed filing of FIR– Nothing incriminatory material is to be recovered from him –Petition allowed– Bail granted. (Paras 5, 6 & 8) Title: Mohan Singh vs. State of Himachal Pradesh, Page-381

Code of Criminal Procedure, 1973- Section 439– Regular bail- Grant of– Prosecution alleging accused involved in theft of Charcoal drums belonging to complainant, a Government contractor and resisting bail on ground of accused being involved in theft case previously also– Held, drums were recovered from isolated place where locked vehicle of co-accused was parked– Accused arrested on next day of offence– Investigation is complete- Guilt of accused in previous case yet to be established– Application allowed– Accused ordered to be released on conditional bail. (Paras 5 to 7 & 13) Title: Prem Singh vs. State of Himachal Pradesh, Page- 422

Code of Criminal Procedure, 1973- Section 439– Regular bail– Grant ofin a gang rape case– Prosecution objecting to grant of bail on ground of severity of offences– Held, on facts, victim herself accepted offer of one of the accused to have liquor and food with him in his house– All consumed liquor there together– Wife of accused also present in house– Highly improbable that wife of accused would sit outside room for hours together where victim was being raped– Prosecution story highly doubtful– Investigation is complete– Nothing is to be recovered from accused and there is no material suggesting that he would tamper with evidence if released on bail– Petition allowed– Accused ordered to be released on regular bail subject to conditions. (Paras 3, 4, 6 & 7) Title: Anil Kumar vs. State of Himachal Pradesh, Page- 427

Code Criminal Procedure, 1973– Section 439- Bail– Grant of– Principles– Held, object of bail is neither punitive nor preventative– Freedom of individual cannot be curtailed for an indefinite period– Gravity of offence alone cannot be a decisive ground to deny bail– Rather competing factors are required to be balanced.(Para 7) Title: Sobharam vs. State of Himachal Pradesh, Page- 347

Code Criminal Procedure, 1973– Section 439-Bail– Grant of– Principles– Held, object of bail is neither punitive nor preventative– Freedom of individual cannot be curtailed for an indefinite period – Gravity of offence alone cannot be a decisive ground to deny bail– Rather competing factors are required to be balanced.(Para 8) Title: Nisha Verma and another vs. State of Himachal Pradesh, Page- 365

Code of Criminal Procedure, 1973 – Section 439– Regular Bail– Grant of in a case registered for offences under Indian Penal Code and Schedule Castes and Schedule Tribes (Preventions of Atrocities) Act, 1989 – Held, petitioner has joined investigation– Eye witnesses allegedly present at spot of incident in their statements to investigating officer,

denying accused having manhandled victim and subsequently called her by caste names– On material collected during investigation, no impediment in admitting accused on regular bail– Petition allowed– Bail granted. (Paras 5, 6 & 12) Title: Ashwani Kumar vs. State of Himachal Pradesh, Page- 875

Code of Criminal Procedure, 1973– Section 439– Regular bail– Filing of successive applications– Effect– Held, person seeking bail has to clearly demonstrate change in circumstances in case his earlier bail application was dismissed– Mere examination of some prosecution witnesses during trial subsequent to dismissal of earlier application, is not a change of circumstances entitling accused to seek bail. (Para 9) Title: Nikhil Malik vs. State of Himachal Pradesh, Page-1112

Code of Criminal Procedure, 1973 –Section 439 – Regular bail– Grant of in a rape case– Circumstances– On facts, held, accused and victim known to each other since when they were in class nine– Victim frequently meeting accused and had intimate relationship with him– FIR registered after five months of last episode of alleged sexual assault– No reason is given for such delay– Prosecutrix major and capable of understanding consequences of her being in company of accused– Petition allowed– Bail granted subject to conditions. (Paras 16 & 13) Title: Yoginder Singh vs. State of Himachal Pradesh, Page- 1202

Code of Criminal Procedure, 1973– Section 439– Regular bail– Grant of in a case of attempted murder and criminal intimidation– Held, injuries on person of complainant and his brother simple in nature– Qua same incident, cross FIR was also registered against complainant party– Allegations of use of sharp edged weapons by accused not borne out from CCTV footage– Investigation is complete and nothing is to be recovered from accused– Parties also compromising dispute– Accused ordered to be admitted on bail subject to conditions. (Paras 7 & 9) Title: Vinod vs. State of Himachal Pradesh, Page- 1212

Code of Criminal Procedure, 1973– Section 439– Regular bail in case registered for offences of kidnapping, rape and under Protection of Children from Sexual Offences Act, 2012– Circumstances– Held, prosecutrix giving statement to investigating officer as well before Magistrate under Section 164 of Code and denying accused of having done anything wrong with her– Also refusing to undergo medical examination– Medical age of prosecutrix found around 16 years– No concrete material suggesting commission of aforesaid offences with her by accused– No allegation that accused may flee if released on bail– Accused in custody since long– Custody not required by police as investigation is complete– Petition allowed– Accused admitted on bail subject to conditions. (Paras 6 to 8 & 12) Title: Dev Khattri vs. State of Himachal Pradesh, Page-1230

Code of Criminal Procedure, 1973-Section 439– **Narcotic Drugs and Psychotropic Substances, Act, 1985 (Act)**– Section 21 & 37–Recovery of 2880 tablets of 'Lomotil' from a car driven by accused– Regular bail– Grant of– Accused contending that recovered tablets do not fall in category of 'manufactured drug', and at any rate, said contraband is not in 'commercial quantity'– Held, as per report of SFSL, Diphenoxylate Hydrochloride has been found to be 2.49 mg per tablet– Prohibited drug in recovered tablets comes to 7.172 gms, which is above small quantity but less than commercial quantity– No opinion is given by SFSL regarding remaining contents of tablets– Question whether 'Lomotil tablet' falls in category of 'manufactured drug' left open for determination by trial court during trial– Investigation is complete– Charge sheet also filed in court– Rigors of Section 37 of Act are not attracted in this case– Petitioner cannot be kept in custody for indefinite period– Petition

allowed– Conditional bail granted. (Paras 3,4, 7, 12 & 19) Title: Gurmeet Singh vs. State of Himachal Pradesh, Page- 901

Code of Criminal Procedure, 1973- Section 439– **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**– Section 37– Bail– Grant of– Accused allegedly supplied huge quantity of charas to co-accused– Subsequent to registration of FIR, he remained absconded and evaded his arrest for long time- It is third successive application for grant of bail- No change of circumstances is there since dismissal of earlier applications- There are chances of his fleeing away from justice– Petition dismissed. (Para 7) Title: Ram Lal vs. Narcotics Control Bureau, Page- 287

Code of Criminal Procedure, 1973– Section 439**- Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)-** Section 21- Recovery of 6.94 gms of heroin– Regular bail– Grant of– Accused roaming in college premises without any authority and on search found possessing heroin– Accused admitted his guilt and begged for pardon before college authorities– State objecting to grant of bail on ground of accused being a drug peddler– Held, recovery of alleged contraband falls in intermediate category– Rigors of Section 37 of Act are not attracted– Petitioner in jail for the last seven months– He cannot be allowed to incarcerate in jail for indefinite period- Petition allowed and accused admitted on regular bail subject to conditions. (Paras 5 to 7 & 13) Title: Gaurav Thakur vs. State of Himachal Pradesh, Page- 491

Code of Criminal Procedure, 1973– Section 439– **Protection of Children from Sexual offence Act, 2012**– Section 4– Regular bail– Entitlement– On facts, held, victim knew accused for the last one year– Earlier also, she had joined his company– Stating in her statement that accused did not do anything wrong with her and she did not want any action against him– Victim though minor, her conduct cannot be ignored altogether– No other reason to put accused behind bars for indefinite period– Petition allowed– Accused released on conditional bail. (Paras 3 & 4) Title: Prince Kumar vs. State of Himachal Pradesh, Page- 406

Code of Criminal Procedure, 1973– Section 439 – **Protection of Children from Sexual Offences Act, 2012** – Section 4 – Regular bail – Grant of in a case registered for offences of kidnapping and penetrative sexual assault– On facts, held, victim and complainant- her father, turning hostile during trial of case– Victim telling that she had made statement before Magistrate under Section 164 of code regarding sexual assault by accused under pressure from her parents– Even prosecution case does not suggest that accused forcibly abducted her or compelled her to join his company– Victim joined his company voluntarily– Petitioner in jail for three years and nine months and cannot be kept to incarcerate for indefinite period– Petition allowed– Bail granted subject to conditions. (Paras 5 to 8 and 14) Title: Sunil Chauhan vs. State of Himachal Pradesh, Page- 910

Code of Criminal Procedure, 1973 -Section 439 –**Protection of Children from Sexual Offences Act, 2012**– Section 4– Kidnapping and penetrative sexual assault -Regular bail- Grant of– On facts, held, victim not supporting allegations during trial which she initially made while recording her statement under Sections 161 & 164 of code– Remaining witnesses required to be examined during trial are public servants- No possibility of accused influencing those witnesses– Liberty of accused cannot be curtailed for indefinite period during trial– Petition allowed– Accused ordered to be released on conditional bail. (Paras 4,6, 8 &14) Title: Sudheer Kumar vs. State of Himachal Pradesh, Page- 919

Code of Criminal Procedure Code, 1973- Section 439– **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**– Section 3- Regular/interim bail– Grant of- Practice of surrendering before Special Judge/ High Court for obtaining bail, whether in accordance with law? Held, practice of accused surrendering before Special Judge/ High court and thereby obtaining ad interim bail cannot said to be with a view to override legislative intention of restraining grant of anticipatory bail to offenders of offences under Act- Rather few persons who are protected under Act use this legislative intent as a tool to send people in custody– In such cases, it shall be proper to grant ad interim bail to person surrendering before court.(Para 18) Title: Geeta Devi vs. State of Himachal Pradesh, Page- 247

Code of Criminal Procedure, 1973– Section 439**– Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act, 1989**- Section 3(1)(s)– Regular bail– Grant of- Circumstances- Held, on facts, accused denying his involvement in commission of crime– He already having made himself available for investigation– Investigation is complete and only the vehicle owned by accused required to be impounded by police– Petition allowed– Accused granted bail subject to conditions. (Paras 5 to 7) Title: Sonu Deshta vs. State of Himachal Pradesh, Page- 437

Code of Criminal Procedure, 1973- Section 439- **Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Section 3(1)(s)- Regular bail– Grant of- Held, after surrendering and admitting him on interim bail, accused joined investigation– His custody not required for further investigation– Accused is a local resident and will be available for investigation as and when directed by investigating officer– No ground to curtail his liberty– Petition allowed– Accused admitted on bail subject to conditions. (Paras 3 to 5 & 11) Title: Vikram Sharma vs. State of Himachal Pradesh, Page- 468

Code of Criminal Procedure, 1973- Section- 482– Inherent powers– Exercise of– Quashing of FIR– Rape case– Permissibility– Held, no doubt power conferred by Section 482 of Act is not to be exercised in cases involving heinous and serious offences but on facts, dispute interse parties more a family dispute– Wife got FIR of rape registered against husband under apprehension that he might not return home from abroad where he had gone in connection with some work– There appears to be no offence– Petition allowed - FIR quashed. (Para 10) Title: Daljit Singh and another vs. State of Himachal Pradesh, Page- 357

Code of Criminal Procedure, 1973- Section 482– Inherent powers– Exercise of– Quashing of FIR - Held, cases which predominantly are of civil character particularly arising out of commercial transactions, matrimonial disputes and strained family relations can be quashed pursuant to bonafide settlement between parties– Parties closely related to each other– No useful purpose would be severed by keeping the proceedings to continue– Settlement voluntarily arrived at by parties- Admitting correctness of settlement before High Court also– FIR registered for criminal trespass and intimidation quashed. (Paras 10 & 14) Title: Hitesh Sharma vs. The State of H.P. and another, Page- 442

Code of Criminal Procedure, 1973– Section 482– Inherent powers– Exercise of- Quashing of FIR– Circumstances- Held- Criminal cases which are overwhelmingly and predominantly of civil nature particularly arising out commercial transactions, matrimonial or family disputes may be quashed in exercise of powers conferred by Section 482 of Code pursuant to amicable settlement of parties involved- FIR registered against petitioners on complaint of

complainant that petitioner No.1 illegally handed over trees to petitioners No. 2 & 3 for extraction of resin without any authority from her– Parties arriving at compromise voluntarily and admitting its correctness before High Court also– Petition allowed– FIR quashed. (Paras 2, 10 & 14) Title: Nirmal Kumar and others vs. The State of H.P. and another, Page- 449

Code of Criminal Procedure, 1973- Section 482- Inherent powers – Exercise of– Quashing of FIR – Circumstances- Held, criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves– Parties amicably settled their dispute – Settlement is voluntary and parties admitting its correctness before High Court also– Chances of conviction bleak– No fruitful purpose would be served by continuing proceedings– FIR quashed- Petition allowed. (Paras 3 to 5, 9 & 14) Title: Hargopal and another vs. State of H.P. and others, Page- 461

Code of Criminal Procedure, 1973–Sections 320 & 482– Inherent powers– Exercise of – Quashing of FIR –Held -High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable but such power is to be exercised sparingly and with great caution- While exercising inherent power under Section 482 of Code court must have due regard to the nature and gravity of offences sought to be compounded- High Court must evaluate whether ends of justice would justify exercise of inherent power- Parties compromising dispute amicably and admitting correctness of settlement before High Court– FIR registered for rash driving ordered to be quashed. (Paras 5 & 11 to 13) Title: Balbir Singh vs. State of Himachal Pradesh & another, Page- 525

Code of Criminal Procedure, 1973– Section 482– Inherent powers– Exercise of- Quashing of FIR and consequent conviction and sentence– Held, power to quash criminal proceedings is not to be exercised in cases involving heinous and serious offences– Nor in cases involving offences committed by public servants while working in that capacity simply pursuant to a compromise between parties– But cases predominantly civil in nature or arising out of matrimonial relationship or family disputes may be quashed when parties have resolved their entire dispute– On facts, parties compromised matter between them and pursuant thereto dissolved their marriage with mutual consent– Wife admitting correctness of compromise before High Court– Wife also agreeing to withdraw all cases instituted by her against her husband– Petition allowed– FIR quashed– Conviction and sentence of petitioner for offence of cruelty set aside. (Paras 5, 8, 12 & 13) Title: Balbir Singh vs. State of Himachal Pradesh and others, Page- 879

Code of Criminal Procedure, 1973–Section 482– Inherent powers– Exercise of- Quashing of FIR– Circumstances– Held, cases having predominantly civil character especially arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when parties have resolved their entire dispute– On facts, parties compromised their dispute between them- Compromise admitted by wife before High Court as correct– Wife stating that she is happily residing in matrimonial house– Dispute is more of civil nature– No fruitful purpose would serve in case proceedings are allowed to continue- FIR ordered to be quashed alongwith trial pending before Judicial Magistrate. (Paras 2, 3, 7, 8, 11 & 12) Title: Manish Gaba and another vs. State of Himachal Pradesh and others, Page- 887

Code of Criminal Procedure, 1973–Section 482– Inherent jurisdiction– Exercise of- Quashing of FIR registered for rash and negligent driving pursuant to a compromise– Held, matter stands settled between parties i.e. petitioner driver of offending vehicle and injured– No fruitful purpose would be served by allowing proceedings to continue– Injured not interested in carrying on with criminal proceedings - Possibility of conviction is bleak and remote– Petition allowed– FIR ordered to be quashed alongwith trial pending before Judicial Magistrate. (Paras 10 & 11) Title: Gopal Singh vs. State of Himachal Pradesh and others, Page- 894

Code of Criminal Procedure, 1908–Sections 320 & 482– Inherent powers– Exercise of– Quashing of FIR– Circumstances– FIR was registered and charge sheet filed for abetment to commit suicide against husband, father-in-law, mother-in-law and sister-in-law– Parties filing petition in High Court and seeking quashing of FIR on ground that father of deceased got registered FIR under misconception of facts and investigation revealed that it was a suicide and accused had no role in it– State resisting petition on ground that offence is not compoundable– Held, jurisdiction vested in High Court under Section 482 of Code is exercisable for quashing criminal proceedings in cases having overwhelming and predominantly civil flavour particularly offences arising from matrimonial disputes or where wrong is basically private or personal in nature and parties have mutually resolved their dispute- In such cases, limitation of Section 320 of Code would not inhibit powers of High Court under Section 482– Material not suggesting that accused had caused abetment to commit suicide– Parties admitting compromise before High Court– Trial if continues is going to face situation of a case of no evidence– Petition allowed- FIR quashed with all consequential proceedings. (Paras 9 to 15) Title: Ashok Kumar and others vs. State of H.P., Page- 1182

Constitution of India, 1950– Articles 14 & 226-Doctrine of procedural fairness- Applicability- Appointment of DPE in a school by PTA Committee– Challenge thereto on ground that procedure adopted by Committee was not fair and transparent– Hon'ble Single Bench dismissing writ and holding selection as valid– LPA– Held, selection criteria was prepared only on date of interview regarding which candidates had no knowledge before participation- Criteria not giving specific marks for possessing M.Phil degree in subject though such marks to be allocated to candidate having done Ph.D.– No material that all candidates who appeared in interview were not of that area– Only selected candidate obtaining full marks under head 'Local dialects' – Petitioner though only candidate with post graduate qualification given 6 marks out of 10 by subject expert whereas selected candidate having lesser qualification getting full marks out of ten– Criteria gave handle to selection committee to discriminate amongst candidates and had actually given them leverage to choose or reject candidate according to their whims and caprice– LPA allowed– Judgment of Hon'ble Single Bench set aside– Appointment of selected candidate set aside. (Paras 5 & 6) Title: Dinesh Kumar vs. State of H.P. & others, Page- 254

Constitution of India, 1950– Article 12– 'State'– Whether school affiliated with C.B.S.E. but not receiving any financial aid comes within definition of 'State'?– Held, a private school not receiving any financial aid from Govt. does not fall within definition of 'State' as used in Article 12 of Constitution even if it is affiliated with C.B.S.E. and discharging public functions. (Para 12) Title: Sandeep Keshav vs. State of H.P. & Ors., Page- 735

Constitution of India, 1950 - Articles 14 & 226– Procedural fairness- Notice inviting tender for leasing out District Water Sports Centre, Taleru, District Chamba to intended lease

holders issued – Challenge thereto- After participating in tender process, petitioner contending notice inviting tender as arbitrary on ground that on previous occasions only 'experienced agencies' were invited to tender but this time no such condition was stipulated and it was done to exclude him– Held, notice and terms and conditions contained in tender document did not speak about requirement of prior experience– If prescription of prior experience is necessarily to be a prerequisite for participating in tender, petitioner could have approached the Court earlier immediately after issuance of notice or after downloading of tender document– Petitioner participated in tender process by filing bid and awaited the outcome– A person who participated in entire tender process, subject to terms and conditions contained in tender document, is estopped from questioning its correctness. (Paras 11& 12) Title: M/s Mystic Boat Cruise vs. State of HP and others, Page- 179

Constitution of India, 1950–Article 14– Tender- Delay in finalizing the tender process, whether inference of lack of transparency can be drawn? Held, on facts, tenders though opened by authorities earlier but could not be finalized because of prevailing Model Code of Conduct on account of elections– Department finalized tenders after obtaining necessary permission from Election Commission of India– Plea of lack of transparency cannot accepted. (Para 13) Title: M/s Mystic Boat Cruise vs. State of HP and others, Page-179

Constitution of India, 1950– Article 14– Procedural fairness- Tender process– Notice inviting tender dated 15.2.2019 issued for leasing out District Water Sports Centre, Taleru in Chamba– Corrigendum dated 11.3.2019 – Challenge thereto and court's interference- Notice document providing that lessee would not prohibit other registered private operators/boat owners using jettis in premises of sports centre– Corrigendum deleting this stipulation and thereby prohibiting use of premises by private operators– Petitioner, a registered private operator and who participated in tender process, challenging corrigendum on ground that it prohibited registered private operators to use premises of Water Sports Complex– Petitioner submitting that corrigendum will infringe his rights as registered private operator– Held, petitioner can not don two roles, one as of bidder and another that of private operator– He could have either challenged corrigendum as private operator without participating in tender or he could have assailed tender only as a person who participated in tender- Deletion of condition through corrigendum was with intention to benefit the highest bidder– If petitioner had become highest bidder, corrigendum would have gone to his assistance– Act of petitioner in waiting for result of tender to challenge corrigendum cannot be accepted. (Para 18) Title: M/s Mystic Boat Cruise vs. State of HP and others, Page-179

Constitution of India, 1950- Article 14- Discrimination between group of employees regarding grant of service benefits pursuant to judgment of court– Permissibility– Held, where judgment of court is in the nature of judgment in rem, obligation is cast upon authorities themselves to extend benefits accruing under it to all similarly situated persons whether they approached court or not– But where judgment is in personam, those who intend to get its benefit must satisfy court that their petition does not suffer from laches, delays or acquiescence. (Para 16) Title: Puran Mal and others vs. M/s Birla Textiles Mills, Page- 605

Constitution of India, 1950– Article 14– Nomination for doing higher course i.e. Sub-Fire Officers' Course– Guidelines for such nomination based on principle of merit cum seniority– Challenge thereto– Petitioner contending that earlier, nominations used to be made on basis of seniority alone and even the college imparting training had been asking the department to send officers for training on basis of seniority– And formulation of guidelines by the

department which ignores seniority and lays merit cum seniority principle for nominations, is arbitrary– Held, mere communication of imparting institute to nominate officers for training course on basis of seniority does not create any right in favour of petitioner to insist to adhere to same practice nor debars Sponsoring Board from framing guidelines in that regard– Course demands young and physically fit officials to be promoted to post of Sub-Fire Officers– Guidelines further providing that candidates have to undergo physical fitness cum trade proficiency test– Weightage given to physical fitness standards– Guidelines not denying chances of promotion to persons not undergoing said training course– Guidelines not arbitrary or unconstitutional- Petition dismissed. (Paras 18, 21 & 23) Title: Nand Lal & others vs. Bhakra Beas Management Board & others, Page-1009

Constitution of India, 1950-Articles 14 & 226– Indian Council of Agriculture Research (ICAR)– Career Advancement Scheme (CAS) dated 19.7.2000 read with Clarification dated 19.4.2001– Promotion to post of Professor– Eligibility criteria– Held, as per Circular of ICAR, minimum eligibility for promotion to post of Professor was eight years of service as Associate Professor in pay scale of Rs.3700–5700– These Circulars of ICAR were binding on State Agriculure Univsersity, Palampur– Amendment carried out by the University in Clause 6.4 of CAS not stipulating condition of service as Associate Professor on the required pay scale of Rs. 3700-5700 and thereby reducing eligibility criteria for promotion to post of Professor fixed by ICAR, was illegal. (Para 4) Title: Chaudhary Sarwan Kumar & Others vs. Shyam Verma & Others, Page-1143

Constitution of India, 1950– Article 14 & 226– Rejection of technical bid by Expert Committee- Challenge thereto– Petitioner, a Government contractor, contending that in respect of certain other works executed by him for the respondents, he was held qualified on the very same parameters and respondents cannot adopt two different standards– Held, works earlier executed by petitioner were regarding improvement and strengthening of a road under Central Road Fund Scheme– While contract in question is under Pradhan Mantri Gramin Sadak Yojna– Different schemes encompass different parameters and it is not task of courts to sit in appeal over evaluation done by committee of engineers– Court can not apply logic 'once qualified always qualified'. (Paras 34 & 35) Title: Bhupinder Paul Mahajan vs. State of Himachal Pradesh and others, Page- 1292

Constitution of India, 1950 – Articles 14 & 226– Tender– Judicial interference- Scope of - Held, power of judicial scrutiny in matter of interpretation of contracts is to be exercised very sparingly particularly in cases, where contract is yet to be borne and is at the stage of invitation to offer– The State or any other institution floating an invitation to offer is entitled to interpret its requirements in a particular manner and at that stage, courts cannot poke their nose. (Para 43) Title: Bhupinder Paul Mahajan vs. State of Himachal Pradesh and others, Page-1292

Constitution of India, 1950- Articles 14 & 226– Equality before law– Petitioner engaged as a PTA teacher pursuant to resolution of Parents Teachers Association, seeking release of Grant-in-Aid qua her– State contending that government having stopped engagement of teachers on PTA basis therefore, grant-in-aid cannot be released– Held, petitioner was eligible for being posted as a teacher– She is continuously working as such in school since 2009– State found to have released Gant-in-Aid in favour of similarly placed other teachers– Petition allowed – State directed to release Grant-in-Aid in favour of petitioner also and continue to do so till she works as a teacher on PTA basis. (Paras 7 to 10) Title: Neelam vs. State of H.P. & Others, Page- 1308

Constitution of India, 1950– Article 14 – Equality before Law – Eligibility/ qualification for a post – Post of Junior Office Assistant– R & P rules amongst other things requiring Diploma in computer science/computer application/ information technology from recognized university/ institution or 'O' or 'A' level diploma from National Institute of Electronics and Information Technology etc – Whether a person holding graduation or post graduation degree in computer application/ computer science/ information technology is ineligible?– Held, assessment of merit should be confined only to those who satisfy the eligibility criteria prescribed by R & P Rules– Persons who fall out side the purview of R & P Rules can not take advantage of higher qualification/ result of written examination– Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad, (2019) 2 SCC 404, relied upon. (Para 37) Title: Bhupender Sharma vs. State of HP and others, Page- 1310

Constitution of India 1950-Articles 14 & 226 – Past army service – Counting of towards pension etc- -Writ jurisdiction – Delay – Effect – Petitioner got discharge from Army in 1966 – Joined SSB and superannuated in 1997 from there - Filing Writ in 2016 and seeking counting of his past army service rendered with Army from May 1960 to December 1966 for purposes of increments, pension etc– Held, there is no cogent explanation from petitioner for the delay in filing Writ– Simply because his belated representation stands responded by the authorities, it shall not condone delay, which exists in petitioner's approaching court for the relief prayed. (Paras 3 & 4) Title: Raghu Nath Sharma vs. Union of India & others, Page-1345

Constitution of India, 1950-Articles 14 & 226 – **Himachal Pradesh Universities of Agriculture Horticulture and Forestry Act, 1986** – Chaudhary Sarwan Kumar Agriculture University - Whether bound by Circulars issued by Indian Council of Agriculture Research (ICAR) ? - Held - Agriculture education comes within purview of Department of Agriculture Research and Education – ICAR provides Grants-in-Aid provided to it by the Government of India for disbursement to State Agriculture Universities (SAUs)- It is ICAR which in case of SAUs plays same role as is played by University Grants Commission for the general universities – Therefore, service conditions of teachers in SAUs as well as their scales of pay will be determined only by ICAR. (Para 4) Title: Chaudhary Sarwan Kumar & Others vs. Shyam Verma & Others, Page-1143

Constitution of India, 1950– Articles14 & 226 – **Reserve Bank of India Pension Regulations ,1990** - Regulation 28 as amendment vide notification dated 28.8.2017 and made applicable from 6.10.2017 i.e, from date of publication in official gazette enabling employees to fix basic pension at 50% of last pay drawn – Effect on retirees who retired before 6.10.2017 – Held, any legislation including subordinate legislation unless otherwise specifically provided for can take only prospective and not retrospective effect – Writ of petitioner was filed on misconception that prospective operation of statutory regulation will amount to artificial cut off date – Petitioner having retired on 31.7.2013 not entitled to compute his basic pension at 50% of last pay drawn vide Regulation which had come into force from 6.10.2017 – By amending Regulation what was changed was just method of computation of pension – LPA allowed – Order of Hon'ble Single Judge set aside – Petition dismissed. (Paras 9 to 13 & 21) Title: Reserve Bank of India and others vs. Shadi Lal Sharma, Page- 935

Constitution of India, 1950 - Articles 14 & 15 - Doctrine of equality - Prospectus and Application Form for the year 2019-2020 for admission to medical colleges against state

quota seats – Petitioners, children of bonafide Himachalis who are working outside the state in private sector, seeking admission against state quota seats at par with children of bonafide Himachalis working outside the state with central/ State government departments etc. – Held, laying down essential educational requirements and domicile in particular state as eligible criteria to seek admission in MBBS course against state quota seats is legally permissible – Exclusion of children of Himachali parents working outside in private employment from admission against state quota seats is based on a reasonable differentia - It is not violative of Article 14 of Constitution of India – (Para 5) Title: Abhinandan Sharma vs. State of H.P. and others, Page- 79

Constitution of India,1950– Articles 14 & 226 – Adverse Annual Confidential Report (ACR) - Non-communication – Effect of - Held, principle of fairness is soul of natural justice – Every entry in an ACR of a public servant must be communicated to him within reasonable period whether it is poor, fair, average 'Good or very Good' entry **–** Non-communication of entries of ACR to a public servant has civil consequences as it may affect his chances of promotion or getting other service benefits - Such non-communication would be arbitrary, and violative of Article 14 of the Constitution.(Paras 4 & 6) Title: Himachal Pradesh State Electricity Board vs. Prem Chand, Page- 8

Constitution of India, 1950- Articles 14 & 16 - Notice inviting applications for appointment of medical officers on contractual basis issued by the Goverment – Challenge thereto– Justification– Petitioners- medical officers, already working with Ministry of Defence on contractual basis ,filing writ to challenge notice issued by union of India inviting applications for appointment of medical officers on contractual basis for 11 months - Also praying that petitioners should be allowed to continue on contractual basis – Held, petitioners were working on contractual basis only – Notice inviting applications did not in any manner affect terms and conditions of their contract – Prayer to allow them to continue is not based on any Rule– Petition lacks merits and is dismissed. (Paras 10 & 11) Title: Dr. Anil Kumar and another vs. Union of India and others, Page-177

Constitution of India, 1950- Articles 14 & 16– Contractual employee– Termination of service – Challenge thereto- Writ seeking reinstatement and regularization– Maintainability- Held, appointment of petitioner was purely on contractual basis on a non-statutory basis - No scheme of or representation by respondents that petitioner would continue or his service would be regularized - He accepted his appointment with his eyes wide open – Order of respondents terminating service of petitioner on account of financial crunch faced by respondents not unreasonable, unfair or irrational- Petition dismissed. (Paras 5, 7, 10 & 17) Title: Kunal Brahma vs. The Board of Trustees of IRMT & others, Page- 222

Constitution of India, 1950- Articles 14 & 16– Appointment on contractual basis– Regularization of service– Writ jurisdiction- Petitioners initially appointed as instructors/ trainers in different ITIs' between 31.7.2015 and 3.10.2015 on contractual basis, seeking their regularization and restraint against State from disengaging their services after the end of current academic session– Petitioners seeking parity with persons regularized under 'one time measure' who had completed seven years service on cutoff date i.e. 31.7.2015– Held, policy dated 30.10.2015 was intended to be a 'one time measure' that was brought forth pursuant to judgment of this court– What was prescribed as 'one time measure' for existing exploited employees cannot be converted into all time measure by future appointees by exploiting the policy itself– Petitioners were not recruited in accordance with procedure prescribed by R & P Rules– The very advertisements pursuant to which

petitioners were selected and appointed were for appointments on contractual basis for one year– Such advertisements would not have certainly attracted more meritorious candidates– Since appointments were not as per R & P Rules, petitioners cannot seek regularization of their services– Petitions dismissed. (Paras 35 & 37) Title: Sanjeev Kumar and others vs. State of HP and another, Page- 226

Constitution of India, 1950- Articles 14 & 226 – Appointment as Aganwari worker – Setting aside of by Competent Authority (Deputy Commissioner) on ground of her family having higher income at relevant time and thus she was not being eligible for appointment - Challenge thereto – Writ jurisdiction – Held – Husband of petitioner was Home Guard Personnel and his income during relevant period was Rs. 12,740/- which was more than prescribed for Anganwari post – Income certificate issued by patwari and Naib Tehsildar in favour of petitioner not only false but was issued solely with intention to illegally help her – Petitioner has not come to court with clean hands – Petition dismissed with costs – Departmental action directed against patwari and Naib Tehsildar concerned. (Paras 6 , 8, 12 & 16) Title: Sunita vs. State of Himachal Pradesh & others, Page- 270

Constitution of India, 1950 - Articles 14 & 226 - Annual income certificate – Honorarium paid to home guard volunteer – Held, receipt of daily allowances by home guard volunteer is in the nature of honorarium" and includable for determining his income or income eligibility criteria. (Para 3) Title: Veena Devi vs. State of H.P. & others, Page- 320

Constitution of India, 1950 - Articles 14 & 226 – Appointment as Anganwari worker – Setting aside of by Appellate Authority (Deputy Commissioner) – Challenge thereto - Writ jurisdiction – Held, petitioner was awarded three extra marks by selection committee for possessing experience certificate of a Nursery teacher – She was selected on basis of such record – However no such school, where petitioner served as a Nursery teacher, factually existed – Information supplied by Public Information Officer, Himachal Pradesh School Education Board as to non-existence of such school – Petitioner could not prove the contrary i.e as to existence of said school – Findings of Appellate Authority not perverse – Petition dismissed. (Paras 12 & 13) Title: Chandra Kumari vs. State of H.P. & others, Page-694

Constitution of India 1950 - Articles 14 & 226 – Selection of part time water-carrier in a school – Selection Committee selecting respondent No 5 on basis of material on record including her below poverty line certificate – Subsequently, said certificate found to be false and having been obtained by her by playing fraud and concealing her income –Hon'ble Single Bench though holding BPL certificate to be false, setting aside selection and ordering redrawing of merit list but without considering such BPL certificate of respondent no. 5 – Redrawing of selection list again resulting in selection of respondent No.5 – LPA –Held, a person who secures appointment by concealing information and giving wrong information eventually plays fraud – Once BPL certificate was obtained by her by playing fraud on basis of which she participated in selection process, then entire selection is to be quashed and fresh selection process is to be initiated – Selection process quashed and set aside – Fresh process ordered. (Paras 6&7) Title: Jamna @ Yashodha Devi vs. State of H.P. & others, Page-781

Constitution of India, 1950- Articles 14 & 226 – Government Notification dated 11.4.2007 regarding engagement of Anganwari Workers/Helpers – Income criteria– Appellate Authority (Additional Deputy Commissioner) setting aside appointment of petitioner as Anganwari Helper on ground that income certificate on basis of which appointment was obtained was

procured by concealing facts – And petitioner was not eligible for appointment since her family having more income than prescribed under Notification– Petition against– Held, Appellate Authority had got the income of petitioner assessed during pendency of appeal through Naib Tehsildar – Report of Naib Tehsildar not disputed by petitioner– Petitioner admittedly was teaching in a private school and earning emoluments from there– Income of family of petitioner was in excess of that which was prescribed in Notification- Petitioner was not eligible for appointment– Income certificate was obtained by concealing facts– Petition dismissed. (Paras 15 & 16) Title: Suman Thakur vs. The State of H.P. and others, Page- 976

Constitution of India, 1950- Articles 14 & 226 – Promotion to higher post – Absence of R & P Rules – Effect and guiding principles – Held, in absence of any valid R & P Rules governing promotions to higher post, promotions are to be made on principle of seniority cum- merit – Principle has to be followed even while making promotions on adhoc basis. (Para 8) Title: Dhanpat Lal Sharma vs. Bhakra Beas Management Board (BBMB) and another, Page- 1014

Constitution of India 1950 – Articles 14 & 226 – Inter-se seniority –Absence of statutory rules – Determination and principles – Held, in absence of statutory rules for determining inter-se seniority, it is to be reckoned from period of initial appointment i.e., continuous period/ length of service should be taken into consideration. (Para 9) Title: Dhanpat Lal Sharma vs. Bhakra Beas Management Board (BBMB) and another, Page- 1014

Constitution of India 1950 – Articles 14 & 226 – Promotion – Regular employees vis-a-vis non-regular employees – Held, regular employees will have preferential right for promotion over non-regular employees. (Para 12) Title: Dhanpat Lal Sharma vs. Bhakra Beas Management Board (BBMB) and another, Page- 1010

Constitution of India 1950- Articles 14 & 226 – Regularization of part -time services – Writ jurisdiction – Held, initial appointment of petitioner was on part time basis – Her engagement was not through process of recruitment by way of notice to general public – No policy of Board in vogue either to regularize services of part-time workers or to convert them as daily wage workers – Writ not maintainable – Petition dismissed. (Paras 8 & 9) Title: Krishna Devi vs. The BBMB through its Chairman and others, Page- 1027

Constitution of India, 1950– Articles 14 & 226 - Absorption on regular basis– Claim of - Petitioner seeking absorption on regular basis and consequential benefits on principle of parity vis a vis one 'LD' – Held, petitioner was engaged as a care –taker purely on contract basis – Contract period already over– No representation by respondents that services of petitioner though contractual, would be regularized– Regularization of one 'LD' on basis of which, plea of parity is being raised by petitioner , was engaged on daily wage basis– As a policy decision, services of all daily wagers were decided to be regularized by department– Principle of parity not applicable– Petition dismissed. (Paras 2 to 4 , 12 & 14) Title: Hiramani vs. State Bank of India & Ors., Page- 1079

Constitution of India, 1950- Articles 14 & 226 – Selection and appointment as Vidya Upasak – Petitioner alleging selection and appointment of private respondent as Vidya Upasak as the result of fraud – Petitioner also sending complaints regarding fraud and tampering with record etc to police and administrative authorities but without any result – Filing Writ and challenging selection and appointment of private respondent - Writ filed by him dismissed by Hon'ble Single Bench on ground that private respondent had secured

more marks than him - LPA – Held, result sheet showing overwritings and cuttings in marks secured by candidates – Initially petitioner was shown as first and private respondent figured at fourth place – Marks given under head 'Viva' were altered qua petitioner and private respondent – '8' marks initially given to petitioner for viva were changed to '4' and of private respondent increased from '4' to '9' as a result making her top the selection list – Cuttings and over writings not initialed by any officers / members of selection Committee – No cutting or overwriting against name of any other candidate affecting his total marks – Overwritings and cuttings not on account of wrong averaging of marks given under head 'Viva' as pleaded by respondents but a cover up to practical fraud committed by Selection Committee –Private respondent was appointed after giving undue advantage as a result of fraudulent selection process – Selection and appointment set aside – Show cause notices issued to Chairman (Presently Deputy Commissioner) and other members of Committee as why action be not taken against them. (Paras 4, 5 8 & 9) Title: Dila Ram vs. State of H.P. & others, Page- 1155

Constitution of India, 1950 – Articles 14 & 226 – Equality before law - Appointment to public office – R & P Rules prescribing eligibility criteria – Person(s) claiming higher qualification than prescribed in Rules –Whether court(s) can direct to treat them as having qualification equivalent to prescribed eligibility norms ? – Held, prescription of qualifications for a post is a matter of recruitment policy and State as an employer is entitled to prescribe qualifications as a condition of eligibility – It is no part of the role or function of judicial review to expand upon the ambit of prescribed qualifications – Equivalence of qualification is not a matter which can be determined in exercise of power of judicial review – Direction of Administration Tribunal to appoint petitioners holding higher qualification in the same discipline vis-a-vis eligibility qualification prescribed in R&P Rules set aside. (Paras 16, 17 & 29) Title: Himachal Pradesh Staff Selection Commission and others vs. Pawan Thakur, Page- 1321

Constitution of India, 1950 – Articles 14 & 226 – Appointment as TGT on basis of being from a BPL family **–** Such enlistment in BPL category being pursuant to resolution of panchayat – Challenge to enlistment –Period of limitation – Held – Scheme framed in 2013 provides period of one month for laying challenge to enlistment in BPL family before initial Authority (SDO Civil) as well as Appellate Authority (Deputy Commissioner) – Period of one month cannot be relaxed or whittled down.(Para 3) Title: Vijay Kumar vs. Deputy Commissioner, Mandi and others, Page- 411

Constitution of India, 1950 - Article 19 (1) (a) - Right to speech and expression of editors, news reporters etc. - Held, a newspaper has no additional privilege beyond privilege of any other member of society in commenting upon any issue of public interest. (Para 27) Title: The Editor, Divya Himachal and others vs. Dr. Sukhdev Sharma and another, Page- 642

Constitution of India, 1950 - Article 226 –Writ Jurisdiction – Scope of – Held, while exercising powers under Article 226 of Constitution, High Court can not upset findings returned by quasi– judicial authorities until and unless some perversity on face of record is demonstrated.(Para 10) Title: Kavita Devi vs. State of H.P. and others, Page- 603

Constitution of India, 1950 – Article 226 – Writ jurisdiction against orders of quasi-judicial authorities – Scope - Held, orders of quasi-judicial authorities setting aside appointment of petitioner as Anganwari Helper, are reasoned one – They having considered respective

contentions of parties and findings returned are duly substantiated from material on record – Petition dismissed.(Para 11) Title: Kavita Devi vs. State of H.P. and others, Page-603

Constitution of India, 1950- Article 226- Claim for damages on account of wrongful act of functionaries of State Govt. – Writ jurisdiction – Maintainability – Petitioner filing writ of mandamus for directing State Govt. to pay damages to him for damage caused to his building and as consequence of which its being declared unsafe for human habitation– Also claiming damages occurring because of his tenants leaving that building– State filing reply and denying any negligence on part of its officials leading to damage to petitioner's building – Held, matter involves serious dispute as to factual matrix of case and damage to his building, causes thereof and liability to pay damages and extent thereof – Writ jurisdiction cannot be availed when there is dispute as to facts of case – Petition dismissed with liberty to petitioner to avail appropriate remedy. (Para 6) Title: Mohan Lal vs. State of Himachal Pradesh & Others, Page- 802

Constitution of India, 1950- Article 226 – Writ jurisdiction - Availability – Dispute between petitioner and private respondents regarding village Bowari and right to take water from it- Petitioner contending that residents of four village having customary right to take water from it and challenging revenue entries showing said 'Bowari' to be in ownership and possession of private respondent No.7– Petitioner seeking writ of Mandamus for directing Deputy Commissioner to take appropriate action against respondent No. 7 and cause removal of his nuisance– Private respondents claiming Bowari having been construed by their ancestors – Held, matter involves seriously disputed questions of fact alleged in petition and such facts cannot be adjudicated while exercising writ jurisdiction – Petition dismissed with liberty to petitioner to approach appropriate court for redressal of grievances raised in it. (Paras 2 to 8) Title: Dr. Pankaj Soni vs. State of H.P. and others, Page- 968

Constitution of India, 1950 –Article 226 – Release of convict on parole for arranging money towards education of daughter – Grant of -Held, husband of petitioner for whose release on parole petition was filed, is a life convict – He was earlier released on parole – As per Standing Orders, next parole available only after six months – That period has not lapsed so far – Daughter of petitioner admittedly studying in Ukraine and needs money to persue studies –Petition disposed of with direction that prisoner be taken in custody to his native place and post office etc., for doing needful for three days and he be lodged during night in nearby Sub - jail /District jail during this period.(Paras 2 to 6) Title: Neelam Kumari vs. State of H.P. & ors., Page-1261

Constitution of India, 1950- Article 226- Inter-caste marriage- Status of off-springs of Scheduled Tribe woman married to forward caste man- Held, main factor for grant of scheduled tribe certificate to off-springs of a couple where one of spouses is a member of scheduled tribe, is acceptance of such off- springs by the tribal society as belonging to their community- In case, children are accepted by society, then they shall be deemed to be scheduled tribes- The other factors being whether children had advantageous start in life or suffered socially, economically and educationally- On facts, petitioner and her children are permanent residents of native place of petitioner, a tribal woman- Their names entered in Pariwar Register of that village and have ration card/ voter cards registered there- Gram Panchayat had passed resolution that Local Community already accepted/ regarded petitioner's children as belonging to Gaddi Hali community- The community of their father did not accept them as their own- Order of SDO (Civil) refusing grant of scheduled tribe

certificate to children of petitioner set aside- Matter remitted for consideration afresh. (Paras 4 to 6) Title: Sreshta Devi vs. State of H.P. & others, Page- 36

Constitution of India, 1950 - Article 226- **The*Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (Act)*-**Section 13 (2)- Notice to take possession of secured assets – Writ against – Whether maintainable?- Petitioner filing writ and challenging all measures undertaken by bank under Act- Also challenging notice issued to it regarding taking over of possession of secured assets by bank – Held, account of petitioner had become NPA and same was got regularized by it by making some payment – Account again became NPA and bank issued notice to petitioner to take over possession of secured assets – Notice already challenged by petitioner before Debt Recovery Tribunal – Petitioner has alternative remedies under Act before Debt Recovery Tribunal qua grievances in question- Maintainability of writ in High Court on same grounds is doubtful – Petition disposed of. (Para 4) Title: Wing Cdr. IBK Singh Memorial Society for Arts & Academics & ors. vs. State Bank of India & ors., Page- 5

Constitution of India, 1950– Articles 226/227– Error of fact– Writ jurisdiction– Availability– Held, error of fact however grave cannot be corrected by writ court. (Para 13) Title: The Executive Officer, Municipal Council, Dalhousie vs. Anil Kumar and another, Page- 336

Constitution of India, 1950– Article 227- Writ jurisdiction– Alternative remedy, available– Consequences – Held, when petitioner has an alternative remedy under law, he can not avail writ jurisdiction – Order of Addl. District Magistrate setting aside appointment of petitioner as Anganwari Helper is made appealable under notification/scheme – Petitioner cannot file writ petition to challenge said order – Petition dismissed. (Para 4) Title: Laxmi Devi vs. State of H.P. and others, Page- 11

Constitution of India, 1950 – Article 227 – Supervisory jurisdiction – Nature of – Held, in exercise of jurisdiction under Article 227 of Constitution of India, High Court in routine does not re-appreciate findings returned by lower courts – It will interfere only if there is any perversity in the order which if not cured would result in grave injustice to party – If view arrived at by lower court is one of possible view which could have had been arrived at on basis of factual matrix before it, then High Court need not interfere with view so taken by lower court. (Paras 11 & 12) Title: Kewal Singh vs. Raju Ram, Page- 1346

Constitution of India, 1950- Article 311- Fundamental Rules,1922 – Rule 29 (1)- Penalty of reduction to lowest stage in existing time scale of pay till retirement – Whether can be imposed ? - State proposing penalty of censure on petitioner, an officer of Indian Police Service – Union Public Service commissioner disagreeing with proposal and recommending reduction to lowest stage in existing time scale of pay till retirement – State imposing penalty accordingly – Central Administrative Tribunal dismissing application of petitioner – Petition against –Held – Order directing reduction to lower stage in time scale of pay of govt. servant as a measure of penalty should state the period for which it shall be effective and whether on restoration, it will operate to postpone future increments if so, to what extent -Reduction to lower stage in time scale of pay is not permissible either for unspecified period or as a permanent measure – Reduction in time scale of pay up to date of retirement is actually a permanent measure. (Paras 21 & 24) Title: O.C. Thakur vs. Central Administrative Tribunal & others, Page- 206

Constitution of India, 1950– Article 320 (3) (c) – Role of Union Public Service Commission in disciplinary matters – Nature of – Held, role of Union Public Service Commission is to find out whether conclusion arrived at by Competent Authority is fair or arbitrary and unjust and to tender necessary advice – Union Public Service Commission cannot independently come to different conclusion as though they have arole of disciplinary authority. (Para-17) Title: O.C. Thakur vs. Central Administrative Tribunal & others, Page- 206

Contempt of Courts Act, 1971- Section 12– Criminal contempt– Proof of– Petitioner contending criminal contempt on part of respondents as he (Petitioner) despite grant of anticipatory bail by High Court, was got declared by them as proclaimed offender from court of Chief Judicial Magistrate– Held, no allegation that petitioner was arrested by respondents by over reaching order passed by High Court – He did not appear despite service before court of CJM in proceedings before him – For that he was declared proclaimed offender – Passing of order by CJM has got nothing to do with order of bail passed by High Court – No case of contempt is made out – Petition dismissed. (Para 6) Title: Maman Chand Jain vs. Jeet Singh and another, Page- 601

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Employees Compensation Act, 1923- Section 3– Expression 'Employment'– Scope - Held - There is no bar that father cannot employ his son as a driver in vehicle owned by him– No presumption can be drawn that son was not employee and he did not suffer injuries while performing duties as an employee. (Para 3) Title: National Insurance Company Ltd. vs. Rajinder Kumar and another, Page- 845

Employees Compensation Act, 1923- Section 4– Liability of insurer- Extent of - Held, liability of insurer to indemnify award is only to extent of wages insured under terms of contract– Liability under award over and above that what is insured is to be satisfied by employer– Wages insured under insurance contract were Rs. 4000 p.m.– Liability of insurer can only be to extent of wages insured per month. (Para 5) Title: New India Assurance Company Ltd. vs. Poonam Sood & others, Page- 619

Employees Compensation Act, 1923– Section 4– Compensation qua injuries received during course of employment– Commissioner fastening liability on insurer and directing it to satisfy award– Appeal against – Insurer contending that contract of insurance covered 19 employees against premium of Rs. 4,53,500/- And insurer is liable proportionately only to extent wages were payable to disabled employee – Held, insurer not led any evidence that premium paid by insured was not adequate or sufficient to cover the aforesaid risk of employee or for fully covering risk, a higher premium was chargeable- Appeal dismissed. (Para 4) Title: National Insurance Co. Ltd. vs. Sanjay Kumar & another, Page- 1090

Employees Compensation Act, 1923– Sections 4 & 22– Injury during course of employment– Claim application– Limitation– Held, it is statutory duty of employer to immediately calculate compensation and pay to employee for injuries suffered by latter during course of his employment – If there is any delay, employer has to pay the penalty also– Injury to workman during course of employment not in dispute– When employer though initially agreeing to pay was delaying payment of compensation on one pretext or other, employee has a continuing cause of action to file claim– Application cannot be said to be barred by limitation - At any rate delay if any, is not attributable to employee and can be condoned. (Para 7) Title: Bhupesh Janartha vs. Ranveer Singh and another, Page- 116

Employees Compensation Act, 1923 –Section 22 - Death of employee – Claim application by legal representatives – Dismissal by Commissioner– Appeal against- On facts, held, deceased was not doing or performing his duties at time of his death –Death seems to have taken place on account of consumption of liquor -Death thus is not shown to have occurred for reasons connected with his employment– Causal nexus between death and employment of deceased not established– Legal representatives have no cause to maintain claim application– Appeal dismissed. (Para 2) Title: Gagan Singh vs. Balwinder Singh, Page- 852

Expressions – 'Jamatalashi' – Meaning of – Held, jamatalashi means, personal search of an individual – Search of bag does not amount to Jamatalashi. (Para 10) Title: State of Himachal Pradesh vs. Naresh Kumar, Page- 54

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Factories Act, 1948 – Section 106 and proviso – Time limitation for taking cognizance of offences – Computation thereof – Petitioner challenging cognizance taken by trial court of offences punishable under Act on ground of limitation **–** State alleging cognizance to be within limitation - Held, violations of factory laws were noticed by Labour Inspector during inspection on 23.5.2016 – Three months period for filing complaint expired before 23.8.2016 - Complaint filed on 21.9.2016 was barred by limitation and no cognizance could have been taken by court – Complaint totally silent about written notice having been sent to Manager and receipt of his response by complainant – Complainant cannot rely upon proviso to Section 106 of Act and claim extension in period of limitation –Petition allowed - Complaint quashed.(Paras 7 & 8) Title Hemant Mohan and another vs. State of H.P., Page- 259

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Guardian and Wards Act, 1890 - Section 25 **–Child Access and Custody Guidelines alongwith Parenting Plan adopted by High Court of Himachal Pradesh** – Custody of minor or visitation rights - Grant of – Relevant considerations – Boy aged 8 years residing with mother and maternal grandparents on account of strained relations between his mother and father – Multiple litigation between two in different courts – Husband committing suicide allegedly on account of torture of wife and her relatives and FIR for abetment to commit suicide also registered against wife and her parents on basis of suicide note of deceased – Paternal grandparents praying for custody of minor child – Held, child has been deprived of love and affection of his parental grandparents – Custody of child should remain with mother so that she could bring him up with due care – Parental grandparents given visitation rights once in week for eight hours from morning to evening – During school vacations, they would be having custody of child for one week. (Paras 13 to 16)Title:Dr. Joginder Singh Chauhan & anr. vs. Praveen Dulta Chauhan & Ors., Page- 95

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Himachal Pradesh Land Revenue Act, 1954 - Section 35– Attestation of mutation – Evidentiary value – Held, mutation confers no title and cannot be made basis or foundation of title – Attestation of mutation is only for fiscal purpose so as to enable State to collect revenue from person in possession. (Para 22) Title: Union of India and another vs. Balak Ram and others, Page- 562

Himachal Pradesh Land Revenue Act, 1954 –Section 130– Partition of joint holding - Mode of partition – Objections thereto– Held, objections to mode of partition should be raised at the earliest– Objection not raised before revenue officer(s) cannot be permitted to be raised by way of petition under Article 227 of Constitution- Petition challenging mode of partition on grounds not raised before revenue officer(s) dismissed. (Paras 2 & 3) Title: Krishan Chand and others vs. Gian Chand and others, Page- 816

Himachal Pradesh Liquor Licence Rules, 1986– Rule 19-A– Para 12.39 (c) of Announcements for Allotment of Retail Excise Vends by Renewal for year 2019 -2020– Grant of Form L-10 BB Licence- Requirement of having premises of stipulated area– Applicability- Held, excise policy requiring minimum floor area with applicant for grant of from L-10 BB licence has been made applicable for financial year 2019 -2020 starting from 1.4.2020 – It has no applicability to existing licences – Licence to respondent No. 5 granted on 15.3.2019 was not covered by said policy – Grant of licence cannot be availed on ground of licences was not having requisite floor area. (Para 29) Title: Aditya Nath Sharma and another vs. State of HP and others, Page- 636

Himachal Pradesh Liquor Licence Rules, 1986 – Notification 7-832/2018 – EXN – 10188 – dated 11.4.2012 – Grant of Form L -10 BB licence – Requirement of applicant having turnover of more than 2 crore in a financial year 2019-2020- Held, this requirement is for grant of licence and not for renewal of existing licence. (Para 31) Title: Aditya Nath Sharma and another vs. State of HP and others, Page- 636

Himachal Pradesh Liquor Licence Rules, 1986 – Grant of Form L-10-BB licence – Requirement of maintaining distance from other liquor vends having Form L-2 licence– Held, there is no rule prohibiting grant of Form L-10 BB licence for a departmental store located at particular distance from L-2 vend. (Para 35) Title: Aditya Nath Sharma and another vs. State of HP and others, Page- 636

Himachal Pradesh Panchayati Raj Act, 1994 (Act) Section 122 (1)(c)- Encroachment over govt land – Disqualification to contest election of Panchayati Raj Institutions (PRIs') – Meaning and Scope – Encroachment by grandfather(s) of winning candidate – Effect – Election of petitioner set aside by SDO(C) and his appeal against that order dismissed by Commissioner on ground of encroachment over Govt. land– Petition against – Petitioner contending that he had separated from grandfather(s) and never shared encroached land with them and Section 122(1)(c) of Act had no applicability – Held, purpose of Section 122 (1)(c) of Act is to prevent encroacher and their progenies from contesting election, irrespective of whether progenies are severed from umbilical cord or not – Separation of petitioner from his grandfather(s) inconsequential - Act does not exempt persons living separately from applicability of Section 122 (1)(c). (Paras 30 to 34) Title: Ram Lal vs. State of HP and others, Page- 629

Himachal Pradesh Panchayati Raj Act, 1994 (Act) – Section 122 (1)(c) and (2) **Himachal Pradesh Land Revenue Act, 1954 (Revenue Act) -** Section 163 – Whether Authorized Officer under the Act, has jurisdiction to decide whether someone is encroacher over government land or not or there must be an order of Revenue Officer under Section 163 of Revenue Act declaring such a person as an encroacher over government land before he could be declared as ineligible to contest election ? Held, during election process, Authorized Officer has the jurisdiction to decide the question of disqualification of a candidate to contest election including question of his encroachment over Govt land-

whereas Section 163 of Revenue Act simply deals with prevention and removal of encroachment over Govt. land and it has nothing to do with disqualification of person to contest election to panchayats (Para 25) Title: Ram Lal vs. State of HP and others, Page-629

Himachal Pradesh Panchayati Raj Act, 1994 – Section 145 (1) and (3) – Suspension of member of Zila Parishad for his alleged involvement in offence - Duration of suspension, whether it would automatically lapse after expiry of period of six month? - Held, under Section 145(3) of Act, Authority concerned is required to conduct an inquiry and pass an order within six months – If inquiry is not conducted and completed within six months, then suspension order shall be deemed to have been revoked – But Sub- section of (3) of Section 145 by its very nature would apply only to cases where proceedings are initiated departmentally – It can not apply to cases where criminal charges are framed against a person. (Paras 10 & 11) Title: Ram Prasad vs. State of Himachal Pradesh & another, Page-1126

Himachal Pradesh Panchayati Raj Act, 1994- Section 145 (1) and (3), whether inconsistent to each other? – Held, Sub-section (1) of Section 145 deals primarily with registration of criminal complaints – Whereas clauses(b) and (c) of Sub-section (1) deal with departmental proceedings – On account of clauses (b) and (c) finding place in Sub-section (1) that Sub-section (3) makes a reference to Sub-section (1) in it – Therefore, there is no incongruity between Sub-section (1) and Sub-section (3) of Section 145 of Act – Suspension of members in cases where criminal complaints are under investigation/ trial can exceed six months. (Para 13) Title: Ram Prasad vs. State of Himachal Pradesh & another, Page-1126

Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983- Section 10– **Indian Penal Code, 1860**– Section 409– Misconduct by criminal misappropriation of government property by public servant- Proof– Trial court convicting accused, a Junior Engineer with Irrigation and Public Health department for misappropriating cement bags belonging to state government and entrusted with him on basis of recovery of such cement bags full, opened as well as empty from his house – Trial court observed that accused was supposed to take permission from department before stacking cement bags in private accommodation– Appeal against– Held, evidence on record indicates that cement bags could not have been stored in open– For storing them in private building, accommodation was required to be taken on rent, if accused had not stored cement bags in his house – His house was in close proximity of construction site -Stacking seems to be on account of his avoiding taking of accommodation on hire – No scientific evidence that cement used in construction of house of "KK' and cement recovered from house of accused were interse compatible – Breach of instruction of storing construction material only at official godown or in private accommodation with prior approval if any,was without mens rea – Appeal allowed – Conviction set aside – Accused acquitted. (Paras 9 & 10) Title: Khushal Singh vs. State of Himachal Pradesh, Page- 473

Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 – Sections 4 & 5 – Removal of unauthorized construction – Held, Collector disposed of application of HIMUDA seeking removal of unauthorized construction of respondent on ground that matter was of complex nature and required adjudication by civil court – Collector and Commissioner, who upheld Collector's order not giving any reason as to how matter was complex nor indicating the complex questions involved in the case- Collector

could not have shrieked away from his responsibility in deciding case – Matter before him and District Consumer Forum / State Consumer Commission entirely different – Orders of Collector and Commissioner set aside – Matter remanded to Collector to decide it afresh. (Paras 4 to 6 & 15) Title: Himachal Pradesh Housing and Urban Development Authority vs. Dr. K. K. Parmar, Page- 1075

Himachal Pradesh Tenancy and Land Reforms Act, 1972 - Section 2 (17) 'Tenant' – Proof – Dispute interse parties being whether defendant was non-occupancy tenant in suit land and had become its owner under the Act- Held, suit land measures just six marlas - Difficult to infer that he was raising crops over it – Five marlas of land recorded as Banjar kadim in revenue paper –No evidence of payment of rent in cash or kind - Defendant not proved to be non-occupancy tenant over suit land – Concurrent findings of lower courts and granting decree of declaration qua revenue entries standing in favour of defendant as wrong as well as injunction in favour of plaintiff upheld – RSA dismissed. (Para 12) Title: Dina Nath vs. Gian Chand and Others, Page- 871

Himachal Pradesh Tenancy and Land Reforms Act, 1972– Section 104 (1) - **Himachal Pradesh Tenancy and Land Reforms Rules**, 1976 – Rule 24(2) – Resumption of land – Entitlement – Held, landowner is entitled to resume tenancy land from tenants only if on date of notification he holds less than one and half acres of irrigated land or three acres of unirrigated land for his personal cultivation so that area of land under his personal cultivation comes to one and half acres irrigated land or three acres of unirrigated land– In case tenancy land is partly irrigated and partly unirrigated and landowner intends to resume land of both classes, he shall be entitled to do so in manner so prescribed by Land Reforms Officer - Orders of Revenue officers allowing landowner to resume land from tenant without determining land in his actual cultivating possession on date of notification and without affording right of selection of land to tenant are wrong – LPA allowed – Matter remanded to Land Reforms Officer for fresh disposal in accordance with law. (Paras 8 to 11) Title: Sharwan Kumar & ors. vs. The Financial Commissioner & ors., Page- 1172

Himachal Pradesh Tenancy and Land Reforms Act 1972 (Act) –Section 118 – Bar of transfer of land to non-agriculturist – Will –Whether bequeath is also hit by Section 118 of Act – Held, by virtue of explanation added to Section 118 of Act, Will is deemed to be a transfer of property which Will take effect on demise of testator – Therefore, no Will of land can be executed in favour of non-agriculturalist of Himachal Pradesh – 'C' executed Will in favour of non-agriculturalist in 1994 – 'C' died in 2004 – Explanation to Section 118 of Act was added in 1997 – As such, Will in favour of non-agriculturalist is not valid. (Paras 11 & 12) Title: Kuldeep Singal vs. Rakesh Kumar and others, Page- 1001

Himachal Pradesh Urban Rent Control Act, 1987 – Section 24 (5) – Interlocutory orders – Challenge thereto – Whether would lie before Appellate Authority by way of appeal or before High Court in exercise of revisional jurisdiction? Held – Appeal is maintainable against such orders of Rent Controller which decide the fate of parties and are not otherwise made appellable under Act - All other interlocutory orders are amenable to revisional jurisdiction of High Court - Therefore, the question whether status of tenant as lessee on purchase of a share in disputed premises by him would merge and enlarge his status to that of co-sharer vis a vis, landlord actually decides fate of parties as far as maintainability of rent petition is concerned – Order of Rent Controller on this point is appellable – Revision against such order not maintainable– Petition dismissed.(Paras 7 & 9) Title: Anil Bhardwaj vs. Tek Chand and others, Page- 548

Himachal Pradesh Urban Rent Control Act, 1987 –Code of Civil Procedure, 1908 - Order 1 Rule 10– Eviction suit– impleadment of co-owner as co-petitioner at belated stage- Permissibility– Held – a co-owner of rented premises can file eviction suit against tenant for and on behalf of other co-owners without impleading them as co-petitioners – Rent suit filed in 2011, whereas application for his impleadment as co-petitioner filed by another co-owner in 2017 almost after six years of institution of eviction suit– No explanation given for delay of six years in moving such application– Application appears to have been filed by co-owner to help the tenant - Order of Rent controller dismissing such application upheld – Petition dismissed. (Paras 10 & 12) Title: Deepak Sood vs. Parmod Sood and others, Page- 667

Hindu Marriage Act, 1955- Section 13 (1)(i-a) (i-b)- Divorce on grounds of cruelty and desertion – Proof- District Judge dismissing petition of husband seeking divorce on grounds of cruelty and desertion – Appeal against –Held - Evidence revealing that wife still residing in house of her in-laws alongwith minor children – They being maintained only by father in-law of wife - Husband not residing with his parents as he was disowned by them – He also performed ring ceremony with another lady despite already being married – He is interested in marrying some other lady and divorce petition filed by him to achieve that end – No evidence of cruelty or desertion by wife on record – Appeal dismissed – Decree upheld.(Paras 17 & 18) Title: Anil Kumar Jamwal vs. Reena Devi, Page- 153

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Indecent Representation of Women (Prohibition) Act, 1986 – Section 6– Obscene and prurient contents – Necessity of publication- Trial court convicting accused for preparing nude photographs and obscene CDs of victim and storing them in his computer– Appeal against– Held, on facts, CDs carrying obscene and prurient contents got generated by investigating agency from hard disc of CPU of accused – No evidence that such CDs were televised or screened for public view by accused– Inference can be drawn that such material was meant only for private viewing by accused – Mere storage of such CDs in CPU of accused will not constitute offence under Section 6 of Act – Appeal allowed – Conviction set aside – Accused acquitted. (Paras 9 to 11) Title: Vijay Kumar vs. State of H.P., Page- 1104

Indian Contract Act, 1872 - Section 70– Quasi-contract– Duty to pay –Money suit for execution of additional work– Trial court decreeing money suit of plaintiff by holding that he had executed additional work over and above what was awarded and he was entitled to recover amount for same– First appellate court upholding decree– RSA – Held, the then junior engineer, specifically admitting of plaintiff having executed additional work as per directions of executive engineer – And that such work could not be awarded through tender due to enforcement of model code of conduct - Nor the could be entered into measurement book – Additional work was in continuity of awarded work – Execution of additional work not denied even by defendant- Work not of gratuitous nature – Payment of said work cannot be denied on ground that work was not awarded to him through tender process. (Paras 7 to 9) Title: Municipal Corporation, Shimla vs. Surinder Kumar, Page- 203

Indian Contract Act, 1872 – Section 73 – 'Debt' - Meaning – Held, debt would include any liability to pay for a breach of a contract and since the liability is pecuniary it would take the character of a debt- Amount payable by department to a contractor in terms of a building contract for work executed by him will amount to 'debt'. (Paras 18 & 25) Title: Om Prakash Sharma vs. H.P. Tourism Development Corporation, Page- 138

Indian Contract Act, 1872 – Section 73 – Payment towards escalation of cost – Held, no evidence on record that contractor had accepted the full and final amount without any objection or protest – He is entitled for amount towards escalation of cost of construction material etc. (Para 33) Title: Om Prakash Sharma vs. H.P. Tourism Development Corporation, Page-138

Indian Contract Act, 1872– Sections 128, 129 & 131– Liability of guarantor– Extent of- Predecessor of defendant standing guarantor for the Principal towards repayment of loan – Death of guarantor and suit for recovery filed against his legal representative - Defendant denying his liability as well as liability of his predecessor on ground that after execution of revival plan between Corporation and Principal debtor, there was novation of contract and his father was not a party to it– Held, defendant not adducing any evidence showing that after execution of revival plan and handing over of assets back to Company his predecessor-in- interest remained only a share holder and consequently his being absolved of his coextensive liability as a guarantor– Plea of novation of contract not proved – Liability of guarantor since is co-terminus with original borrower, hence defendant is jointly and severally liability towards decreetal amount. (Para 19) Title: The Himachal Pradesh State Industrial Development Corporation Limited vs. M/s Himachal Air Products (P) Ltd and others, Page- 1363

Indian Easements Act, 1882- Section 13 – Right of passage by way of necessity for cultivation etc.– Held, on facts, lands came to parties through their mother – Land of plaintiff can be cultivated only if he has access through defendant's land – Defendant's land is a servient tenement vis-a-vis land of plaintiff – Right of passage for cultivation includes right to carry tractor also but for cultivation purposes – Passage closed by defendant by erecting gate – Decree of mandatory injunction for removal of obstruction in the said passage as well as for damages as passed by trial court restored. (Paras 14 to 17) Title: Kalyan Singh vs. Kartar Singh, Page-112

Indian Evidence Act, 1872- Section 3– Appreciation of evidence– Interested witness– Evidentiary value– Held, statements of interested witnesses cannot be brushed aside solely on ground of non-association of independent witnesses – But where complainant and accused parties are inimical, version put forth by interested witnesses cannot relied upon in absence of corroborative evidence.(Para 11) Title State of H.P. vs. Raj Kumar, Page- 369

Indian Evidence Act, 1872–Section 3– Appreciation of evidence–Hostile witness– Held, testimony of hostile witness cannot be brushed aside completely simply on ground that witness was declared hostile– Credible part of hostile witness which is acceptable in facts and circumstances of case and is duly corroborated by other reliable material on record can be taken into consideration in favour of either party. (Para 21) Title: Pala Singh & others vs. State of H.P., Page- 688

Indian Evidence Act, 1872- Section 3**-** Appreciation of evidence– Circumstantial evidence– Held, circumstances relied upon must be conclusive in nature and consistent only with hypothesis leading to guilt of accused. (Para 24) Title: Rakesh Shah @ Chillu vs. State of H.P., Page-710

Indian Evidence Act, 1872- Section 8 –Motive – Relevancy and requirement of proof – Held, - Ordinarily prosecution is not required to prove motive of accused to commit offence – But

where prosecution case hinges upon circumstantial evidence alone, it must establish that there was some motive behind commission of crime – On facts, motive of accused to commit murder of deceased as latter having illicit relation with his wife, not proved beyond reasonable doubts. (Para 36 & 37) Title: Rakesh Shah @ Chillu vs. State of H.P., Page-710

Indian Evidence Act, 1872 – Section 8-Motive – Existence of and relevance – Held, if accused had motive to cause death, eye witness count of occurrence may not be required– Where motive is missing, prosecution is required to prove its case with testimony of eye witnesses. (Para 17) Title: Mohan son of Ram Dass vs. State of Himachal Pradesh, Page- 476

Indian Evidence Act, 1872–Section 8– Motive– Absence of- Effect– Held– Absence of proof of motive to commit crime itself is no ground to throw away prosecution case– Absence of proof of motive only demands careful scrutiny and deeper analysis of evidence of prosecution– On facts, killing of wife by accused stands proved beyond all reasonable doubts by cogent and reliable evidence– Absence or presence of motive on part of accused will not be of any significance. (Para 12) Title: Vinod Kumar Khadia vs. State of H.P., Page-786

Indian Evidence Act, 1872–Section 18– Admission– Evidentiary value– Held, admission made by a party on statement on oath before court must be taken to be reliable unless party gives explanation of circumstances in which admission was made or otherwise proves that such admission was erroneous– Duty is cast on party to explain his previous admission- Mere contradictory statement on oath cannot said to be an explanation of circumstances under which such admission was made. (Paras 12 & 14) Title: Hiru and others vs. Mansa Ram (deceased) through his LRs Chaman Lal and others, Page- 277

Indian Evidence Act, 1872– Section 18– Admission- Evidentiary value– Held, court has discretion to accept or not to accept admission made by defendant in written statement. (Para 14) Title: Kuldeep Singal vs. Rakesh Kumar and others, Page-1001

Indian Evidence Act, 1872– Section 27– Disclosure statement– Credibility of- Held, on facts, where disclosure statement is recorded in police station in presence of an independent person, then such person having witnessed the same must also state the purpose of his visit to police station– Witness also not stating in his examination that he was present in police station at relevant time– Disclosure statement of accused thus not proved on record. (Para 33) Title: Mohan son of Ram Dass vs. State of Himachal Pradesh, Page- 476

Indian Evidence Act, 1872 – Section 45– Expert evidence – Report of Serologist– Relevancy – Held, presence of blood group of deceased on knife and clothes of accused not relevant until grouping of blood of accused is also got done. (Para 45) Title: Rakesh Shah @ Chillu vs. State of H.P., Page-710

Indian Evidence Act, 1872- Sections 63 & 65– Secondary evidence– Leading of- Pre requisites– Held, when loss of original is not accounted for or application seeking leave of court otherwise is bereft of particulars required for discharging proof contemplated under Section 65 of Act, secondary evidence can not permitted to be adduced. (Paras 5 & 6) Title: Amar Nath vs. Bhagat Chand, Page-545

Indian Evidence Act, 1872 - Section 65– Secondary evidence– Leave of court– Grant of - On facts, held, despite their best effort defendants not able to trace the original resolution deed - No material on record to suggest negligence on part of defendants in producing

original deed within reasonable period– Application allowed– Leave granted to lead secondary evidence. (Para 7) Title: Sanatan Dharam Pratinidhi Sabha vs. State of H.P. & others, Page- 838

Indian Evidence Act, 1872- Section 68– Will– Proof of– Held, due execution and attestation of Will can only be proved by calling at least one attesting witness of Will, in case he is alive. (Para 16) Title: Sohan Lal & another vs. Thakur Dass & others, Page- 236

Indian Evidence Act 1872– Sections 101 & 102 – Burden of proof in criminal case– False defence– Effect- Held, before using false defence as additional link, it must be proved that all the links in the chain are complete and do not suffer from any infirmity– Where there is any infirmity or lacuna in prosecution case, it can not be cured or supplied by a false defence or a plea which is not accepted by court. (Para 17) Title: State of Himachal Pradesh vs. Sanjiv Kumar alias Sanju, Page- 1271

Indian Evidence Act, 1872– Sections 101 & 103– **Indian Contract Act, 1872 -** Section 16 (3)– Undue influence, fraud etc.,- Onus of proof– Held, normally onus of proof is on party, who is alleging fraud, undue influence or misrepresentation – But where person is in fiduciary relationship with another and latter is in a position of active confidence, then burden of proving absence of fraud etc is on person in dominating position.(Para 15) Title: Mahesha Devi and others vs. Satya Devi (since deceased) through her LRs Smt. Chanchala Devi and Others, Page- 773

Indian Evidence Act, 1872– Sections 101 & 103 – **Indian Contract Act, 1872 -** Section 16 (3) – 'Pardanashin Lady'– Concept– Held, rules regarding 'Pardanashin lady' are equally applicable to an illiterate and ignorant women– Illiterate lady not knowing Hindi .English or Urdu and knowing 'Pahari' only, on facts, held entitled to protection available to Paranashin lady. (Paras 16 & 18) Title: Mahesha Devi and others vs. Satya Devi (since deceased) through her LRs Smt. Chanchala Devi and Others, Page-773

Indian Evidence Act, 1872 – Section 106– Plea of alibi– Proof– Held, mere arrest of accused on next day of offence and at place other than place of incident perse does not prove plea of alibi – On facts, witnesses deposing about presence of accused in his tenanted premises with wooden plank and knife in his hands and where at the relevant time, his wife was lying on floor in a pool of blood – Plea of alibi is not probablised. (Para 8) Title: Vinod Kumar Khadia vs. State of H.P., Page-786

Indian Evidence Act, 1872 – Section 106 – Special circumstances in the knowledge of person only – Onus of proof – Held, accused taking plea of his wife having received injuries by fall from lintel and the same leading to her death – Accused not proving this fact – His presence at place of occurrence established from other evidence on record – Accused failed to explain injuries suffered by his wife and can be inferred to have caused such injuries. (Para 13) Title: Vinod Kumar Khadia vs. State of H.P., Page-786

Indian Evidence Act, 1872 – Sections 107 & 108 – Presumptions thereunder – Applicability –Held, if a man is proved to be alive for thirty years then burden of proving qua his being dead is to be discharged by apposite espousing litigant and he may relieve the rigors thereof by cogent evidence being adduced qua said person remaining unheard of by his relatives for seven years – In that eventuality, onus shifts to litigant making a proclamation vis-a-vis the

factum of his being alive. (Para 12) Title: Zabar Singh and others vs. Atma Ram and others, Page- 1373

Indian Evidence Act, 1872 –Section 112- **Code of Civil Procedure, 1908 –** Section 151 – Paternity dispute – DNA examination – Permissibility – Held, courts with a view to ascertain truth should be furnished with best available scientific evidence and courts must not be left to bank upon presumptions unless science has no answer to facts in issue – However, court must apply test of 'eminent need' while considering application for DNA examination, which will depend upon facts and circumstances of each case. (Paras 12 & 13) Title: Naveeta vs. Bhagwan Singh, Page- 351

Indian Evidence Act, 1872 (Act)- Section 112- **Code of Civil Procedure, 1908–** Section 151– Paternity dispute– DNA examination– Rejection of application– Petition against– Held, on facts, child (plaintiff) has already attained majority – Her case is that she was born out of physical relations between her mother and defendant without having contracted marriage – Presumption of Section of 112 of Act thus was not attracted – Plaintiff otherwise could not have proved her paternity except by DNA examination – Rejection of her prayer by trial court improper – Petition allowed. (Para 13) Title: Naveeta vs. Bhagwan Singh, Page- 351

Indian Evidence Act, 1872 - Section 112 - **Code of Civil Procedure, 1908 –** Section 151 – Paternity dispute – DNA examination – 'Eminent need' for DNA examination - Inference as to – Held, test of eminent need for DNA examination is whether it is not possible to reach the truth without use of such test. (Para 13) Title: Naveeta vs. Bhagwan Singh, Page-351

Indian Evidence Act, 1872– Section 113 A – Presumption as to abetment to commit suicide – Applicability – Held, before presumption contemplated under Section 113-A of Act is drawn against accused, prosecution must prove that wife was subjected to cruelty – Degree of cruelty meted out to deceased must be such that she could not make any distinction between urge to live and pangs of death. (Para 12) Title: State of H.P. vs. Narender Singh, Page- 729

Indian Penal Code, 1860 – Sections 147, 148, 302 and 323 read with 149 –Rioting, murder etc., by unlawful assembly– Proof -Appeal against conviction– Prosecution alleging accused having caused death of 's' and injuries to 'B' and 'H' in prosecution of common object of unlawful assembly at village water source– Held– Complainant 'B' giving entirely different sequence of events on oath than what he told in statement recorded under Section 154 of Code – Denying statement given in FIR – Witnesses 'VC', 'RD' and 'HY' giving entirely different versions as to manner and sequence of occurrence of incident – Medical examination reports of accused not placed on record by investigating agency –Injured witness saying that on account of darkness, it was not possible to identity persons who were assailants - Identity of accused as assailants beyond reasonable doubts not established– Appeal allowed- Accused acquitted – Conviction set aside. (Paras 25 to 41) Title: Sonu and others vs. State of Himachal Pradesh, Page- 192

Indian Penal Code, 1860 - Section 279 – Rash driving on public highway – Proof – Appeal against acquittal recorded by trial court -Prosecution assailing acquittal on ground of wrong appreciation of evidence by trial court - Held, (i) driver of offending bus was driving his vehicle in his lane i.e towards his left (ii) complainant had emerged from residential colony situated towards right side of accused (iii) complainant was entering in main highway from right side and had to come towards lane in which accused was driving his bus, as direction

of their journey was towards same side (iv) accused had applied brakes still struck against front of car of complainant (vi) complainant had not entered left lane at all – Probability of complainant himself not vigilant while crossing road at 90 degree cannot be ruled out – No evidence of rash driving on part of accused - Acquittal upheld – Appeal dismissed (Paras 8 to 10) Title: State of H.P. vs. Kamlesh Kumar, Page- 953

Indian Penal Code,1860– Sections 279 & 304-A – Rash and negligent driving etc–Proof– Appeal against acquittal – Held- Driver of offending vehicle fled away immediately after occurrence of accident – Witnesses never told investigating officer that they could identify driver of offending vehicle – Identification parade never got conducted by investigating officer– Owner of vehicle denying having employed accused as driver on his truck – Identification of accused as driver by witnesses during trial not of much significance – No mis - appreciation of evidence on part of trial court – Acquittal upheld – Appeal dismissed. (Paras 10, 12 & 14) Title: State of H.P. vs. Jai Chand, Page- 373

Indian Penal Code, 1860 - Sections 279, 304A & 337 – Rash and negligent driving – Proof – Trial court convicting accused of rash driving and thereby causing death of 'GC' and simple injuries to 'SK' – In appeal, Additional Session Judge acquitting accused – Appeal by State – Held, complainant deposing on oath that accused was not attentive in his driving and he was looking here and there – Statement does not find mention in his version recorded under section 154 of Cr.Pc – 'SK' an occupant of tractor attributing accident to be on account of rash driving of accused – Tractor admittedly loaded with compressor at relevant time – Highly improbable that tractor was being driven rashly – Evidence contradictory and not reliable – Appeal dismissed – Acquittal upheld. (Paras 8, 9 & 12) Title: State of Himachal Pradesh vs. Ramesh Chand, Page- 290

Indian Penal Code, 1860 - Sections 279 and 337- Rash and negligent driving – Proof – Appeal against acquittal by State – Prosecution coming with case that accused by his rash driving caused head on collision resulting in injuries to complainant and other occupants of car – Held, prosecution case that after collision vehicle of accused stopped at 24 feet from place of collision , inherently improbable – Complainant got medically checked up after about four hours of accident – Inference can be drawn that complainant and other occupants were drunk and for that reason their medical examination was delayed – Spot position as reflected in site plan disturbed and reorganized to show occurrence of head on collision – Mechanical examination of vehicles by expert suspicious – Prosecution case extremely doubtful – Appeal dismissed. (Paras 10 & 11) Title: State of Himachal Pradesh vs. Jitender Kumar, Page- 625

Indian Penal Code, 1860- Sections 279 and 337– **Motor Vehicles Act, 1988**- Section 187- Rash and negligent driving on public highway- Proof- Prosecution alleging that accused by his rash driving of truck hit a scooter and caused injuries to victim– Trial court convicting accused– Additional Sessions Judge affirming conviction in appeal – Revision against – Held, mere rashness or negligence on part of accused is not sufficient to prove charge – It is criminal rashness or negligence on part of accused which constitutes offence – Speed alone is not criteria for inferring criminal rashness – Victim not receiving injuries so not filing report with police – FIR registered at instance of brother of victim, a press reporter– Investigating officer also admitting of case having been registered on instructions of Additional S.P.– No independent witness examined– No evidence of damage to scooter of victim on account of collision as its mechanical examination was not got done – Case of

prosecution doubtful– Revision allowed – Conviction and sentence set aside – Accused acquitted. (Paras 5, 9, 18 & 20) Title: Bunti Lal vs. State of Himachal Pradesh, Page- 929

Indian Penal Code, 1860 - Sections 279, 337 and 338 - Rash and Negligent driving – Proof of– Trial court acquitting accused of rash driving– Appeal against– Held, prosecution story being that accused hit his vehicle against victim's legs, when he (victim) was crossing road – Complainant not stating that offending vehicle was in high speed – Alleged eye witnesses to occurrence in fact, were not present on spot at time of occurrence of accident – In absence of proof of rash and negligent driving, no presumption can be drawn against accused– Appeal dismissed– Acquittal upheld. (Paras 7 & 8) Title: State of Himachal Pradesh vs. Kuldeep Chand, Page- 121

Indian Penal Code, 1860 – Sections 279, 337 & 338 – Rash and negligent driving – Proof – Held – Onus is always upon prosecution to prove beyond reasonable doubt that vehicle was being driven rashly and negligently – No presumption of rashness or negligence can be drawn by applying principle of res ipsa loquitur. (Para 20) Title: State of H.P. vs. Baishakhi Ram, Page- 413

Indian Penal Code, 1860–Sections 279, 337 & 338– Rash and negligent driving– Prosecution alleging accused being negligent in driving bus as a result of which one 'N' fell down while boarding into bus and sustained grievous injuries – Trial court acquitted accused – Appeal against – On facts, held, bus was at halt in order to make passengers alight or board into it – Duty of driver was to concentrate on the road and not on passengers boarding into or alighting from bus – Primary duty of vigil in this regard was of conductor – He was required to be watchful about safety of such passengers – Conductor not made accused in this case- No case of negligent driving on part of accused made out – Appeal dismissed. (Paras 12 & 13) Title: State of Himachal Pradesh vs. Surinder Singh, Page-1083

Indian Penal Code, 1860– Sections 279, 337 & 338– Rash and negligent driving/act– Proof– Held, victim was in process of alighting from bus– Its driver and conductor were required to adhere to standards of due care and caution qua passengers alighting from bus– Evidence reveals that driver had steered vehicle ahead only on signal of conductor– So he goaded driver to depart without ensuring that victim had safely alighted– He did not take standard of care and caution he was required to observe in such a situation– No negligence was there on part of driver as he drove vehicle on signal of conductor– Conviction of conductor of bus upheld whereas that of driver set aside and he is acquitted of all offences. (Paras 10 to 14) Title: Pawan Kumar vs. State of H.P., Page- 1093

Indian Penal Code, 1860– Sections 279 and 338– Rash and negligent driving– Proof– Appeal against acquittal of accused by State – Prosecution case being that accused by his rash driving dashed his car against cycle of victim and caused grievous injuries to him– On facts– Held – Offending car was on ascend– Injured was moving his cycle by standing on paddles– Cycle was being driven in zig-zag manner and all of sudden he turned it towards right– And hit against car coming from behind – Allegations of rash driving on part of accused not proved – Appeal dismissed – Acquittal upheld (Para 8) Title: State of Himachal Pradesh vs. Kamal Kumar, Page- 507

Indian Penal Code, 1860– Section 300– Culpable homicide amounting to murder– Ingredients– Held, Ingredients of culpable homicide amounting to murder are (a) causing

death intentionally and (b) causing bodily injury which is likely to cause death. (Para 17) Title: Mohan son of Ram Dass vs. State of Himachal Pradesh, Page- 476

Indian Penal Code, 1860- Section 304-A- Death by medical negligence– Proof– Prosecution alleging that accused by his medical negligence caused death of sister of complainant – Trial court acquitting accused – Appeal against – Evidence on record revealing (i) victim visited hospital of accused for kidney ailment and her X-ray examination showed that she had kidney stone and needed operation (ii) during operation she died and death certificate indicated reason of death as perforation and rupture of intestine– (iii) accused gave fair treatment to deceased and made every possible effort for her betterment– Held, death of deceased was a sheer accident– Accused had no mens rea and was not negligent in conducting operation– Appeal dismissed– Acquittal upheld.(Paras 10 to 13) Title: State of Himachal Pradesh vs. Rakesh Mohan Gautam, Page- 101

Indian Penal Code, 1860– Sections 306 and 498-A– Cruelty and abetment to commit suicide – Proof – Appeal against acquittal of trial court– Held, demand of dowry by accused not proved – Relations between parental side of victim and accused good – No dowry given at time of marriage of accused with victim on account of poverty of her mother- Mere asking by accused of his wife to sleep on the floor does not amount to cruelty – Appeal dismissed – Acquittal upheld. (Para 13) Title: State of H.P. vs. Narender Singh, Page- 729

Indian Penal Code, 1860- Sections 307 & 452– Attempt to murder and house trespass – Proof – Prosecution story being that accused 'JS' and 'RK' made trespass in house of complainant during night and then 'JS' made an assault with darat at behest of 'RK' on her– Trial court acquitting 'RK' but convicting 'JS'– Appeal against by accused– Held, evidence on record is marred with contradictions and discrepancies i.e., complainant stating about darat with which assault was made was complete and unbroken, whereas darat produced during trial was with broken handle (i) in statement given to police, complainant not telling that 'JS' was having darat with him and 'RK' having gas lighter in his hand (iii) statements of other witnesses at variance with statements given to investigating officer during investigation– (iv) complainant not telling witnesses which of accused had inflicted injuries with darat (v)witness 'M' deposing that 'RK' was having darat with him– There was land dispute between parties– Motive to commit crime on part of 'JS' unclear– Trial court convicted accused 'JS' on basis of suspicion– Appeal allowed– Accused acquitted– conviction set aside. (Paras 19 to 21) Title: Jeet Singh alias Jaggu vs. State of Himachal Pradesh, Page- 956

Indian Penal Code 1860 – Sections 323 & 325 – Grievous hurt – Proof – Appeal against acquittal –Held, on facts, in FIR, complainant alleged of incident having taken place at Main Chowk, Palampur – In evidence, saying that incident happened inside shop of accused – Site plan also shows alleged incident having taken place inside shop of accused – Visit to shop of accused also admitted by complainant – Investigating officer admitting of accused having told him that complainant was blackmailing him – No person from bazar was associated in investigation – Case of prosecution doubtful – Appeal dismissed – Acquittal upheld. (Paras 9 to 11 & 16) Title: State of Himachal Pradesh vs. Ashish Sangrai, Page- 1198

Indian Penal Code, 1860 –Sections 323 & 427, 452, 506 read with 34 – Criminal house trespass, causing hurt, mischief etc., - Proof - Appeal against acquittal by State on ground of wrong appreciation of evidence on part of trial court –Held, parties litigating with each other for last 18-20 years – Statements of complainant 'BR' and his son 'SK' contradictory to each other – 'BR' denying his son having received injuries in said incident whereas 'SK' claiming

to have received such injuries – Witnesses to recovery of shirt of complainant and stones from spot not supporting prosecution case – Investigating officer himself denying smashing of window panes by accused though case in charge sheet is otherwise – Injuries possible by fall – Case of prosecution is doubtful – Appeal dismissed – Acquittal upheld. (Paras 7 to 15) Title: State of Himachal Pradesh vs. Mansha Ram & others, Page- 1207

Indian Penal Code, 1860- Section 325 - Grievous hurt– Proof – Appeal against acquittal of trial court by State on ground of wrong appreciation on its part– Held, parties though closely related to each other yet highly inimical on account of property of father- in- law of accused which accused was possessing and managing – Complainant being nephew of deceased father- in -law of accused wanted to get that property – Independent witnesses admitting of hurling of abuses by accused but denying any assault by him on injured – Previous litigation interse parties pending – Case of prosecution doubtful – Acquittal upheld – Appeal dismissed. (Paras 15, 18 & 21) Title: State of Himachal Pradesh vs. Gauri Ram, Page- 1193

Indian Penal Code, 1860- Section 326 – Grievous hurt with sharp edged weapon– Proof– Accused assailing concurrent judgments of conviction of lower courts on ground of wrong appreciation of evidence – Held, independent witnesses 'VD' and 'PC' having reached place of occurrence on hearing shrieks and cries not made witnesses in case – 'MR' to whose house victim was taken immediately after assault also not cited as witness – Statement of eye witness recorded by investigating officer belatedly and said witness improving version during trial - Other witnesses interested one– Accused himself handing over Darat to police in police station – Such recovery not admissible in evidence – Conviction being based on inadmissible evidence, set aside– Appeal allowed – Accused acquitted. (Paras 9 to 12 and 14) Title: Harbans Lal vs. State of H.P., Page- 831

Indian Penal Code, 1860– Sections 365, 376-D and 452– House trespass and gang rape etc – Proof – Trial court convicting and sentencing accused of house trespass and gang rape– Appeal against by accused on ground of wrong appreciation of evidence on part of trial court– Defence contending that prosecutrix did not identify accused as persons who raped her, in her statement during trial and they deserve acquittal– Held, prosecutrix admitted of having made statement recorded under Section 164 Cr.pc before Magistrate - Statement duly proved by examining Magistrate who recorded it - Statement clearly mentioning names of accused in it as perpetrators of crime– FSL report clearly linking accused "RK' and "SS' as persons whose seminal stains were found in vaginal swab of victim– Medical evidence does not rule out participation of more persons in crime in addition to 'RK' and 'SS'– Accused 'P' specifically named in statement recorded under Section 164 of Cr. Pc– Mere non-identification of accused during trial in such circumstances is inconsequential– Appeal dismissed– Conviction upheld.(Para 10 to 15) Title: Pankaj vs. State of Himachal Pradesh, Page- 498

Indian Penal Code, 1860- Section 376 **-** Rape– DNA examination, when becomes necessary– Trial court convicting accused of raping victim– Appeal against– On facts, held victim, a married lady left matrimonial house of her own without informing her husband (complainant)– During investigation, victim telling Police that accused took her away and had coitus with her without her consent– Semen found and collected by medical officer during her medical checkup not sent for DNA examination– Incriminatory material does not connect accused with certainty with commission of said offence– Appeal allowed– Conviction set aside– Accused acquitted.(Paras 22 & 23) Title: Om Prakash vs. State of Himachal Pradesh, Page- 157

Indian Penal Code, 1860- Section 376 – Rape- Appreciation of evidence– Principles reiterated, that allegations of rape may not always be correct and sometimes these may have been leveled falsely for variety of reasons– Where statement of prosecutrix inspires no confidence, conviction cannot be based solely on its basis– On facts, prosecutrix contradicted prosecution case on material particulars- Medical evidence not supporting sexual assault– No other scientific evidence indicating commission of crime – Material witnesses also denying prosecution case– FIR might have been lodged to settle property dispute– Prosecution case doubtful– Appeal allowed– Accused acquitted. (Paras 14 to 25 & 31& 32) Title: Jatinder Kumar vs. State of H.P., Page- 669

Indian Penal Code, 1860– Section 379– **Indian Forest Act, 1927**- Sections 41 & 42**-** Illicit transport of timber– Proof– Criminal revision against concurrent findings of conviction – Accused assailing conviction on ground of wrong appreciation of evidence on part of lower courts – Held, on facts, identification of driver of truck, 'ML' on basis of wallet recovered from truck and photocopy of driving licence lying inside it ,is insufficient - Wallet easily available in market and copy of driving licence without proof of its original will not connect 'ML' as driver of truck– Material suggesting that police themselves drove truck from place of its interception to Range Office– Seizure of truck and recovery of alleged timber at spot doubtful- Forest officials who unloaded the seized timber not cited as witnesses– Sample slippers produced before court not bearing FIR No etc., on them– Case of prosecution doubtful– Revision allowed– Conviction set aside– Accused acquitted. (Paras 10 to 15) Title: Muni Lal vs. State of Himachal Pradesh, Page- 518

Indian Succession Act, 1925 - Section 63– Will - Execution of – Held- Will has to be attested by two or more witnesses– It is not necessary that both these witnesses should be present simultaneously and they put their signatures at each other's presence– Mandatory requirement is that these witnesses must have seen testator signing Will or affixing his mark thereon or they have received personal acknowledgement from testator of his signature or mark on Will– Other mandatory pre-requisite is that attesting witnesses of Will must sign it in presence of testator. (Para 14) Title: Sohan Lal & another vs. Thakur Dass & others, Page- 236

Indian Succession Act, 1925– Section 63 – Execution of Will– Proof – Plaintiff claiming title to property by inheritance – Defendant claiming succession by way of Will executed by 'L' – Trial court and appellate court declining plaintiff's claim and dismissing suit/ appeal – RSA – Held **–** 'L' was alone in his old age - He died issueless - His wife predeceased him – Defendant looked after deceased in last 4 – 5 years of his life – Defendant performed his final rituals – Plaintiff or her Power of Attorney never visited village and never served deceased – Due execution of Will proved by examining attesting witness 'MS' also – Will registered one – Findings of lowers Courts regarding due execution of Will are correct. (Para 6) Title: Jagdish vs. Shibi Devi & others, Page- 262

Indian Succession Act, 1925- Section 63 – Indian Evidence Act, 1872- Section- 68 - Will – Execution of and proof - Participation of beneficiary– Effect – Held – Mere participation by the beneficiary or his relation in execution of Will by itself cannot construed to be a suspicious circumstance.(Para 7) Title: Jagdish vs. Shibi Devi & others, Page-262

Indian Succession Act, 1925- Section 63 – Indian Evidence Act, 1872- Section - 68 - Will– Reading of – Principles– Held, while construing a document fundamental rule is to ascertain

intention from words used– Surrounding circumstances are to be considered but for purpose of finding out the intended meaning of the words which have been actually employed– True intention of testator has to be gathered not by attaching importance to isolated expressions but by reading will as a whole with all its provisions and ignoring none of them as redundant or contradictory. (Paras 14 & 17) Title: Chando (deceased) through his LRs Smt. Sandesh Devi & Ors. vs. Baldev Singh & Ors., Page- 762

Indian Succession Act, 1925– Section 63 – Indian Evidence Act, 1872 – Section- 68 - Will– Execution of and proof – Trial court holding will to be duly proved on record – First appellate court allowing appeal and returning findings that execution of Will not proved in accordance with law– RSA by defendants – Held, marginal witness 'SR' clearly deposing about sound mental state of testator and his signing Will in presence of marginal witnesses and about said witness signing/thumb marking Will in testator's presence– Will duly registered before Sub-Registrar– Other marginal witness 'JR' not supporting case of propounders/ defendants and denying his having marked Will in presence of testator –'JR' instead, appearing as witness for plaintiff - He admitting in his cross-examination that plaintiff had asked him to depose as his witness– Also admitting presence of testator and other attesting witness 'SR' at relevant time– Deposition of 'SR' proved due execution of Will by testator– Registration of Will by Sub-Registrar raises presumption of truth and this presumption remains unrebutted– Appeal allowed– Decree of first appellate court set aside and that of trial court restored. (Paras 10 to 12) Title: Madan Lal and others vs. Gyan Chand and Others, Page-1327

Indian Succession Act, 1925 –Section 63 – **Indian Evidence Act, 1872**- Section 68 – Execution and proof of Will – Held, mere statements of attesting witnesses regarding due execution of Will per se would not constrain court to mete deference to their testifications - Witnesses if inherently incredible, their deposition cannot be taken as proof of due execution of Will – Will scribed in grossly unnatural manner – Recitals made therein belied from other evidence on record – Marginal witness admitting legatee having assisted him in earlier litigation – Due execution of will not proved. (Para 9) Title: Beant Kaur and Anr. vs. Inder Pal Singh Rana (since deceased) through his legal heirs and others, Page- 297

Indian Succession Act, 1925 – Section 63 – **Indian Evidence Act, 1872**– Section 68 – Execution and proof of Will – Defendants challenging concurrent findings of lower courts holding Will propounded by them as not duly proved and decreeing suit of plaintiff to the effect that she and proforma defendants having succeed to estate of 'RR' – Held, (i) attesting witnesses 'ML' and 'A' duly deposing about testatrix in sound mental state (ii) putting thumb mark on Will in their presence and they also signing Will in her presence (iii) house of propounders in proximity to house of testatrix enabling them to serve her even though she was residing alone as reflected in pariwar register (iv) findings that thumb mark of testatrix was smudged on Will in absence of expert evidence of document writer, are perverse- Execution of Will in favour of defendants proved on record – RSA allowed – Decrees of lower courts set aside and suit dismissed. (Paras 7& 8)Title: Om Prakash (since deceased) through his LRs vs. Sanjay Kumar and another, Page- 860

Indian Succession Act, 1925– Section 90 – Will – Bequeath of property – Construction of Will – Held, where property is bequeathed in generic which may increase, diminish or otherwise change during testator's life so that description may from time to time apply to

different amounts of property of like nature then property answering the description at death of testator passes under Will unless contrary intention is shown. (Para 18) Title: Chando (deceased) through his LRs Smt. Sandesh Devi & Ors. vs. Baldev Singh & Ors., Page- 762

Indian Succession Act, 1925– Section 90 – Construction of Will – Will bequeathing 'all property' in favour of nephews – Held, bequeath includes land which was initially under tenancy of testator and of which he had become owner by operation of tenancy laws before his death (Paras 13 & 21) Title: Chando (deceased) through his LRs Smt. Sandesh Devi & Ors. vs. Baldev Singh & Ors., Page-762

Industrial Disputes Act, 1947– Section 25F– Illegal retrenchment– Prayer for reinstatement– Delay in raising dispute– Effect– Industrial Tribunal-cum-Labour Court dismissing application seeking reinstatement- Writ petition– Held, there is no plausible explanation on part of petitioner as why a demand notice was served by him on employer after two decades since he ceased to serve the employer– Even if there is no period of limitation within which an Industrial dispute has to be raised by workman but this does not mean that workman can continue to sleep over his rights for decades together and thereafter on one fine day he can wake up and approach court without explaining delay on ground that there is no limitation prescribed in law to approach it - Even in case, where no limitation is prescribed, the court can presume period of about three year, as a reasonable time within which litigant must approach it for redressal of his grievances. (Paras 9 to 11) Title: Prithvi Singh vs. The Executive Engineer, HPSEB Ltd. Division Rajgarh, District Sirmaur,H.P. & others, Page- 1383

Industrial Disputes Act, 1947–Sections 25 F & 25 G – Retrenchment – Validity– Held, where disengagement of workmen is in violation of section 25 F & 25 G of Act, award of Labour Court directing continuity with all consequential benefits from date of illegal disengagement is just and proper– It cannot be interfered with in exercise of writ jurisdiction– On facts, retrenchment of workmen without paying retrenchment compensation at time of serving notices, held to be illegal (Paras 2 & 10) Title: The Executive Officer, Municipal Council, Dalhousie vs. Anil Kumar and another, Page-336

Interpretation of Statutes - **Himachal Pradesh Panchayati Raj Act, 1994** - Section 145 (1) (a) – Word 'or' – Meaning of – Held, word used is 'or' which is a disjunction and not 'and' which is a conjunction. (Para 14) Title: Ram Prasad vs. State of Himachal Pradesh & another, Page- 1126

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Juvenile Justice (Care and Protection of Children) Act, 2015–Sections 3 (iv) and 18 (1) (a)- Dispositional orders– Principle of best interest– Juvenile Justice Board ordering detention of juvenile in conflict with law in observation home for one month – Sessions court upholding order in appeal– Revision against– Juvenile in conflict with law found having tendered apology at very first opportunity to victim and her parents– No history of his ill conduct subsequent or prior to said incident– Dispositional order modified– He is let off after due admonition. (Para 12) Title: Saurabh vs. State of H.P., Page-306

Juvenile Justice (Care and Protection of Children) Act, 2015- Sections 12 & 15- Heinous offences – Child in conflict with law in category of 16-18 years– Bail– Jurisdiction of Juvenile

Justice Board (JJB) –Held, jurisdiction under Section 12 of Act to grant bail either by JJB or Children Court would be valid only after strict compliance with provisions of Section 15 (1) of Act regarding preliminary assessment of child in conflict with law by JJB – Grant of bail by JJB before that would amount to granting bail at inchoate stage – Order of JJB granting bail is set aside. (Para 3) Title: State of H.P. vs. Satish Chauhan, Page- 835

Juvenile Justice (Care and Protection of Children) Act, 2015 –Section 14– Juvenile Justice (Care and Protection of Children) Rules, 2016 – Rule 10 (6) – Presentation of final report in petty or serious offences –Time period - Juvenile Justice Board (Board) returning final report to investigating agency on ground of not having been filed within statutory period– Petition against– Held, Rule, 10 (6) of Rules provides that final report in petty or serious offences by investigating agency should be filed before Board within period of two months from date of receipt of information except in those cases where it was reasonably not know that person involved in an offence was a child– But even in such cases, application is required to be filed before Board seeking extension of time– No reason given by police for delay caused in filing final report– Order of JJB's is not illegal– Petition dismissed. (Para 4) Title: State of Himachal Pradesh vs. Monu @ Gulu, Page- 497

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Land Acquisition Act, 1894– Section -11- Acquisition of land for public purpose – Dispute as to title– Determination– Jurisdiction of Land Acquisition Collector – Held – Land Acquisition Collector has no jurisdiction to determine question of title of any person in land sought to be acquired. (Paras 23 & 24) Title: Rajindra Kumari & Ors. vs. The Collector, Shimla & Ors., Page- 742

Land Acquisition Act, 1894 – Section 18 (3) – Refusal of Land Acquisition Collector (Collector) to send reference to District Judge on ground of delay – Writ against – Whether maintainable? - Held, against an order of collector refusing sending of reference to District Judge on ground of delay, aggrieved party has alternative remedy to challenge it by way of revision u/s 18 (3) of Act – Writ petition, challenging order of collector is not maintainable. (Para 2 & 3) Title: Garu Lal vs. State of H.P. & ors., Page- 67

Land Acquisition Act, 1894 – Sections 18, 28A & 54 – Re-determination of compensation on basis of judgment of High Court passed in appeal against award of reference court, whether can be sought by co-owner who had filed reference under Section 18 of Act ? – Held, benefits enshrined in Section 28 A of Act are bestowable only upon those landowners , who after award of land acquisition collector did not constitute a valid reference under Section of 18 Act before District Judge (Paras 3 & 5) Title: Keshav Ram and others vs. Assistant Engineer, HPPWD, Page- 300

Land Acquisition Act 1894 – Section 23 – Payment of enhanced compensation – Writ Jurisdiction – Corporation acquiring land of petitioner through private negotiations– Corporation also executing an undertaking in favour of petitioner to pay more compensation for said land, if negotiated rates of lands are enhanced – Land Acquisition Collector (LAC) enhancing rates of similar lands vide his award – Petitioner praying for enhanced compensation in terms of undertaking as per award of LAC – Denial by Corporation – Writ jurisdiction – Held, in terms of undertaking given by Corporation itself, petitioner is entitled for enhanced compensation as per award of LAC – Plea of Corporation that petitioner was entitled to enhanced compensation only if negotiated rates of land were increased through

negotiations by Corporation itself, is bogus and frivolous for pursuing of which public money was squandered and petitioner harassed- Corporation grossly misused and abused process of court by adopting litigious attitude –Petition allowed - Petitioner entitled for enhanced amount of compensation with statutory benefits as per award of LAC – Costs of Rs. 1,00000/- imposed on Corporation. (Paras 8, 31, 42 & 47) Title: Sat Dev Singh vs. State of H.P. & Ors., Page- 1056

Land Acquisition Act, 1894 – Section 23 – Acquisition of land for public purpose – Market value – Determination – Held, sale deeds which are beyond 12 months from date of issuance of notification or last publication thereof and showing no equivalency of land mentioned therein with land acquired, have no relevance in determining market value of acquired land. (Para 10) Title: Dhanu (deceased) through LRs vs. State of H.P. & others, Page- 1108

Land Acquisition Act, 1894 – Section 23 – Acquisition of land for public purpose – Market value – Previous award – Relevancy – Held, land involved in previous award similar to land acquired under Notification – Previous award can be considered for determining market value of acquired land. (Para 13) Title: Dhanu (deceased) through LRs vs. State of H.P. & others, Page- 1108

Land Acquisition Act 1894 – Sections 23 & 25 – Acquisition of land for public purpose – Market value – Determination – Sale deed(s) – Relevancy – Held, sale deed(s) on basis of which value of land becomes less than the highest value of land determined by Land Acquisition Collector are not relevant in view of Section 25 of Act. (Para 8) Title: Collector LAC and another vs. Narayan Singh and others, Page- 1189

Land Acquisition Act 1894 – Sections 23 & 25 – Acquisition of land for public purpose – Market, value – Determination – Sale deed(s) – Relevancy – Held, sale deed(s) on basis of which value of land becomes less than the highest value of land determined by Land Acquisition Collector are not relevant in view of Section 25 of Act (Para 6) Title: State of H.P. vs. Mehtab Singh & others, Page-1191

Land Acquisition Act, 1894 – Sections 23 & 54 – **Code of Civil Procedure, 1908** – Order XLI Rule 33 – Enhancement of compensation by High Cour, in absence of any cross appeal or cross objection by claimant. **-** Held, even if there is no appeal, cross appeal or cross objection of claimant on record, appellate court is competent to determine fair and just compensations payable to him in an appeal pending before it. (Para 24) Title: The Land Acquisition Collector HP PWD & ors. vs. M/s Sanatan Dharam Sabha Ganj Bazar, Shimla through its Secretary, Page- 537

Land Acquisition Act, 1894– Section 28 -A– Re-determination of compensation – Application for – Limitation – Held, period prescribed for making application under Section 28-A of Act for re-determination of compensation is three months from award and this period cannot be condoned through application under Sections 5 of Limitation Act. (Para 3) Title: Keshav Ram and others vs. Assistant Engineer, HPPWD, Page- 300

Land Acquisition Act, 1894- Section 30 - Dispute as to apportionment of compensation – Trespasser, whether entitled for compensation? Held, trespasser is not a person interested vis a vis acquired land – He has no right in it and thus not entitled for apportionment of compensation.(Paras 16, 29 & 35) Title: Rajindra Kumari & Ors. vs. The Collector, Shimla & Ors., Page- 742

Land Acquisition Act, 1894– Section 34– Taking over of possession of land by Government without acquiring it –Consequences –Possession of land taken by Government in 1985 for construction of road- Notification under Section 4 of Act for its acquisition issued in 2005- Held– On facts, there is no specific evidence of date regarding taking over of possession of land by Govt. for purpose of raising construction of road in 1985- Landowner entitled for additional interest @ 15% of per annum on market value of land towards its utilization by government from January, 1986 till issuance of notification under Section 4 of Act as damages. (Paras 3 & 4) Title: State of H.P. and others vs. Abnash Chander Mehra, Page- 52.

Limitation Act, 1963- Section 5 – Condonation of delay– Whether delay caused in filing appeal before Appellate Authorities against selection/appointment of Anganwari helper can be condoned? – Held, Appellate Authority (Deputy Commissioner) is a person designate and it exercises quasi-judicial functions – As such, Section 5 of Limitation Act has no applicability in proceedings before Appellate Authority and it cannot condone delay occurred in filing appeal. (Paras 10 to 13 & 19) Title: Praveena Devi vs. State of H.P. & ors., Page- 942

Limitation Act, 1963– Section 5 - Condonation of delay of 581 days in filing review petition– Justifiability– State contending that executive engineer concerned could not understand implications of order sought to be reviewed – And for filing review, department was required to follow procedure involving movement of files from one office to another etc – Held, it is not understandable why executive engineer failed to understand the implications of an innocuous order to the effect that state withdrew its Writ pursuant to re-engagement of respondent– Plea of delay on account of movement of files from one office to another is a mundane explanation not supported by contemporaneous official records- No cogent reason given for delay in question– Application dismissed. (Paras 4 & 6) Title: State of H.P through its Principal Secretary (IPH) & another vs. Sandeep Kumar, Page- 1331

Limitation Act, 1963 – Section 19 –Extension of period of limitation – Held, Section 19 of Act will be applicable to a suit filed by contractor for recovery of amount regarding work executed by him under a building contract- Payment in writingmade by the Government in his favour will extend the period of limitation. (Paras 28 to 30) Title: Om Prakash Sharma vs. H.P. Tourism Development Corporation, Page- 138

Limitation Act 1963 – Sections 64 & 65– Adverse possession– Joint land– Proof– Held, land purchased by father in name of his five sons i.e., parties to litigation– Land recorded in joint ownership of plaintiff and defendant No.1– Defendant No. 1 never agreed to transfer his share in favour of plaintiff – Presumption of truth attached with revenue entries– Otherwise also, plaintiff can not lay suit for claiming ownership by way of adverse possession– RSA dismissed. (Paras 9, 12 & 13) Title: Dila Ram vs. Jalam Ram & others, Page- 1341

Limitation Act, 1963– Articles 64 & 65 – Adverse possession– Proof– On facts, held old house of plaintiff standing over suit land had fallen down - Defendants constructed house over said land to the knowledge of plaintiff– Plaintiff admitting defendants possession by way of construction for last many years prior to filing of suit– Oral evidence is corroborated by revenue entries – Duration of defendants' possession exceeds statutory period of 12 years– Possession of defendants open peaceful and hostile to title of plaintiff – Defendants had become owner by way of adverse possession– Suit of possession cannot be decreed in favour of plaintiff.(Paras 14 to 16) Title: Sukh Ram (deceased) through his legal representative Papender Kumar & others vs. Narain Dass & Others, Page- 706

Limitation Act, 1963– Article 65 - Adverse possession– Joint land– Exclusive hissedari possession – Nature of such possession –Held, legal relationship between co-owners is not regulated by any statute - It is governed by principles of equity , justice and good conscience – For better management of joint estate, co-owners hold separate possession of parcels of joint land – Their separate possession without corresponding intent to severe joint status, does not confer a right upon co-sharer in separate possession to assert his separate ownership over it. (Paras 12 & 13) Title: Sheru (since deceased) through his LRs Hind Rustam and ors. vs. Zannat and ors., Page- 571

Limitation Act, 1963– Article 65 – Adverse possession– Joint land– Exclusive possession vis-a vis plea of ouster– Held– Possession of co-owner is to be taken as possession of all co-owners– Co-owner in possession cannot render his possession adverse to other co-owners not in possession merely by any secret hostile animus on his own part– Ouster of other co-owners must be evidenced by hostile title coupled by exclusive possession and enjoyment to the knowledge of other co-owners- Mer exclusive payment of land revenue by one co-owner is not proof of ouster. (Paras 23& 30) Title: Sheru (since deceased) through his LRs Hind Rustam and ors. vs. Zannat and ors., Page-571

Limitation Act, 1963– Article 65 – Adverse possession – Mohamedan law – Held, heirs succeed to estate of ancestor as tenants –in common in specific shares – Where heirs continue to hold estate as tenants- in -common without dividing it and one of them brings suit for recovery of share, period of limitation would start not from date of death of ancestor but from express ouster or denial of title. (Para 24) Title: Sheru (since deceased) through his LRs Hind Rustam and ors. vs. Zannat and ors., Page- 571

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Motor Vehicles Act 1988 - Sections 14 & 15- Driving licence – Deemed validity – when is applicable ? - Held, if holder of driving licence applies within 30 days of expiry of licence and licence is got renewed within this period, then licence would be deemed to have been renewed from date of expiry – On facts, driving licence expired on 21.5.2003 and accident took place on 26.5.2003- Licence not proved to be fake by insurer – Accident occurred during statutory protected period of 30 days from expiry and it yet remained effective – Tribunal went wrong in applying principle of pay and recover on ground that driver was not holding valid and effective driving licence on date of accident. (Paras 3 & 4) Title: Shyam Lal vs. Urmila Devi and others, Page- 316

Motor Vehicles Act, 1988- Section 149 - Motor accident– Claim application– Defence of gratuitous passenger in goods vehicle– Proof– Insurer contending that contents of FIR not showing that deceased was travelling as owner of goods in offending vehicle– He was gratuitous passenger and indemnificatory liability cannot be fastened upon it – Held, mere fact that at time of accident deceased was not accompanying any goods in offending vehicle, will not suggest that vehicle was never hired by him for transporting goods – After unloading of goods such passengers do travel in same vehicle to place from where they had commenced their journey – Passengers do so and are allowed to do so in their capacity as owner of goods or their representatives who hired the vehicle for transportation of goods – In such circumstances indemnificatory liability will have to fasten on insurer – But onus is always upon claimants concerned to prove that deceased had hired vehicle for

transportation of goods. (Para 4) Title: Shriram General Insurance Co. Ltd. vs. Sakina Devi and others, Page- 32

Motor Vehicles Act, 1988 - Section 149 (2)(a)(ii) - Motor accident - Claim application – Defence of fake driving licence – Proof – Held, insurer did not lead any evidence to prove that driving licence of driver of offending vehicle was fake – Copy of driving licence placed on record clearly indicating that its holder was authorised to drive the offending vehicle – Insurer failed to discharge its onus of proving driving licence of driver of offending vehicle as fake.(Para 4) Title: United India Insurance Co. Ltd. vs. Asha Devi and others, Page- 65

Motor Vehicles Act 1988 – Section 149 (2)(a)(ii) – Motor accident – Claim application – Defences – Validity of driving licence – Onus on whom? – Held, once insured had filed copy of driving licence showing that driver was authorised to drive offending vehicle, onus shifts to insurer to prove its invalidity – In absence of discharge of this onus, liability cannot be fastened on insured / driver of offending vehicle. (Para 2) Title: Yadvender Singh and another vs. Kirpa Ram and another, Page- 322

Motor Vehicles Act, 1988 - Section 166 - Motor accident – Claim application -Liability of insurer, when limited by contract – Effect – Held, when contract of insurance inter se parties itself limits liability of insurer to indemnify award only up to certain amount, then insurer cannot be directed to pay entire amount covered by award – Liability beyond the contracted amount is to burdened upon registered owner of offending vehicle. (Para 3) Title: National Insurance Company Ltd. vs. Sheela Devi and others, Page- 23

Motor Vehicles Act 1988 – Section 166 – Motor accident – Claim application – Monthly income of deceased – Determination –Held, evidence on record clearly shows that deceased was carpenter himself and had been deploying other workers for executing contracted works of carpentry – Assessment of monthly income at Rs. 7500/- on basis of his being skilled labourer is beyond rule of wholesome appreciation of evidence – Monthly income reassessed at Rs. 20,000/- p.m. – Award modified accordingly. (Para 3) Title: Parshant alias Pintu vs. Shanno Devi & Anr., Page- 25

Motor Vehicles Act, 1988 - Section 166 –Motor accident – Claim application – Defences– Contributory negligence – Proof – Insurer filing appeal against award of tribunal and arguing that indemnificatory liability should also have been fastened on both vehicles involved in accident as it was result of negligence of both the drivers- Held, ascriptions made in FIR allege rash driving only on part of driver of offending vehicle – Chargesheet for rash driving filed before criminal court only against driver of offending vehicle – No other ocular evidence showing that accident was result of negligence on part of drivers of both vehicles – Plea of contributory negligence not embedded on any firm evidentiary material existing on record. (Para 3) Title: Royal Sunderam Alliance Insurance Company Ltd. vs. Mukandra Devi and others, Page- 29

Motor Vehicles Act, 1988– Section 166– Motor accident– Claim application- Compensation towards leave availed by claimant during treatment, medical rest and hiring services of domestic help etc – Grant of - Held, in absence of any evidence as to kind of leave i.e., earned leave or medical leave taken by claimant during hospitalization and medical rest no compensation can be granted on ground that claimant could have got that leave (earned leave) encashed at time of retirement - Similarly in absence of necessary evidence qua availing of services of domestic help during prolonged hospitalization and subsequent to

recuperation compensation cannot be awarded to claimant. (Paras 3 & 4) Title: Seema Hastu vs. National Insurance co. Ltd. & another, Page- 86

Motor Vehicles Act 1988- Section 166– Motor accident– Permanent disability–Assessment of compensation under head "Future pain and suffering, loss of amenities" etc – Held, medical disability not proved by examining medical officer – No evidence that disability mentioned in disability certificate would permanently render claimant disabled from doing household work – Disability of 41% accruing from 26% mild hearing impairment and 20% loss of olfaction – Auditory impairment may be reparable with auditory aids – Olfactory disability appertains to loss of smell – Disability does not render claimant incapable to perform household chores – Compensation reduced to Rs. 75000/- towards failure pain & suffering and loss of amenities of life. (Para 4) Title: Rachna Devi vs. Sushila, Page- 303

Motor Vehicles Act, 1988 - Section 166 – Motor accident – Claim application – Defences – Gratuitous passenger in goods vehicle- Held, on facts, deceased used to collect milk in village and sell it at Chilling Plant – Milk used to be taken to Plant in offending vehicle – Documentary evidence of Chilling Plant corroborating petitioners' case – Plea of deceased being a gratuitous passenger not proved by insurer. (Para 14) Title: Oriental Insurance Company Ltd. vs. Baldev and others, Page-324

Motor Vehicles Act, 1988- Section 166– Motor accident– Claim application– Defences– Gratuitous passenger in goods vehicle- Held, on facts, deceased used to collect milk in village and sell it at Chilling Plant– Milk used to be taken to Plant in offending vehicle– Documentary evidence of Chilling Plant corroborating petitioners' case – Plea of deceased being a gratuitous passenger not proved by insurer. (Para 14) Title: Oriental Insurance Company Ltd. vs. Manjani Kumari and others, Page- 330

Motor Vehicles Act, 1988- Section 166 – Motor accident – Claim application – Identity of offending vehicle- Determination – Insurer relying upon recitals made in FIR as well as untrace report for argument that offending vehicle was not involved in accident – And oral evidence ought not to have been accepted by Tribunal – Held, contents of FIR and untrace report of police cannot prohibit Tribunal to accept reliable evidence of witness to occurrence of accident regarding vehicle involved in it. (Para 3) Title: Oriental Insurance Company vs. Surti Devi and others, Page- 533

Motor Vehicles Act, 1988– Section 166- Motor accident- Claim application- Permanent disability– Amputation of right leg below knee– Effect– Held, claimant was doing diploma in Mechanical Engineering in ITI– Amputation of leg below right knee would deprive him to perform any avocation relating to Mechanical Engineering- Functional disability would be 100%- Assessment as done by Tribunal toward loss of future income on this basis not interfered with- Appeal of insurer dismissed. (Para 5) Title: Reliance General Insurance Company Limited vs. Parmod Parkash and others, Page-842

Motor Vehicles Act 1988- Section 166 – Motor accident– Claim application – Defence of deceased being gratuitous passengers in goods vehicle – Proof- Insurer disputing its indemnificatory liability as fastened by Tribunal on ground that deceased were travelling in goods vehicle as gratuitous passengers– Held, on facts documentary evidence clearly shows that offending vehicle was laden with garlic bags and furniture owned by deceased– Deceased were not travelling as gratuitous passenger in goods vehicle, rather they were

aboard as owner of goods– Findings of Tribunal fastening liability on insurer not wrong. (Para 3) Title: Shriram General Insurance Com. Ltd. vs. Sangeeta Devi & others, Page- 848

Motor Vehicles Act, 1988– Section 166 – Motor accident– FIR– Evidentiary value– Held, allegations made in FIR perse would not be admissible in evidence – But when FIR is made part of claim application then Tribunal and Appellate Court would be entitled to look into same. (Para 7) Title: Reliance General Insurance Co. Ltd. vs. Renuka Massey & Ors., Page-1030

Motor Vehicles Act 1988– Section 166 – Motor accident– Contributory and composite negligence – Inter-se distinction – Held, in contributory negligence, person himself contributes to accident – And he cannot claim compensation for injuries sustained by him in accident to extent of his own negligence– In composite negligence, persons who has suffered does not contribute to occurrence of accident in any manner and it is result of combination of negligence of two or more other persons- Here, injured need not establish extent of responsibility of each wrong doer separately. (Para 11) Title: Reliance General Insurance Co. Ltd. vs. Renuka Massey & Ors., Page-1030

Motor Vehicles Act, 1988–Section 166 – Motor accident– Contributory negligence of deceased – Proof – While relying upon statement of investigating officer and site plan, Tribunal holding that accident had taken place also on account of contributory negligence of deceased, a driver of motor cycle and fastening indemnificatory liability on the insurer of truck to extent of 50% only – Appeal by claimants – Held, informant specifically stating before Tribunal that accident was result of rash driving of driver of truck – Truck being a larger vehicle vis-a-vis motor cycle, it was for driver of offending truck to ensure steering on to abundant vacant space available on road – His maneuvering of truck resulted into head on collision at middle of road – He alone was rash and negligent in driving – Tribunal misappreciated evidence qua contributory negligence of deceased – Appeal allowed – Insurer of truck liable to indemnify entire award. (Para 3) Title: Swati Sharma vs. Ashraf Khan & others, Page- 1098

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Rash and negligent driving – Proof – Insurer of offending vehicle disputing factum of accident having taken place because of rash driving by its driver and attributing negligence on part of deceased driver of motor cycle – Held –In FIR registered against deceased driver of motor cycle, a cancellation report was filed after investigation of case – Report was accepted by Judicial Magistrate – Eye witness to occurrence of accident attributing rash and negligent driving on part of driver of offending vehicle – Witness genuine and credible – Accident had taken place because of rash driving of driver of offending vehicle. (Para 5) Title: The New India Assurance Company Ltd. vs. Parameshwari Dass and others, Page- 1102

Motor Vehicles Act, 1988– Section 166– Motor accident – Compensation for loss of business income during treatment and also future income on account of disability – Grant of - Held, no evidence on record that disability also resulted in loss of business income to claimant during period of treatment or he was permanently precluded to perform callings of his avocation– Claimant not entitled for any compensation in this regard – Moreover, such compensation cannot be claimed by his legal representatives after his death which took place during pendency of claim proceedings. (Para 2) Title: Ram Lal deceased through LRs. vs. Chitra Rai & others, Page- 1139

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application – Defences – Non- renewal of registration certificate – Effect – Held, though registration of vehicle was not renewed after expiry of statutory period of 15 years and no taxes were paid yet insurance company insured the vehicle – No evidence that vehicle was not roadworthy at the relevant time when accident occurred or such unfitness caused accident – Plea that vehicle was not registered can not be raised to deny claim. (Paras 30 & 31) Title: United India Insurance Company Limited vs. Sanjiv Kumar & Others, Page- 1333

Motor Vehicles Act, 1988– Section 166 – Motor accident– Claim application– Defences– Fake driving licence– Effect– Held, evidence shows that insured had given vehicle to driver concerned only after seeing his driving licence– Nothing on record to demonstrate that owner was aware that licence of driver was take– Insurer can not absolve itself from liability to indemnify award. (Paras 36 to 38) Title: United India Insurance Company Limited vs. Sanjiv Kumar & Others, Page- 1333

Motor Vehicles Act, 1988– Section 166 – Motor accident– Rash and negligent driving– Proof– On basis of contents of FIR insurer contending that accident was result of rash driving of deceased himself and being so it has no liability to indemnify award – Held, FIR does not constitute a substantive evidence – Person who lodged FIR not examined by insurer as witness – Eye witness to accident examined by claimants giving uneroded testification vis-a-vis commission of tort of negligence by driver of offending vehicle – Averments made in FIR ascribing commission of tort of negligence qua deceased stand blunted and maimed. (Para 2) Title: New India Assurance Company Ltd. vs. Rohit Kumar Sharma and others, Page- 1361

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Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of charas– Whether small, intermediate or commercial quantity? – Determination - Held, amount of contraband recovered from accused cannot held to be more than that what was actually sent to chemical analyst and affirmed by FSL as contraband - On facts, entire recovered stuff was not sent to FSL for examination – Only its sample of 25 gms was sent for chemical examination – Accused can be held to be possessing 25 gms of contraband only. (Para 23) Title: State of Himachal Pradesh vs. Naresh Kumar, Page- 54

Narcotic Drugs and Psychotropic Substances Act, 1988- Section 20– Recovery of charas– Proof– Special Judge convicting and sentencing accused of consciously possessing 1.674 kg of charas– Appeal against– Defence arguing that no Independent witness was joined at time of search and seizure– And deposition of official witnesses is not trustworthy– Held on facts, seizure memo, different parcels containing bulk and sample contraband admittedly bearing signatures of accused– Statements of official witnesses clear and consistent– Case property found untampered from time of seizure till production in court– FSL report proving recovered stuff as charas– No fundamental rule of law that investigating officer has to join independent witnesses in investigation- No misappreciation of evidence on record by trial court– Conviction is- based on evidence on record– Appeal dismissed -Conviction upheld. (Paras 10 & 11) Title: Kewal Krishan vs. State of Himachal Pradesh, Page- 503

Narcotic Drug and Psychotropic Substances Act, 1985– Section 20– Recovery of charas– Proof– Special Judge convicting accused of possessing commercial quantity of charas – Appeal against – Held, case of prosecution being that it was a chance recovery at a secluded

place- And for that reason, independent witnesses were not available –However, evidence revealing that place of alleged recovery was located nearby a market and village– No attempt to call villagers was made– Villagers also frequented that area when investigation was going on – No such person was made to witness even later part of investigation – No efforts made to prove that alleged signature on various parcels were actually of accused particularly when he denied existence of his signature over them– Documents not showing that police team had left police station with investigation kit- Sampling and sealing of case property at spot becomes doubtful– Case does not inspire confidence– Appeal allowed– Conviction set aside. (Paras 10 to 15) Title: Karam Singh vs. State of Himachal Pradesh, Page- 980

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 & 50– Search of bag -Notice u/s 50 of Act given to accused prior to search of bag but defective -Consequences– Held, only search of bag was conducted leading to recovery of contraband– There was no necessity to issue notice as required u/s 50 of Act before searching bag– Notice even if defective will not have any effect on prosecution case. (Para 11) Title: State of Himachal Pradesh vs. Naresh Kumar, Page- 54

Narcotics Drugs and Psychotropic Substances Act, 1985- Section 22– **Drugs and Cosmetics Act**, **1940**- Section 18 (c) – Recovery of 741 capsules of 'Spasmo Proxyvon capsules' – Whether offence is under Act of 1985 or Act of 1940 ? Held, Spasmo Proxyvon capsules containing Dextroproxypene will fall under Act of 1985 only if quantity of salts is more than 135 mgs of Dextroproxypene per capsule – Otherwise offence will fall under Act of 1940. (Para 15) Title: State of H.P. vs. Asha Gupta & another, Page- 659

Narcotic Drugs and Psychotropic Substances, Act, 1985– Section 54– **Indian Evidence Act, 1872 –**Section 106 – Presumption of conscious possession, when can be drawn? Held – Recovery of contraband from vehicle in which accused were travelling not in dispute – Onus shifted to accused to prove that it was not in their conscious possession– Accused not furnishing any explanation qua stuff recovered from vehicle in their respective statements recorded under Section 313 of Cr.PC– Possession of accused has to be held as conscious. (Para 11) Title: State of Himachal Pradesh vs. Bhotu & others, Page- 679

National Highways Act, 1956- Section 3(9)– ***Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act of 2013***– Section 105 (1) & (3) – Schedule IV- Held, Act of 2013 has limited application vis-a-vis acquisition of lands made for public purpose under Act of 1956. (Paras 3 & 4) Title: Mohan Lal Benal vs. National Highway Authority of India & others, Page- 1178

Negotiable Instruments Act, 1881– Section 138– **Code of Criminal procedure, 1973**- Section 482– Dishonour of cheque – Complaint– Quashing of proceedings– Inherent powers of High Court– Sessions Court upholding conviction and sentence as recorded by trial court– Revision against– During revision parties compromising matter and petitioner praying for quashing of proceedings – Held, legislature's intention is not to send people to suffer incarceration because of bouncing of cheques but to provide an opportunity to them to pay– Offence under 138 of Act is not serious one but a case of failure to discharge financial liabilities– Fit case to quash proceedings pursuant to compromise– Petition allowed– Revision stands closed– Accused acquitted. (Paras 6 & 7) Title: Manoj Chauhan vs. Suman Sehgal, Page- 283

Negotiable Instrument Act, 1881– Section 138- Dishonour of cheque– Complaint– Dismissal thereof and acquittal of accused by trial court - Appeal against– Held, all scribings

on cheque, words as well as figures to be in handwriting of accused, not denied by him– Mere suggestion that cheque was not issued for discharging any debt or liability, not sufficient to rebut presumption that cheque was issued for consideration– No evidence adduced qua discharge of debt taken by accused from complainant– Material on record proving case of complainant– Acquittal of accused simply on ground that dishonour of cheque for want of funds not proved is not correct inasmuch as return memo clearly showed dishonour of cheque for want of funds– Appeal allowed– Accused convicted. (Paras 8 to 10) Title: Prem Singh vs. Kiran Prakash, Page- 823

Negotiable Instruments Act, 1881 (Act)- Section 138– Dishonour of cheque– Complaint– Revision against concurrent findings of guilt and sentence– Petitioner contending wrong appreciation of evidence on part of lower courts– On facts, held complainant a company engaged in hire and purchase had financed vehicle loan to accused – Taking of loan and dishonour of cheque for want of funds not denied by him– Plea of accused that he repaid loan to complainant and company is misusing cheque which was given as security not probablised by him - Presumption of consideration attached with cheque not rebutted by him. (Para 7) Title: Nikka Ram vs. New Jagdambay Finance and another, Page- 827

Negotiable Instruments Act, 1881 – Section 138- Dishonour of cheque **–** Complaint - Trial Court convicting and sentencing accused for dishonour of cheque – Judgment upheld by court of session – Revision against - Parties compromising matter during revision – In view of compromise interse parties, petition allowed – Leave to compound offence granted – Conviction and sentence set aside.(Para 5) Title: Gian Chand vs. Harish Kumar, Page- 119

Negotiable Instruments Act, 1881 (Act)- Section 138– **Himachal Pradesh Registration of Money Lenders Act**, **1976**- Section 3- Dishonour of cheque- Complaint- Requirement of registration of money lender(s) – Non-compliance and effect on complaint filed under Act – Held- Bar stipulated in Section 3 of H P Registration of Money Lenders Act, works only against institution of suits for recovery of money by lenders against borrowers – It does not oust mandate of relevant provision of Act. (Para 10) Title: Nikka Ram vs. New Jagdambay Finance and another, Page- 827

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Payment of Gratuity Act 1976 – Section 7(3) and (3-A) – Delayed payment of gratuity – Liability to interest thereon and exceptions thereto - Circumstances – Held, employer is bound to pay interest on delayed payment of gratuity – The only exception to this rule is that delay in payment must be on account of fault of employee and controlling authority should have approved such withholding of gratuity on basis of alleged fault of employee- Petitioner was facing departmental proceedings for major penalty at time of superannuation - Withholding of gratuity was approved by competent authority – Gratuity was withheld for default of petitioner himself – He is not entitled for interest on delayed payment of gratuity. (Paras 6 to 11) Title: Padam Prakash Sharma vs. Powergrid Corporation of India and others, Page- 949

Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 -Section 20 – **Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1994** – Rule 13 – Transportation of ultrasound machines – Held, clinic of petitioners was duly registered at Delhi – Ultrasound machines were transported from Delhi to Kullu under this registrations certificate – Metropolitan Magistrate had

permitted release of these machines on spurdari to one of petitioner – There is no violation of Rule 13. (Para 19) Title: Urvashi Fakay and others vs. State of Himachal Pradesh, Page- 1042

Punjab Excise Act, 1914 (as applicable to state of HP) -Section 61 (1)(a) – Recovery of illicit liquor- Proof – Prosecution alleging recovery of can containing illicit liquor from accused – Trial court acquitting accused- Appeal by state- Held, spot of alleged recovery surrounded by about 30 houses – No independent person called to join investigation before conducting search – Non-joining of independent persons when easily available makes prosecution case doubtful – Evidence of police witnesses not inspiring any confidence – Appeal dismissed- Acquittal upheld. (Paras 6 & 7) Title: State of Himachal Pradesh vs. Joban Dass, Page- 98

Punjab Excise Act, 1914 (as applicable to state of H.P)–Section 61 (1) (a)– Recovery of country liquor without licence – Proof – Trial court acquitting accused of possessing 180 bottles of country liquor in his shop without licence– Appeal against– Held, shop of accused from where recovery effected situated in middle of Bazar, but no witnesses from that area were associated at time of search– Panch witness 'RP' not supported case during trial regarding search and recovery– Case of prosecution doubtful – Appeal dismissed- Acquittal upheld. (Paras 4 to 6 & 10) Title: State of Himachal Pradesh vs. Budhi Singh, Page- 339

Punjab Excise Act, 1914 (as application to state of HP)- Section 61 (1) (a) – Recovery of 168 bottle IMFL without licence – Proof -Trial court acquitting accused of charges of keeping 168 bottles of IMFL without licence in his house -Appeal by State on ground of wrong appreciation of evidence by trial court – On facts, held, independent witnesses 'PD', a Ward Panch and 'SK' relating to search and seizure not supporting prosecution case during trial– Seal on case property when produced during trial found tampered with – House of accused situated in Bazar - Witnesses from Bazar having 200-300 shops not associated in investigation – Case of prosecution is doubtful – No reason to interfere with judgment of acquittal appeal dismissed. (Paras 2, 7 to 10 & 14) Title: State of Himachal Pradesh vs. Parveen Kumar, Page- 915

Punjab Excise Act 1914 (as application to State of HP) - Section 61(1)(a) – Recovery of thirty cartons of IMFL from floor mill of accused - Accused not holding any licence to possess liquor – Appeal against acquittal of trial court -State contending wrong appreciation of evidence on part of trial court -On facts, held, 'PK' and 'GK' independent witnesses not supporting case during trial relating to recovery of cartons of liquor from premises of accused - Panch witnesses not from that locality where search was made - Disputed mill was open and not locked at relevant time - Investigating officer and other police witnesses not knowing about ownership of building – Case of prosecution doubtful – Acquittal of accused based on correct appreciation of evidence – Appeal dismissed. (Paras 6 to 8, 13 & 20) Title: State of Himachal Pradesh vs. Maan Singh, Page- 924

Punjab Reorganizations Act 1966 (Act) –Sections 79 & 97 – **Bhakra Beas Management Board Rules**-Scope of – Held, services of employees of Bhakra Beas Management Board are governed by regulations framed by Board under Sub-section (9) of Section 79 of Act – Rules framed by State of Himachal Pradesh, governing service conditions of its employees are not applicable to employees of Board simply because some of its offices are located within territory of Himachal Pradesh. (Para 11) Title: Krishna Devi vs. The BBMB through its Chairman and others, Page- 1027

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Securitization and Reconciliation of Financial Assets and Enforcement of Security Interest Act, 2002 – Section 18 (1) - Second proviso – Requirement of deposit of 50% of amount due for filing appeal – Applicability and computation of amount – Whether amount recovered by bank by way of auction of secured asset can be computed, when auction is challenged by debtors? – Held, second proviso to Sub- section (1) of Section 18 of Act imposes an obligation upon person filing appeal to make pre-deposit – A person filing appeal cannot take advantage of amount paid by other parties, except under certain circumstances – Where borrowers themselves are appellants they cannot claim benefit of money recovered through an auction, which itself had become subject matter of challenge – A borrower who assails an auction conducted under Act as null and void cannot take advantage of amount recovered by bank through such an auction – If in opinion of borrower an auction is invalid it would not confer any benefits upon any of parties including secured creditors and auction purchasers- To show the sale proceeds of very auction that is assailed in an appeal as money recovered by the Bank would tantamount to proverbial act of eating cake even while retaining it. (Para 16) Title: M/s. Shivalik Fibres (P) Ltd. and others vs. The Authorized Officer, Punjab National Bank and others, Page- 185

Specific Relief Act, 1963- Section 5- Suit for possession on strength of title– Proof – Trial court decreeing suit for possession – First appellate court dismissing defendants appeal– RSA– Defendants contending that local commissioner was never authorized to demarcate land and demarcation report so furnished should not have been considered- Held, trial court had appointed local commissioner for getting lands demarcated – Said order was accepted by defendants– Demarcation is not shown to be in violation of procedure required to be followed in demarcation of an estate– Defendants accepted demarcation by signing report– Demarcation revealing encroachment of defendants over suit land– Decree based on said report of local commissioner– Defendants cannot assail order of trial court appointing local commissioner in this appeal– RSA dismissed- Decrees of lower courts upheld. (Para 5) Title: Ranjha Ram and others vs. Pankaj Sharma and others, Page- 808

Specific Relief Act, 1963 – Sections 10 & 15 – **Indian Registration Act, 1908** – Section 17 (1A) - Specific performance of unregistered agreement to sell - Permissibility **–** Held, Unregistered agreement to sell even if it was executed after the amendment made in Indian Registration Act vide Amendment Act 2001 and possession under it, was delivered to proposed vendee, still it can be specifically enforced by him against vendor – There is no bar to enforce unregistered agreement to sell by instituting suit for specific performance for executing a registered sale deed. (Para 9) Title: Udi Ram vs. Anant Ram Negi, Page- 60

Specific Relief Act, 1963 – Section 34 – Suit challenging sale deeds on ground of fraud – Proof –Held, power of attorney executed by illiterate lady in favour of defendant No.1 just to enable her to defend litigation on her (Plaintiff) behalf – Defendant No.1 misusing PoA and executing sale deeds with respect to plaintiff's land in favour of others including her son – Sale consideration never paid to plaintiff – Sale deeds were result of fraud on plaintiff – Decrees of lower courts upheld- RSA dismissed. (Para 22) Title: Mahesha Devi and others vs. Satya Devi (since deceased) through her LRs Smt. Chanchala Devi and others, Page- 773

Specific Relief Act, 1963- Section 34– **Limitation Act, 1963**- Article 113- Limitation in filing suit qua wrong revenue entries– Commencement of– Held, when order has been passed

behind back of party, it would not be binding upon him– He is not required to assail it immediately on coming to know about the same– Period of limitation would commence when on basis of such order, his rights are actually threatened or invaded. (Para 19) Title: Union of India and another vs. Balak Ram and others, Page- 562

Specific Relief Act, 1963– Sections 34, 38 & 39– Suit for declaration, permanent prohibitory and mandatory injunction(s)– Grant of- Plaintiff claiming 'share am raasta' over suit land since long and alleging said land to have been wrongly included in land of defendants – Plaintiffs seeking removal of structure raised by defendants over said path– Trial court dismissing suit and first appellate court dismissing plaintiff's appeal– RSA- Held, on facts, revenue entries prepared at time of settlement showing existence of path over suit land ordered to be corrected by Settlement Officer– His order upheld by Financial Commissioner (Appeals) in revision and by High Court in Civil Writ Petition – Claim of 'share am raasta' over suit land thus can not be accepted – RSA dismissed. (Para 9) Title: Mohinder Singh and others vs. Roshan Lal and Others, Page- 1354

Specific Relief Act, 1963–Section 38– Permanent prohibitory injunction– Grant of– Plaintiff seeking permanent prohibitory injunction against defendant for restraining him from constructing Gharat and taking water channel through his land– Case of plaintiff being that after death of defendant's father Gharat built over his land was in disuse and defendant now trying to reconstruct it– Trial court decreeing suit– First appellate court allowing defendant's appeal and dismissing suit– RSA– Held, revenue entries showing suit Khasra numbers as 'Banjar Kadim' and 'Nakabil jangle jhadi'– No description of Gharat or water channel recorded in revenue papers over this land– Revenue entries not rebutted– No proof of allegations that defendant is constructing Gharat or water channel through plaintiff's land, plaintiff is not entitled for permanent prohibitory injunction– RSA dismissed. (Paras 8 & 9) Title: Bahadur Singh (Deceased) through LRs vs. Sarup Singh (Deceased) through LRs., Page- 864

Specific Relief Act, 1963– Section 38- Permanent prohibitory injunction– Grant of- Held, co-sharer is not entitled for decree of permanent prohibitory injunction with respect to land recorded in exclusive possession of usufructuory mortgagee. (Para 10) Title: Dev Raj vs. Nihal Singh & others, Page- 1087

Specific Relief Act, 1963–Section 38- Decree of permanent prohibitory injunction –Grant of –Plaintiff seeking decree of permanent prohibitory injunction against defendant for restraining him from interfering in his land or raising construction over it– Suit of plaintiff dismissed by trial court and appeal by District Judge– RSA– Held, oral evidence of plaintiff not proving that construction of defendant was over his land– Report of local Commissioner vague inasmuch as it did not include difference of two Karukans as reflected in musabi– Plaintiff not entitled for decree of permanent prohibitory injunction – RSA dismissed. (Paras 11 to 14) Title: Rattanu vs. Lakhu and others, Page- 1130

Specific Relief Act, 1963–Section 38– Permanent prohibitory injunction– Grant of- Plaintiff filing suit for permanent prohibitory injunction on allegations of unauthorized interference by defendants in her possession over suit land– Suit dismissed by trial court and her appeal by District Judge– RSA– Held, grant of permanent prohibitory injunction is discretionary and court may grant this relief to plaintiff in case it is satisfied that there is interference being caused by defendants – Plaintiff failing to substantiate allegations of interference whatsoever being caused upon suit land by defendants – Present suit is nothing but an

addition to long process which involved filing of numerous such suits unsuccessfully by plaintiff against defendants– RSA dismissed with costs assessed at Rs. 3000/- Decrees of lower courts upheld. (Paras 14 to 20) Title: Dropti Devi (deceased through Legal Representative) vs. Purshottam Singh (deceased through LRs & another, Page- 1379

Specific Relief Act, 1963–Section 38– Permanent prohibition injunction- Grant of– **Code of Civil Procedure**, **1908**– Order 1 Rule 10– Necessary parties- Whether other co-sharers are necessary parties to suit for injunction? –Held, when plaintiff has filed simple suit for permanent prohibitory injunction for himself as well as on behalf of persons recorded as co-sharers without denying their title in such land, then other co-sharers are not necessary parties to lis– Dismissal of suit after setting aside decree of trial court decreeing suit of plaintiff by first appellate court simply on ground of non-joinder of other co-sharers is perverse– RSA allowed– Decree of first appellate court set aside– Decree of trial court restored. (Paras 10 to 13) Title: Harinder Singh & others vs. Ram Lal, Page- 13

Specific Relief Act, 1963- Section 41(e)– Contract of personal service– Specific performance thereof- Held, contract of personal service like employment and related issues cannot be specifically enforced.(Para 13) Title: Sandeep Keshav vs. State of H.P. & Ors., Page-735

State Bank of Patiala Officers Service Regulations, 1979–Registration 19(2)– Order retiring officer on date of his superannuation but without relieving/suitable retiring certificate on ground of his alleged misconduct– Held, an employee of the bank can be retired under this regulation only in case disciplinary proceedings had been initiated against him before his date of retirement– Date of retirement of petitioner was 31.5.2015- Disciplinary proceedings were initiated against him after normal date of retirement by issuing charge sheet to him on 26.10.2015– Issuing of retirement order in purported exercise of Regulations 19 (2) not valid and it rendered all subsequent proceedings invalid. (Paras 4 & 5) Title: Ved Prakash Gupta vs. State Bank of India and another, Page- 1121

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BEFORE HON'BLE MS. JYOTSNA REWAL DUA, J.

Sh. Master Jagmohan (Minor) & others …Petitioners.
Versus
Shri Amar Chand …Respondent.

CMPMO No 249 of 2019
Decided on: 31.05.2019

Code of Civil Procedure, 1908– Section 47– Order XXI Rule 17 (4)- Execution of decree– Objection thereto– Maintainability - Executing court summarily dismissing objections of wife and son of judgment debtor raised to the execution of decree of specific performance of agreement to sell to effect that land was ancestral in hands of judgment debtor and he was debarred from selling it– Petition against– Held, jurisdiction of executing court is limited and narrow and it cannot be equated with jurisdiction of court of appeal or review - Right to raise objections does not mean that objector can re-open the matter– Only such objections may be raised which are apparent on face of record and show that decree was void ab initio or it is otherwise unexecutable– Objections raised do not pertain to lack of jurisdiction of court or unexecutability of decree– Petition dismissed. (Paras 6 & 7)

Cases referred:

Brakewel Automatic Components (India) vs. P.R. Selvam Alagappan, 2017 (5) SCC 371
Dhurandhar Prasad Singh vs. Jai Prakash University and others, (2001) 6 SCC 534
Gulab Singh and others vs. Mahender Singh and others 2019 (2) Him L.R. (HC) 1055
Sneh Lata Goel vs. Pushplata and others, (2019) 3 SCC 594
Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman and Others, 1970(1) SCC 670

For the petitioners. : Mr. Owais Khan Pathan, Advocate.
For the respondent : Nemo for the respondent.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(Oral)*

Instant petition has been preferred against the order dated 2.8.2018, passed by the learned Senior Civil Judge, Kullu, H.P., dismissing Objection Petition No. 1/2015, filed by the petitioners in Execution Petition No. 68-X/2013.

02. The factual matrix of case :-

2 (i) Suit was filed by the respondent seeking specific performance of the agreement to sell dated 25.08.1998. The suit was decreed vide judgment dated 20.5.2004 (Civil Suit No. 207 of 1999/62/2003). First appeal filed by the Judgment Debtor was dismissed by the learned District Judge, Kullu. Second appeal filed by the Judgment Debtor (RSA No.1 of 2005) was dismissed by this Court, vide judgment, dated 22.03.2013. Special Leave Petition bearing No. 24773/2013 filed by the Judgment Debtor was also dismissed by the Hon'ble Apex Court, vide order dated 16.8.2013.

2(ii) Decree holder, thereafter filed execution petition on 02.12.2013. Objections were preferred by the Judgment Debtor and thereafter by petitioners (wife and children as his successors) to the effect that (a) suit land was joint Hindu ancestral property and that Judgment Debtor had no right to execute the agreement in respect of same; (b) petitioners

became aware of previous litigation only after dismissal of Special Leave Petition, whereafter, they instituted an independent Civil Suit (No. 76 of 2014) against the Judgment Debtor and Decree Holder. In this suit presently pending adjudication, before the learned Civil Judge Senior Division, Lahul and Spiti at Kullu H.P., petitioners have challenged the judgment and decree dated 20.05.2004, have also sought declaration that they have rights over the suit land and that Judgment Debtor had no right to transfer the same.

2(iii) Replies to the objections were filed by the respondent-Decree Holder, denying that the suit land was joint/ancestral land. It was pleaded that Judgment Debtor had sold the suit land in favor of Decree Holder under the agreement dated 25.08.1998 and that the concurrent judgments right upto Hon'ble Apex Court had been passed affirming the decree of the suit for specific performance of this agreement dated 25.08.1998. The subsequent suit filed by the wife of the Judgment Debtor against the Judgment Debtor and Decree holder was asserted to have been filed in connivance with the Judgment Debtor.

03. Learned Executing Court observed in the impugned order that admittedly no document has been brought on record by the petitioners to show that the suit land was joint Hindu ancestral property. It was also observed that since subsequent to the dismissal of the Special Leave Petition by the Hon'ble Apex Court, petitioners have instituted a separate civil suit for determining their alleged rights over the suit land, therefore, their rights, title or interest, if any, shall be decided in the said Civil Suit. The objections were dismissed. Nine months after the dismissal of objection vide impugned order, present petition has been instituted, challenging the same.

04. I have heard learned counsel for the petitioners and gone through the appended record. Learned counsel for the petitioners argued that the petitioners were not aware of the earlier litigation and the successive appeals filed by Judgment Debtor (Father of Petitioners No. 1 & 2 and Husband of Petitioner No.3). Further that they became aware of the decision only after the Special Leave Petition No. 24773 of 2013 was dismissed on 16.08.2013. It is only thereafter they filed their own separate Civil Suit (No. 76 of 2014). It was further asserted that learned Executing Court should have framed issues in their objection petition and should have given them adequate opportunity to lead evidence for proving their contentions that the suit land was joint Hindu Ancestral Property and that Judgment Debtor was not competent to execute agreement dated 25.08.1998. The order of the learned Executing Court in summarily dismissing the objection was erroneous and therefore is liable to be interfered with.

05. It is settled law that the Executing Court cannot go behind the decree and has to execute the decree as it stands. The Hon'ble Supreme Court in **Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others,** 1970(1) Supreme Court Cases 670 held as under:-

> *"6. A Court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.*
>
> *7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make objection as to its validity may be raised in an execution proceeding if the*

objection appears on the face of the record: Where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In Jnanendra Mohan Bhaduri and Another v. Rabindra Nath Chakravarti, the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction.

06. In case of **Brakewel Automatic Components (India) Vs. P.R. Selvam Alagappan,** 2017 (5) Supreme Court Cases 371,it washeld by Hon'ble Apex Court as under:-

"20. It is no longer res integra that an executing court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardising the rights of the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus unexecutable. An erroneous decree cannot be equalled with one which is a nullity. There are no intervening development as well as to render the decree unexecutable.

21. As it is, Section 47 of the Code mandates determination by an executing Court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law being sacroscant in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof."

In Paras 22 and 23 of the aforementioned judgment Hon'ble Apex Court relying upon judgments rendered in **Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, (**1970) 1 Supreme Court Cases 670 and in **Dhurandhar Prasad Singh Vs. Jai Prakash University** and others (2001) 6 Supreme Court Cases 534, held that purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness. Exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an Executing Court can allow objection to the executability of the decree, if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing.

Similar principles have been laid down by Hon'ble Apex Court in **Sneh Lata Goel Vs. Pushplata and others** (2019) 3 Supreme Court Cases 594 that the Executing Court lacks jurisdiction to decide an objection, which does not relate to inherent lack of jurisdiction of Civil Court.

07. It is not the case of the petitioners here that the decree was passed by a Court lacking inherent jurisdiction. It also cannot be said that objections are such which are apparent on the face of the record. In fact, the objections pertain to the merits of the matter. Any decision thereupon by Executing Court would amount to reopening of the judgment

and decree passed in favour of the Decree Holder, which have been concurrently upheld right till the Hon'ble Apex Court. This would have been impermissible in execution petition. Jurisdiction of Executing Court is limited and narrow. Right to raise objection does not mean that objector can re-open the matter. The jurisdiction of Executing Court cannot be equated with that of appeal or review. Therefore, no fault can be found in the impugned order, dismissing the objection petition.

08. Regarding the rights and contentions of the parties in the suit filed by the petitioners, subsequent to the dismissal of the Special Leave Petition, it will be apt to refer few paragraphs of decision of Hon'ble Supreme Court in **Sneh Lata Goel Vs. Pushplata and others** (2019) 3 Supreme Court cases 594:-

> *5. On 12th May 2014, the appellant filed proceedings for the execution of the final decree at Ranchi. On 1st January 2015, the first respondent filed an objection under Section 47 of the Code of Civil Procedure contending that the decree dated 13.6.1990, the final decree dated 5th April 1991 and the supplementary final decree dated 18th December 2013, were without jurisdiction and therefore, a nullity. On 10th March 2015, the first respondent challenged the decree dated 13th June 1990 in appeal under Section 96 CPC. The appeal is pending.*
>
> *6. On 10th March 2016, the executing court dismissed the objections of the first respondent under Section 47 CPC with the following observations:*
>
> *"The decree holder is entitled to get the fruits of the decree and the executing cannot go behind the decree. When a decree is made by a court which has no inherent jurisdiction, an objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. Where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at trial, which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree on the ground of jurisdiction.*
>
> ___________……………………….___________
>
> *25. The respondent has filed a first appeal (First Appeal No. 43 of 2015) where the issue of jurisdiction has been raised. We must clarify that the findings in the present judgment shall not affect the rights and contentions of the parties in the first appeal."*

Thus, while affirming order of Executing Court dismissing the objection, which did not pertain to inherent lack of jurisdiction of Court, the rights and contentions of the parties in the first appeal were protected by the Hon'ble Apex Court. Such protection was also accorded by this Court in **Gulab Singh and others versus Mahender Singh and others** 2019 (2) Him L.R. (HC) 1055, a case involving somewhat similar factual position.

09. Learned Executing Court has rightly observed in the impugned order that right, title or interest of the objectors (petitioners), if any over the suit land shall be decided in the Civil Suit (No. 76 of 2014). Thus, dismissal of the objection petition will not come in the way of determination of right, title or interest of the petitioners over the suit land in their independent suit pending before the learned Civil Judge Senior Division, Lahul and Spiti at Kullu, H.P. Observations made in present judgment are for adjudication of present petition and shall have no bearing on Civil Suit filed by the petitioners.

10. In view of the foregoing observations, the present petition is dismissed, being devoid of any merit. Pending *miscellaneous application(s), if any, also stand disposed of.*

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, ACJ AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Wing Cdr. IBK Singh Memorial Society for Arts & Academics & ors.
...... Petitioner.
Versus
State Bank of India & ors. ......Respondents

CWP No. 1242 of 2019.
Decided on: 10.06.2019

Constitution of India, 1950 - Article 226- **The*Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (Act)***-Section 13 (2)- Notice to take possession of secured assets – Writ against – Whether maintainable?- Petitioner filing writ and challenging all measures undertaken by bank under Act- Also challenging notice issued to it regarding taking over of possession of secured assets by bank – Held, account of petitioner had become NPA and same was got regularized by it by making some payment – Account again became NPA and bank issued notice to petitioner to take over possession of secured assets – Notice already challenged by petitioner before Debt Recovery Tribunal – Petitioner has alternative remedies under Act before Debt Recovery Tribunal qua grievances in question- Maintainability of writ in High Court on same grounds is doubtful – Petition disposed of. (Para 4)

Case referred:
Authorized Officer, State bank of Travncore & another vs. Mathew K.C., (2018) 3 SCC 85

For the petitioner: Mr. Mukesh Pandit, Advocate.
For the respondents: Mr. Arvind Sharma, Advocate for respondent No. 1.
Mr. Narinder Guleria, Addl. A.G.with Mr. J.S.Guleria and Kunal Thakur, Dy. AGs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Acting Chief Justice *(Oral)*

This writ petition has been filed with the following prayers:

"a) To set aside all the measures undertaken by the respondent-Bank under the Securitization & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

b) The impugned notice u/s 13(2) dated 15.05.2017 and Order Annexure P-12, copy of Possession Notice dated 29.07.2017 Annexure P-8, Copy of D.M. order Annexure P-10, Copy of sale Auction Notice dated 7.05.2019 Annexure P-16 may be ordered to be quashed and the Respondent Bank be further restrained from initiating any further action under the

Securitization Act against the Petitioner and their movable and immovable properties in any manner whatsoever, through any mode and further break open the locks and hand over the physical possession of the Property to the Applicant.

c) To direct the Respondent to produce the actual amount paid by the petitioner and the actual amount payable till today as per the Terms Loan Agreement dated 2.06.2015."

2. On the previous date, learned Vacation Judge has passed a detailed order highlighting therein all the developments having taken place and the orders passed by the Debt Recovery Tribunal (I), Chandigarh twice. It has also been noticed that in view of the proceedings pending before learned Debts Recovery Tribunal, the maintainability of the present writ petition in this Court is doubtful. This order reads as follows:

> "Notice. Ms. Divya Sood, learned Deputy Advocate General, appears and accepts service of notice on behalf of respondent No.2/State. Issue separate dasti notice to the respondent No. 1, returnable for 10th June, 2019. Petitioners to take steps for the service of respondent No. 1, during the course of the day and also to ensure that the service of said respondent is effectuated before the next date of hearing.
>
> List on 10th June, 2019, as prayed for.
>
> CMP No. 5038 of 2019
>
> Allowed and disposed of.
>
> CMP No. 5039 of 2019
>
> The immediate grievance of the petitioners is in respect of Annexure P-16 dated 07th May, 2019, whereby, the Authorizing Officer of the respondent-bank has notified Public E-Auction of secured assets mortgaged/charged to be held on 10.06.2019.
>
> The perusal of the record appended with the writ petition reveals that the petitioners have already approached the learned Debts Recovery Tribunal-I, at Chandigarh, in S.A. No. 7 of 2018, inter alia laying challenge to notice issued to them on 12th December, 2016, under Section 13 (2) of SARFAESI Act as well as possession notice dated 29th July, 2017. There are other reliefs prayed for by the petitioners in this Securitization Application. To this application, reply was filed by the respondent-bank, submitting therein that subsequent to the demand notice dated 12th December, 2016 issued under Section 13 (2) of SARFAESI Act, challenged by the petitioners in Securitization Application, the petitioners had deposited some amount. Whereafter, the account of the petitioner had become regular. But, their accounts again became NPA on 10th May, 2017, which led the respondent-bank to issue fresh notice under Section 13 (2) of SARFAESI Act on 15th May, 2017. It was further submitted by the bank in its reply that neither the demand notice dated 15th May, 2017 duly received by the borrowers and guarantors nor the possession notice dated 19th January, 2018 have been challenged by the petitioners. This Secruitization Application is pending for adjudication and the record reveals that this is now fixed for arguments on 15th June, 2019.
>
> The record also reveals that the respondent bank filed its own separate Original Application bearing No. 1741 of 2018 against the petitioners for recovery of total sum of Rs1,98,63,040,71p (Rupees One Crore Ninety Eight

Lakh Sixty Three Thousand Forty point Seventy One only). This Original Application has been allowed by the learned Debts Recovery Tribunal-I, Chandigarh, vide its order dated 07th March, 2019. It is subsequent, to allowing the Original Application No. 1741 of 2018, that bank had issued auction notice dated 07th May, 2019. The petitioners moved I.A. No. 303 of 2019 in S.A. No. 7 of 2018, pending adjudication before the learned Debts Recovery Tribunal-I, Chandigarh, seeking preponement of S.A. No. 7 of 2018 as well as for stay of proceedings including operation of sale notice dated 07th May, 2018. This application was decided on 31st May, 2019 by the learned Debts Recovery TribunalI, Chandigarh, noticing the contentions of the bank that S.A. has become infructuous, as earlier notices issued by the bank under Section 13(2) as well as 13 (4) of SARFAESI Act, have been withdrawn, but on subsequent default the bank has issued fresh notices, which have not been challenged by the petitioners. The S.A. No. 7 of 2018 has now been fixed for arguments, before the learned Debts Recovery Tribunal-I, Chandigarh, on 15th June, 2019.

Learned counsel for the petitioners has submitted that no challenge to the order allowing Original Application No. 1741 of 2018 has been laid. It is for the petitioners to avail alternative remedies available to them in terms of provisions of SARFAESI Act, be it against the order dated 7th March, 2019, allowing the Original Application No. 1741 of 2018, filed by the respondent-bank for recovery of loan amount or subsequent notices issued to them. Presently the Securitization Application is already pending adjudication before the learned Debts Recovery Tribunal-I, Chandigarh and as observed earlier is now fixed for 15th June, 2019. Maintainability of present writ petition during the pendency of the proceedings before the learned Debts Recovery Tribunal-I, Chandigarh is another question to be looked into.

In view of the above facts, list the matter before the Appropriate Bench, at the pleasure of Hon'ble the Acting Chief Justice on 10th June, 2019."

3. The facts reveal that the loan account of the petitioner has been declared NPA on 10.12.2016 by the respondent-Bank. The total term loan sanctioned by the respondent-Bank under the Scheme "School Plus" is Rs.1,75,00,000/-. After the account of the petitioner having declared NPA, the respondent-Bank issued notice under Section 13(2) of the SARFAESI Act. Irrespective of a sum of Rs.45,09,276/- having already been deposited by the petitioner to liquidate the liability towards outstanding loan amount, till January, 2018 a sum of Rs. 61,34,276/- was paid by the petitioner. Even another notice under Section 13(2) of the Act was slapped by the respondent on 15.7.2017 without there being any mention of the date of NPA of the loan account therein. Even symbolic possession notice was also served upon the petitioner on 29.7.2017 on which a request was made for OTS on 30.10.2017, however, declined. When a letter to take over the physical possession of the assured assets was received, the petitioner preferred S.A. No. 7 of 2018 in the Debts Recovery Tribunal but of no avail as the possession was taken over by respondent No. 2 and handed over the same to respondent No. 1. Even the sale notice was also challenged before learned Tribunal, however, the Tribunal was reluctant to hear the petitioner. Fortunately, respondent no. 1 did not find any purchaser and as such the notice has turned infructuous. In O.A. No. 1741 of 2018 preferred by the respondent-Bank, the petitioner could not appear hence proceeded against ex-parte. The application filed for setting aside the ex-parte order was also dismissed and to the contrary, the respondent got issued another sale notice for auction on 7.2.2019 for re-auction on 10.6.2019. It is the entire proceedings having taken place in this matter before the Debts Recovery Tribunal and the notices issued under

Section 13(2) as well as under Section 13(4) of the SARFAESI Act has been sought to be quashed.

4. It is worth mentioning that the proceedings against the petitioner under the SARFAESI Act have already been initiated by the respondent-Bank. Therefore, the petitioner has equally alternative and efficacious remedy available under the provisions of the Act itself. The submissions of the petitioner are that irrespective of it was regular in repayment of the loan amount, the proceedings under the Act should have not been initiated. We, however, are not inclined to entertain the same as alternative remedy is available to the petitioner under the Act itself. The petitioner, after issuance of demand notice dated 12.12.2016 by the respondent-Bank had deposited some amount and thereby made its account regular. The account, however, again declared NPA on 10.5.2017 which led the respondent-Bank to issue fresh notice under Section 13(2) of SARFAESI Act on 15.5.2017. The said notice seems to be neither received by the petitioner nor the guarantor. Not only this, the notice to take over the possession dated 19.1.2018 has also been challenged further. The securitization application, as noticed supra, is pending for adjudication and fixed for the purpose before learned Tribunal on 15.6.2019. On the other hand, the original application registered as 1741/2018 filed by the respondent-Bank against the petitioner for recovery of sum of Rs. 1,98,63,040.71 paise stands allowed vide order dated 7.3.2019. It is thereafter the auction notice dated 7.5.2019 has been issued. The application I.A. No. 303/2019 in S.A. No. 7 of 2018 seeking preponment of the S.A. and also stay of the proceedings, including auction notice dated 7.5.2018 had turned infructuous because the earlier notices issued by the respondent-Bank under Section 13(2) as well as 13(4) of the SARFAESI Act stood withdrawn in view of the petitioner having deposited the amount in its account and thereby made the same regular. The S.A. No. 7/2018 has otherwise been fixed for arguments on 15.6.2019. The order passed in OA No. 1741/2018 has not been challenged by the petitioner any further. It is for this reason also the petitioners, if so desire, may avail the alternative remedies available to it in terms of the provisions contained under the SARFAESI Act. We are not adverting to other and further contentions raised in this petition in view of the alternative remedy available to the petitioner and also the ratio of the judgment of the Supreme Court in ***Authorized Officer, State bank of Travncore & another vs. Mathew K.C., (2018) 3 SCC 85.*** The writ petition is, therefore, disposed of, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, ACJ AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Himachal Pradesh State Electricity Board ....Petitioner
Versus
Shri Prem Chand ....Respondent

CWP No.645 of 2018
Decided on: June 11, 2019

Constitution of India,1950– Articles 14 & 226 – Adverse Annual Confidential Report (ACR) - Non-communication – Effect of - Held, principle of fairness is soul of natural justice – Every entry in an ACR of a public servant must be communicated to him within reasonable period whether it is poor, fair, average 'Good or very Good' entry **–** Non-communication of entries of ACR to a public servant has civil consequences as it may affect his chances of

promotion or getting other service benefits - Such non-communication would be arbitrary, and violative of Article 14 of the Constitution.(Paras 4 & 6)

Cases referred:
Abhijit Ghosh Dastidar vs. Union of India and Others, (2009) 16 SCC 146
Dev Dutt vs. Union of India & Others, (2008) 8 SCC 725
Sukhdev Singh vs. Union of India, (2013) 9 SCC 566

For the petitioner : Mr. T.S. Chauhan, Advocate.
For the respondents : Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge*(Oral).*

Dispute in this matter pertains to un-communicated, adverse Annual Confidential Reports (ACRs) and their effect on further promotion of a public servant.

2(i). Respondent filed Civil Writ Petition (No.10741/ 2012) in this Court, praying for promotion to the post of Assistant Engineer (Electrical) from the date his juniors were promoted, alongwith all consequential benefits, including seniority, pay, arrears etc. The ground for praying the relief was that the Electricity Board, petitioner herein, had denied the promotion to the respondent on the basis of un-communicated ACRs for the years 2007-08, 2008-09, 2009-10 and 2010-11, wherein he was graded as "Good". It was the stand of the present respondent in the aforesaid writ petition that ACRs were graded 'Good' but they had civil consequences and therefore, were required to be communicated to him, so that he could have taken appropriate steps in that regard.

2(ii). Reply to this writ petition was filed by the Board, taking the defence that since the present respondent, in these ACRs, was assessed as "Good", therefore, there was no question of informing him about these ACRs. The fact that these ACRs were not communicated to the respondent, was not denied. It was also submitted in the reply that on account of these adverse entries in his ACRs, the respondent was not promoted to the higher post and has been superseded by his juniors who were graded as "Very Good", in the Departmental Promotion Committee meeting which was convened on 08.06.2012 for promotion to the post of Assistant Engineer (Electrical).

2(iii). This writ petition (CWP No.10741/2012)was transferred to learned H.P. Administrative Tribunal, where it was registered as T.A. No.4096 of 2015 and decided on 15th May, 2017. The transferred application was allowed by learned Tribunal and directions were given to the Electricity Board (petitioner herein) to consider the case of the respondent for promotion to the post of Assistant Engineer by ignoring the un-communicated ACRs for the period 2007 to 2011, alongwith all consequential benefits.

3. Feeling aggrieved against this decision, the Electricity Board has preferred the instant writ petition.

4. The law in respect of un-communicated adverse entries and its effect on a public servant, is well settled by Hon'ble Apex Court in catena of judgments. In Dev Dutt versus Union of India & Others, (2008) 8 SCC 725, it was held that every entry in a ACR of public servant must be communicated to the public servant within a reasonable period

whether it is a poor, fair, average, "Good" or "Very Good" entry. The object of communication is to enable the employee to know about the assessment of his work and conduct by his superiors, enabling him to improve his work in future. It is apt to reproduce Paras-16 and 18 of the judgment (supra):-

> *"16. In our opinion if the office memorandum dated 10/11-9-1987, is interpreted to mean that only adverse entries (i.e. "poor" entry) need to be communicated and not "fair", "average" or "Good" entires, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or to get some other benefit. For example, if the benchmark is that an incumbent must have "very good" entries in the last five years, then if he has "very good" (or even "outstanding") entries for four years, a "good" entry for only one year may yet make him ineligible for promotion. This "good" entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or to for some other extraneous consideration.*
>
> *18. Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder."*

6. In Abhijit Ghosh Dastidar versus Union of India and Others, (2009) 16 SCC 146, relying upon Dev Dutt's case (supra), it was held that non-communication of entries in the Annaul Confidential Report to a public servant have civil consequences affecting his chances of promotion and getting other benefits. Non-communication of adverse ACRs would be violative of Article 14 of the Constitution. Para-8 of the judgment is reproduced as under:-

> *"8. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion, admittedly the entry of "good" was not communicated to the appellant. The entry of "good" should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the annual confidential report of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances of promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been reiterated in the abovereferred decision (Dev Dutt case, SCC p.738, para 41) relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him."*

7. In Sukhdev Singh versus Union of India, (2013) 9 SCC 566, the larger Bench of Hon'ble Apex Court, relied and followed afore two judgments to hold that every entry in ACR must be communicated to the public servant and communication of only adverse entry is not enough.

8. Recently, in Rukhsana Shaheen Khan verus Union of India, Civil Appeal No.32 of 2013, decided on 28th August, 2018, it has been held in Para- 2 as under:-

> "2. In view of the decision of this Court in Sukhdev Singh vs. Union of India & Ors. reported in (2013) 9 SCC 566, there cannot be any dispute on this aspect. This Court has settled the law that un-communicated and adverse ACRs cannot be relied upon in the process."

9. It is the admitted case of the petitioner-Board that ACRs for the period 2007 to 2011, with grading "Good", were not communicated to the respondent and on the basis of these very gradings, he was not promoted as Assistant Engineer (Electrical) and was superseded by his juniors with grading "very good". Applying the law, discussed above, no fault can be found with the impugned order dated 15th May, 2017, passed by learned H.P. Administrative Tribunal.

10. It has been brought to our notice that during the pendency of the present writ petition, in terms of the directions issued by this Court on 21st November, 2018, the petitioner-Electricity Board had convened a Review DPC and promoted the respondent as Assistant Engineer (Electrical) on regular basis (notionally) w.e.f. 01.10.2012 and as Sr. Executive Engineer(E) on regular basis (notionally) w.e.f. 31.08.2017 from the date of promotion of his immediate junior. Since we have upheld the order passed by learned Tribunal, the respondent will be entitled to all consequential benefits on actual basis.

11. In view of the observations made hereinabove, we find no merit in the instant writ petition and the same is accordingly dismissed, so also pending application(s), if any.

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BEFORE HON'BLE MS. JYOTSNA REWAL DUA, J.

Laxmi Devi ……Petitioner.
Versus
State of H.P. and others ……Respondents

CWP No.9404 of 2013
Decided on: 26.06.2019

Constitution of India, 1950– Article 227- Writ jurisdiction– Alternative remedy, available– Consequences – Held, when petitioner has an alternative remedy under law, he can not avail writ jurisdiction – Order of Addl. District Magistrate setting aside appointment of petitioner as Anganwari Helper is made appealable under notification/scheme – Petitioner cannot file writ petition to challenge said order – Petition dismissed. (Para 4)

Cases referred:
Ruma Devi vs. State of H.P. & others, 2013 (1) Shimla. LC 112

For the petitioner	Ms. Suman Thakur, Advocate.
For the respondents	M/s Desh Raj Thakur, Anil Jaswal and Rameeta Rahi, Additional Advocate Generals, for respondents No. 1 to 4. Mr. Ashok K. Tyagi, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(Oral)*

Prayer of the petitioner is for setting aside the order dated 07.10.2013, passed by the Additional District Magistrate, District Sirmaur, Nahan, H.P., whereby appointment of petitioner as Anganwadi worker was quashed.

02. The undisputed factual position of the case is:-

2 (i) In terms of notification dated 11.04.2007, selection process was initiated for the post of Anganwadi Worker/Helper for Anganwadi Centre, Kadiyana, Tehsil Renuka Ji, ICDS, Block- Sangrah, District Sirmaur.

2(ii) Petitioner was selected as Anganwadi worker and appointment letter in this regard was issued on 03.08.2007. Respondent No.5 participated in the selection process and had stood 2nd in the merit list, after the petitioner, for the post of Anganwadi Worker. Presently respondent No.5 is working as Anganwadi Helper.

2(iii) A complaint against the selection of the petitioner as Anganwadi Worker was filed by respondent No.5, which was registered as Case No. 16/4 of 2007, before the Additional District Magistrate, District Sirmaur, Nahan, H.P. The complaint was in respect of ineligibility of petitioner for the post on the date of interview, primarily on grounds of her having married before the cut off date and therefore belonging to another area & the other grounds pertained to her higher family income & relations being in service.

2(iv) While the complaint was pending, the petitioner filed writ petition bearing No. CWP No. 564 of 2008, titled as Luxmi Devi Versus State of H.P., before this Court, seeking her transfer to a vacant post in another Anganwadi Centre. This request was directed to be considered, in accordance with law, vide order dated 11.04.2008 passed in the writ petition. In terms of this order, the petitioner's case for transfer was considered and she was accordingly transferred on her request to Anganwadi Centre at Aun Khadri, Teshil Nahan, H.P.

2(v) The complaint filed by respondent No. 5 against the selection of the petitioner was decided by the Additional District Magistrate, District Sirmaur at Nahan, H.P., vide impugned order dated 07.10.2013 (annexure P-12) holding therein that the allegations levelled against the petitioner were proved and that she was not eligible candidate for the post of Anganwadi Worker, on the date of interview i.e. 2.8.2007, accordingly, her appointment was quashed and set aside. It is against this order, petitioner has filed the instant writ petition.

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

4(i) Under the notification dated 11.04.2007, there exists a provision for appeal under Clause-12, against the order passed by the Deputy Commissioner. Such an order can be assailed within a period of 15 days from the date of passing of the order before the Divisional Commissioner.

4(ii) Respondent No.5 has taken a categoric stand in its reply with regard to maintainability of the writ petition without exhausting alternate remedy available against impugned order under that very policy in terms of which the petitioner was appointed. Respondent No.5 has also alleged that pendency of complaint against the selection & appointment of the petitioner was not disclosed by the petitioner in CWP No.564 of 2008. Respondent-State has also supported the impugned order on merits.

4(iii) No whisper has been made in the writ petition as to why the petitioner did not approach the appellate authority for redressal of her grievances.

4(iv). Admittedly, this recourse to alternate remedy, has not been availed by the petitioner. There is not even a whisper in the writ petition in respect of existence of this provision in the notification. The averments made in the writ petition that there is no alternate efficacy remedy available to her, is a factually incorrect statement.

5. The law in this regard is well settled, in case **Ruma Devi Vs. State of H.P. & others,***2013 (1) Shimla. LC 112*, where similar question was raised. There also, a selection process undertaken in terms of notification dated 11.4.2007, was in question and the petitioner therein had not availed the alternate remedy as provided under Clause-12 of the notification. It was held therein as under:-

> *"9. There is no explanation why the petitioner could not file the appeal within 15 days which is the period of limitation prescribed. With regard to the present petition all that has been stated is that the petitioner could not muster up proper legal advice till the month of April, 2012. The petitioner was represented by counsel throughout and had earlier also filed a writ petition and we fail to understand how she can be heard to urge that she could not muster up proper legal advice.*
>
> *10. We are also of the view that in case an alternative remedy is provided the party approaching the writ Court without availing of this remedy must in all fairness give the reasons for not availing the alternative remedy. The principle of alternative remedy is a rule of prudence. It is not as if the writ Court is powerless to interfere but when an alternative remedy is available the writ Court normally will not exercise its jurisdiction unless such remedy has been availed of. A person who fails to avail the alternative remedy within the time prescribed stands on an even worst position. In a case where the petitioner informs the Court that for certain reasons he could not file an appeal and since the appellate authority has no right to condone the delay he may be left with no other efficacious remedy but to file a writ petition. However, in this case other than saying that the petitioner was debarred from filing an appeal because limitation has expired, no reason has been given as to why the appeal was not filed within limitation."*

6. The ratio of above judgment squarely applies to the facts of instant case. Petitioner without exhausting provision of alternate remedy, directly invoked the writ jurisdiction of this Court and falsely stated therein that no alternate remedy is available to her. No explanation was given in the writ petition as to why alternate remedy could not be invoked by the petitioner.

7. In view of above, I find no merit in the writ petition and the same is accordingly dismissed. Petitioner is at liberty to avail appropriate remedy in accordance with law, if so advised. The present petition is disposed of, so also the pending application, if any.

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

Sh. Harinder Singh & others. .....Appellants/Plaintiffs.

Versus

Sh. Ram Lal ....Respondent/defendant.

RSA No. 4237 of 2013.
Reserved on : 29th May, 2019.
Decided on : 28th June, 2019.

Specific Relief Act, 1963–Section 38– Permanent prohibition injunction- Grant of– **Code of Civil Procedure**, **1908**– Order 1 Rule 10– Necessary parties- Whether other co-sharers are necessary parties to suit for injunction? –Held, when plaintiff has filed simple suit for permanent prohibitory injunction for himself as well as on behalf of persons recorded as co-sharers without denying their title in such land, then other co-sharers are not necessary parties to lis– Dismissal of suit after setting aside decree of trial court decreeing suit of plaintiff by first appellate court simply on ground of non-joinder of other co-sharers is perverse– RSA allowed– Decree of first appellate court set aside– Decree of trial court restored. (Paras 10 to 13)

For the Appellants: Mr. C.N. Singh, Advocate.
For the Respondent: Mr. Deepak Bhasin, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for permanent prohibitory injunction, vis-a-vis, the suit land, and, against the defendant, stood hence decreed, and, the defendant's/counter claimant's, counterclaim, wherein he reared a plea qua his acquiring title, vis-a-vis, the suit khasra number(s), through, adverse possession, rather stood dismissed, by the learned trial Court. The aggrieved therefrom defendant/counter claimant one Ram Lal, preferred an appeal, before the learned First Appellate Court, and, the latter court , while upholding the appealed against verdict, hence, dismissing the defendant's/counter claimant's counterclaim, (a) thereafter proceeded to accept the appellant/defendant's appeal, only, on the score qua the suit being not maintainable, vis-a-vis, the undivided suit property, conspicuously for want of joinder, of all the co-sharers, in the array of plaintiffs or in the array of co-defendants. The plaintiffs are aggrieved therefrom, hence, have instituted, the instant regular second appeal, before this Court.

2. Briefly stated the facts of the case are are that the plaintiff has filed suit for rendition of a decree for permanent prohibitory injunction against the defendant to restrain the defendant from interfering in any manner in peaceful ownership and possession of the land comprised in Khasra No.912, 913 and 915, Kita 3, measuring 00-18-38 hectares, Khata No.8, min, Khatauni No. 56, situated in Chak Chillala, Tehsil Chirgaon, District Shimla, H.P. The suit land is averred to be in exclusive ownership and possession of plaintiff's father along with other co-sharers and over khasra No.912, there is two storeyed house and over the land comprised in Khasra No. 913 and 915, there is apple orchard with fruit bearing plants. The house was constructed by the plaintiff himself in 1990 and apple orchard was planted by the father of the plaintiff along with other co-sharers in the year 1975. It is also averred that father of the plaintiff and other co-sharers died in 1998 and suit land was inherited by the plaintiff and other co-sharers. The plaintiff along with other co-sharers is exclusive owner in possession of the suit land. The defendant is real uncle of the plaintiff and other cosharers and he resides near to the suit land. The plaintiff used to reside maximum time in village Tangnu. The defendant by taking advantage of absence of plaintiff from the suit land started causing interference by preparing bedding and pruning

etc., in the apple orchard in the first week of March, 2003 with the intention to take its possession. The plaintiff has not allowed the defendant to take forcible possession of the suit land by the defendant is still adamant to take forcible possession of the suit land. It is also averred that in the column of possession and ownership, the name of Smt. Bhajan Dei and Parmod Kumar, Smt. Sarojni etc., figures but they have not been arrayed parties as the suit has also been filed for their benefit also. The defendant has o right, title or interest over the suit land and he be restrained from causing any kind of interference with the ownership and possession of the plaintiff in respect of the suit land in any manner and prayed that the suit be decreed.

3. The defendant contested the suit and filed written statement, wherein he has taken preliminary objections qua maintainability, suit is not properly constituted, land being in possession of the defendant and suit for injunction being not maintainable, suit being bad for non joinder of necessary parties, and, that the plaintiff has not cause of action to file the suit and the replying defendant has acquired title over the suit land by way of adverse possession. On merits, it is averred that it is wrong that orchard was raised by the father of the plaintiff. It is also denied that there is two storeyed house upon the suit land. It is averred that in the month of March, 1975, the father of the plaintiff Main Ram sent defendant to village Chillala to develop the land and use the same for the benefit of family. The parties to the suit belongs from village Tangnu and there entire landed property is joint at village Tangnu. Earlier the father of the plaintiff Main Ram and now plaintiff himself along with his family used to reside at village Tangnu. However, the replying defendant is residing at village Chillala where suit land is situated and he has constructed the house over the suit land and developed the orchard out of his personal income. Neither the plaintiff nor his father Main Ram ever took any activities over the suit land. The suit land was purchased by defendant and father of the plaintiff jointly out of joint funds of family and 90% was contributed by the defendant but the father of the plaintiff by taking advantage of illiteracy of the defendant got entered the suit land in his name only. It is averred that recently, defendant came to know about the wrong revenue entries hence he inspected the revenue record. The revenue entires in the name of the plaintiff and earlier in the name of his father may be declared null and void. The suit land is in possession of the replying defendant and there arises no question of taking forcible possession as averred in the plaint. The possession of the defendant over the suit land is since 1975 and the defendant has now acquired title by way of adverse possession regarding which the defendant is filing counterclaim separately.

4. The defendant in his counter claim has pleaded that the suit land was jointly purchased by the counter claimant and his late brother Main Ram out of joint funds and the entries showing previously late Main Ram as exclusive owner and thereafter the non counter claimant are illegal, baseless and may be set aside. In the alternate, it is prayed that the counter claimant is in hostile possession of the suit land since March, 1975 and has acquired title, vis-a-vis, the suit land.

5. Plaintiff filed written statement to the counterclaim, wherein, he has taken preliminary objections qua maintainability, evaluation, non supplying of better particulars, mis-joinder and non joinder of parties and counter claim is barred by limitation. On merits, it is averred that initially Swarup Chand, brother of non counter claimant/plaintiff was looking after the suit land till his death in the year 1986 and thereafter it was the father of the non counter claimant/plaintiff till 1998 and now non counter claimant/plaintiff is looking after the suit land. The counter claimant/defendant has his own land near to the suit land and also in its possession. It is further averred that the counter claimant has made a false story that the suit land was purchased out of joint funds of the family. In fact, the

counter claimant/defendant has purchased the land comprised in Khata No.49, Khataoni No.225 to 228 to the extent of 1/12 share situated in Chak Chillala on 28.2.1997. The plea of adverse possession which has been taken in alternate is in contradiction tot he plea taken about the joint property. The suit land is in possession of plaintiff/non-counter claimant and there arises no question of adverse possession.

6. The plaintiffs filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement(s), and, re-affirmed and re-asserted the averments, made in the plaint.

7. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed? OPP.
2. Whether the suit of the plaintiff is not maintainable and competent as alleged? OPD.
3. Whether the suit of the plaintiff is bad in the eyes of law and effect thereof?OPD.
4. Whether the suit of the plaintiff is bad for non joinder of necessary parties, as alleged?OPD.
5. Whether the suit land is joint property of parties to the suit as alleged by the counter claimant? OPD.
6. Whether the revenue entries firstly showing late Main Ram as owner and then the non counter claimant as owner by way of succession are wrong, illegal, unlawful, null and void, being fraudulent and effect thereof?OPD
7. Whether the counter claimant have acquired the title of the suit by way of adverse possession, as alleged? OPD.
8. Whether the counter claimant is entitled to the relief of permanent prohibitory injunction,a s prayed for?OPD.
9. Relief.

8. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed plaintiffs'/appellants' herein suit, whereas, it dismissed the defendant's/counter-claimant's counterclaim. In an appeal, preferred therefrom, by, aggrieved defendant/counter-claimant, before the learned First Appellate Court, the latter Court affirmed the verdict of the learned trial court, hence, dismissing the defendant's/counter-claimant's counterclaim, whereas, it dismissed the plaintiff's suit, for want of non joinder, of all co-sharers, in the undivided suit property either in the array of plaintiffs, or in the array of co-defendants.

9. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 24.10.2013, this Court, admitted the appeal instituted by the plaintiff/appellant, against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

1. Whether the judgment/decree dated 14.8.2013 passed by the first appellate court, is perverse, unsustainable in law in view of the fact that

the first appellate court misinterpreted documentary evidence which was the foundation of the rights of the parties and failed to give benefit of the revenue record in favour of the appellant/plaintiff, i.e. Missal Hakiat and Parcha Jamabandi pertaining to the suit PW1/A, PW1/B,m and PW1/C to which the appellant/plaintiff was entitled for?

2. Whether the first appellate court failed to appreciated the fact that the reliance put on by the appellant/plaintiff upon the revenue record i.e. Missal Haquiat and Parcha Jamabandi pertaining tot he suit land i.e. PW1/A, PW1/B and PW1/C showing the possession of the appellant/plaintiff in law substantiate his case/claim and that the presumption of truth is attached with the revenue records under section 35 of the Indian Evidence Act and under Section 45 of the H.P. Land Revenue Act. Ignoring the aforementioned position of law has lead to passing of a judgment and decree which is perverse and not sustainable in law?

Substantial questions of Law No.1 and 2:

10. For the reasons to be assigned hereinafter, it would be wholly unnecessary either to dwell upon or to mete an adjudication, vis-a-vis, the afore substantial question of law, whereon the extant appeal hence came to be admitted, under orders recorded by this Court, on 24.10.2013. The learned First Appellate Court, has made a fallacious or an erroneous reasoning, vis-a-vis, the suit being not maintainable, for want of joining in the apposite array, of legal combatants, all the co-owners in the undivided suit property, and, thereafter, it, also untenably proceeded to decline, the espoused relief qua rendition of a decree, of, permanent prohibitory injunction, qua the suit property, (i) given an issue in respect thereof, serialized as issue No.4, standing struck, and, also thereon the learned trial Court, hence, rendering findings qua, despite, non joinder of all co-sharers, in the undivided suit property, rather not rendering the plaintiffs' suit, being not maintainable, (ii) given, the plaintiff averring qua the suit standing instituted, for the benefit of all co-sharers, in the undivided suit property, and, also when no relief against all the co-owners, in the undivided suit property, standing, claimed or ventilated hence in the plaint. The afore reasoning is well merited, as, a perusal of the plaint, as well as, of, the copies of missal hakiyat, and, of the apposite jamabandis, respectively embodied in Ex.PW1/A, to, Ex.PW1/C, (iii) appertaining to the suit property, though carrying reflections therein qua the suit property besides the legal contestants in the extant suit, being also, owned by other co-owners, (iv) and, when they may have been hence necessary parties, for, hence theirs being joined in the apposite array, of, legal combatants. (v) Importantly, all the concomitant effects thereof, and, besides fatality, vis-a-vis, non joinder, in the extant suit, of all co-owners in the undivided suit property, rather was required to be tested, in the light, of forthright averments, being cast in the plaint, qua apart, from the plaintiff, and, the defendant, there being other co-owners in the undivided suit property, (vi) casting, of, candid averment(s) whereof, spark, an inference qua the plaintiff coming forth with clean hands, and, obviously not camouflaging, the factum qua the suit property, standing, co-owned apart from him, and, by the defendant, rather also by other co-owners, as reflected in the afore exhibits, (vii) imperatively when therein also rather qua other co-owners in the suit property, there is no further espousal, vis-a-vis, rendition of a decree, of, permanent prohibitory injunction against them, rather the afore relief being confined only, vis-a-vis, the defendant. Cumulatively, hence, when the acquisition of title, vis-a-vis, the suit khasra numbers, though, forming a part of other lands jointly owned, and, possessed by the plaintiff, and, the defendant, along with other co-owners, (viii) is squarely rested, upon, the predecessor-in-

interest of the plaintiff, making a registered deed of conveyance, with the vendor thereof. (ix) Moreover, when, further thereonwards, with the defendant's/counter claimant's, counter claim, being only confined, vis-a-vis, validity of execution of a sale deed, inter se the predecessor-in-interest of the plaintiff, and, the vendor of the apposite sale deed, (x) inasmuch as it being fraudulently executed, despite, his liquidating to the vendor a substantial part, of the sale consideration, (xi) and, when also in addition thereto, hence, the defendant in the counter-claim, rather projecting a stand qua his acquiring title, vis-a-vis, the suit khasra numbers, through adverse possession, and, when all the afore espousals rather stood negated, by the learned trial Court, (xii) and, the defendant/counter claimant's appeal, reared therefrom, before the learned first appellate Court, also, suffering an alike fate. (xiii) Moreover, when the defendant/counter claimant, has not assailed, the dismissal, of, his counter-claim, by both the learned courts below, carrying therein the afore espousal, (xiv) hence, when the verdicts concurrently rendered, upon, his counter claim hence acquire conclusive, and, binding effect, (xv) the natural corollary thereof, is that, the acquisition of title, through, a sale deed, by the predecessor-in-interest of the plaintiff, vis-a-vis, the suit khasra numbers, khasra numbers whereof, upon being pooled or amalgamated, with the other khasra numbers, which are rather jointly owned and possessed, by other co-owners, also, apart from the legal contestants hereat, (xvi) and, even though even when, vis-a-vis, the suit property acquired, through, a registered deed of conveyance, by the predecessor-in-interest of the plaintiff, may be distinct, from other jointly owned property, inter se the legal contestant hereat, (xvii) and, the co-owners reflected in the afore exhibits, yet, upon, anvil of the principle of unity of title, and, community of possession, rather all the other recorded co-owners, also hence hold joint interests in the suit property, (xviii) and, though also would be required to be joined in the apposite array, of co-plaintiffs, or, in the array, of co-defendants. However, when the defendant, did not, after raising the afore preliminary objection, in his written statement, instituted to the plaint, hence, institute an appropriate application, for adding, in the array of co-defendants, other recorded co-owners, namely, Bhajan Devi, Parmod Kumar, Smt. Sarojni etc., (xix) thereupon, it appears that his raising the afore objection, vis-a-vis, the non joinder of the afore, in the array of litigants, being merely a mechanical, and, a perfunctory recourse, and, also his acquiescing qua the plaintiff instituting the suit, for permanent prohibitory injunction, also for the protection of the interests, in the jointly owned property, of, even afore recorded co-owners, in the undivided suit property. (xx) Conspicuously when the counsel for the defendant while holding, the plaintiff to cross-examination, meted an affirmative suggestion to him, qua the property located, at village Tangnu, standing partitioned inter se him, and, the defendant, and, whereto an affirmative answer, stood, purveyed by the plaintiff, (xxi) and, thereupon, this court makes a fortified inference, that there was no necessity at all, for the joining in the array of legal contestants, in the extant suit, of all the recorded co-sharers, in the undivided suit property nor hence the conclusion, recorded by the learned first appellate court, (xxii) that for want of joinder in the array, of legal contestants, in the extant suit, hence, of all the recorded co-owners, hence, the suit being not maintainable, (xxiii) and, thereafter its proceeding to decline the relief of permanent prohibitory injunction, vis-a-vis, the plaintiffs also rather cannot be countenanced, by this Court.

11. Be that as it may, since the dismissal of the defendant's counter claim, has acquired conclusivity, and, binding effect, and, when the afore conclusivity, acquired by the concurrently recorded verdicts, by both the learned courts below, upon, the defendant's counterclaim, wherethroughs, it rather stood dismissed, (i) and wherein espousals are borne qua his acquiring title, vis-a-vis, the suit land by adverse possession, (ii) and, qua the father, the predecessor-in-interest of the plaintiff fraudulently purchasing the suit land, through, a registered deed of conveyance executed inter se him, and, the apposite vendor thereto, (iii) resultantly also begets an imperative sequel, qua the plaintiff, validly deriving an interest in

the suit property through his predecessor-in-interest, and, hence both, in equity and in law, he held a valid right to seek relief of permanent prohibitory injunction, vis-a-vis, the suit property, and, against the defendant/respondent herein. In aftermath, the declining of relief, to him, by the learned first appellate Court, under, the afore specious and flimsy reasoning, is unmeritworthy, and, suffers from a gross mis-appreciation of pleadings respectively, cast by the plaintiff, and, by the defendant.

12. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first appellate court has excluded germane and apposite material from consideration. Accordingly, the substantial questions, of law are answered in favour of the appellants/plaintiffs, and, against the respondent/defendant.

13. In view of the above discussion, the instant appeal is allowed, and, the verdict of the learned first appellate court, dismissing the plaintiffs' suit for permanent prohibitory injunction is set aside. Consequently, judgment and decree rendered by the learned trial Court upon Civil Suit No. 250/1 of 2008, is affirmed and maintained. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Kamal Chand and others ……Appellants/defendants.
Versus
Smt. Jagiro ……Respondent/Plaintiff.

RSA No. 613 of 2005.
Reserved on : 11th June, 2019.
Decided on : 28th June, 2019.

Code of Civil procedure, 1908– Order 1 Rule 10– Order XLI Rule 27– Additional evidence at appellate stage– Permissibility– Lower courts concurrently holding plaintiff's right to get her land irrigated throw water channel located in defendants land– RSA– Defendants filing application for adducing revenue record showing that plaintiff had no right or interest in land for which irrigation rights were claimed– Held, material on record does not indicate whether judgment in favour of plaintiff was judgment in rem or judgment in personam in which case, her assignees will not be having any right of irrigation- Decrees set aside– Matter remanded to trial court with direction to take additional evidence of defendants and then provide opportunity to plaintiff to lead evidence in rebuttal– If plaintiff had no right or interest subsisting in such land, it shall be open to assignees to move appropriate application for their impleadment in the lis. (Paras 8 & 9)

For the Appellants: Mr. Dinesh Bhanot, Advocate.
For the Respondent: Mr. Rakesh Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff, one Smt. Jagiro's suit, for rendition of a decree for permanent prohibitory injunction, and, for mandatory injunction, vis-a-vis, the suit khasra number, stood decreed, by the learned trial Court, and, in an appeal carried therefrom, before the learned first appellate Court, by the aggrieved defendants, and, also upon, cross-appeal No.30-NL/13 of 2004, preferred therebefore hence by the plaintiff, rather sequelled, a pronouncement, hence dismissing the defendants' appeal, and, allowing, of, the plaintiff's cross appeal, (a) wherethrough, in consonance with Ex.P-1 (site plan), the defendants were directed to provide, through, the, suit khasra numbers, hence, space for enabling water traveling, through, the kuhal onto the land, of the plaintiff, hence for facilitating the plaintiff's land, being irrigated. The defendants being aggrieved therefrom, hence, institute the instant appeal before this Court.

2. Briefly stated the facts of the case are that the subject matter of the present list is a permanent katchi kuhal crossing through the land bearing Khasra Nos. 1036/115, 1039/117, 1040/121, comprised in Khewat/Khatauni No.24 min/25 min, situated in the area of village Makhnu, Majra, Pargana Dharampur, Tehsil Nalagarh, District Solan, H.P. for irrigation of the land of the plaintiff comprised in Khewat/Khatauni Nos. 27/28, bearing Khasra No. 1031/93, 1038/117, 118 and 119 total measuring 5 bighas as shown with red ink in Annexure PA. The case of the plaintiff is that the plaintiff is resident and Khewatdar of village Mahnumajra, and, had installed one tube well shown at point T in annexure PA about 20 years ago in village Makhnu Majra, for providing irrigation water to the Khewatdars. The water from the tube well is distributed to all the landowners for irrigation of their respective lands. The Irrigation and Public Health Department has further constructed some small water distribution tank at point C and water from point C used to cross through permanent kutcha channel/drain to irrigate the lands of the adjoining owners. The water passes through the lands of Kali Ram, Amin Chand and defendants and then reaches to the land of the plaintiff for the last about 28 years. The plaintiff used to irrigate her land measuring 5 bighas comprised in Khata/Khatauni No. 27/28, for the last 28 years peacefully, continuously, openly and uninterruptedly through kutcha channel over the land of the defendants. The plaintiff has acquired easementary right by way of prescription to irrigate her land through kutcha channel/kuhal over the land of the defendants and the defendant shave no right to interrupt or cause hindrance in smooth running of the water through disputed channel. The plaintiff is also having right to enter upon the land of the defendants in order to repair or remove blockage in the channel. The defendants used to irrigate their aforesaid land through Kutcha Kuhal which is passing over the land of other villagers. The defendants disturbed the kutcha channel/kuhal over their land by way of ploughing and refused the plaintiff to use the irrigation water from the disputed channel illegally. Hence the suit.

3. The defendants contested the suit and filed written statement to the plaint, wherein, they have taken preliminary objections, qua maintainability, cause of action, suppression of facts etc. On merits, the defendants averred that there was no kutcha kuhal through the land of the defendants for irrigation of land of the plaintiff. The Government of Himachal Pradesh had installed tube well about 8 years ago in village Makhnu Majra for irrigation to the Khewatdars of village Makhnu Majra but the Government of Himachal Pradesh had not prepared any plan for irrigation of the land of the inhabitants. There was no water channel for irrigation of the land nor the plaintiff had any right to pass channel of water from the fields of the defendants my making alignment of her own choice nor plaintiff had any right of easement. The water from tube well flowed to the fields of the inhabitants of the locality with the consent of the each other. The landowners were irrigating their fields

per the season as licencees and the plaintiff cannot claim easementary right to irrigate her fields. The plaintiff being a relative of the defendants was allowed to irrigate suit land by taking water from one corner of the land upto her land purely as a concession. The plaintiff had no right to cross the water channel in the middle of the fields of the defendants. Khasra No.1031/93 measuring 1 bigha 03 biswas was far away from the land of defendants. The defendants themselves used to irrigate the aforesaid land through Kutcha channel/kuhal which was passing through the land of the other villager with their consent. The defendants had acquired right to irrigate their land per facility and water available and with the consent of the villagers. There is no easementary or customary right for getting the water through kutcha channel/kuhal for irrigating over the land of adjoining landowners.

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

1. Whether there exists a water channel in the land of the defendants? OPP
2. Whether the plaintiff is having right to irrigate his fields from the water channel existing in the fields of the plaintiff by way of custom or by way of easement?OPP
3. Whether the defendant is interfering with the flow of water in the water channel? OPP
4. Whether this suit is bad for non joinder of necessary parties? OPD
5. Whether the plaintiff has suppressed material facts from the court, if so its effect? OPD
6. Whether the suit is not maintainable in the present form?OPD.

6A. Whether the plaintiff has suffered loss to the tune of Rs.15,000/- due to the acts of the defendants? OPD.

7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. The appeal, preferred therefrom, by, aggrieved defendants, before the learned First Appellate Court, as also, the cross-appeal preferred therebefore, by the plaintiff, sequelled a pronouncement, hence dismissing the defendants' appeal, and, allowing, of, the plaintiff's cross-appeal.

6. Now the defendants/appellant(s) herein, have instituted the instant Regular Second Appeal, before, this Court, wherein, they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 12.1.2006, this Court, admitted the appeal instituted by the defendants/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial question of law:-

1. Whether in the facts and circumstances of the present case relief of permanent prohibitory injunction could be granted unless a declaration of the right to take water through the fields of the appellants/defendants was sought and granted by ld. Trial Court?
2. Whether the plaintiff was entitled to the entire damages when she is the owner to the extant of ½ land only?
3. Whether the judgment and decree of the learned appellate court is sustainable in view of the fact that the application under Order 41,

Rule 27 of the CPC filed by the appellants remains undecided by the learned lower appellate court, if so the effect thereof?

4. Whether the jurisdiction of the civil courts is barred in view of the provisions of Section 54 of the H.P. Minor Canals Act, 1976 Act No.42 of 1976, if so its effect?

7. For the reasons to be assigned hereinafter, and, without meteing any answer to the afore substantial question of law, this Court proceeds, to, make an order of wholesale remand, vis-a-vis,l the learned trial Court, for its hence within six months hereafter, in compliance with the further directions enunciated hereinafter, rather making a fresh decision, upon, the apposite civil suit No. 291/1 of 2000. (a) The aggrieved defendants instituted an application bearing CMP No. 414 of 2012, within the instant RSA, (a) wherethrough, they seek leave of this Court, to adduce into evidence, copies of the revenue records, with articulations therein, vis-a-vis, the plaintiff, extantly not, being recorded as owner in possession of the suit land, (b) wheretowhich the defendants were directed, through a decree of mandatory injunction, hence, provide through their fields, water channels, hence for irrigating her land. The afore enunciations, if, credible, thereupon, it comprises, a, valuable piece(s) of evidence, (c) rather whereupon, the defendant may be entitled to make an espousal, before this Court, that, the decree impugned rather squarely appertaining, vis-a-vis, acquisition, of, easementary rights, before this Court, hence being in personam or in other words, only appertaining to the rights, and, entitlements, of one Jagiro, (d) thereupon, her alienees/assignees, not being entitled to receive, the benefit, of, the concurrently recorded judgments, and, decrees, by both the learned courts below, rather holding leanings, vis-a-vis, one Jagiro. Further corollary thereof, is that, when the afore documents appended, with the afore application, may be, just and essential, for the defendants hence making a meritworthy effort, to dislodge the concurrent findings, recorded by both the learned courts below, against them, thereupon, it is deemed fit to grant the espoused relief, to, the defendant.

8. Be that as it may, for the reasons to be assigned hereinafter, it would not be appropriate, merely, on anvil, of the afore leave being granted, vis-a-vis, the defendants, for, this Court, (a) also proceeding to, thereafter accept, the further submission made before this Court by their counsel, that hence, the verdicts recorded by both the learned courts below, wholly wanting in legal efficacy, and, hence after accepting, the instant appeal, the concurrently recorded verdicts against them, by both the learned courts below, rather being set aside. (b) Conspicuously, only, upon the attested copies of the relevant documents, being permitted to be placed on record, and, merely, upon, a presumption of truth, being, may be, enjoyed by them, hence their purportedly holding the requisite fullest probative vigour, or hence theirs being also per se admissible, and, exhibitable. (c) Emphatically, when all the afore endeavours, can be resorted to, only before the learned trial Court, and, obviously after an opportunity, to the counsel, for the litigants concerned, to adduce evidence, for rebutting the veracities or truth(s) thereof, (d) dehors reiteratedly even if assumingly, the documents in respect whereof, the espoused relief hence stands granted, to the aggrieved defendants/appellants, hence are, documents whereto, a, presumption, of, truth is attached. (e) Preeminently, also when solitarily upon the afore facet, it would be inappropriate, to conclude, that the extant regular second appeal being amenable, for it being allowed, (f) as reiteratedly prima faice at this stage, it cannot be straight way hence concluded, that, the verdicts recorded, vis-a-vis, one Jagiro, are, judgments in rem, or verdicts in personam nor it can be concluded, that, the alienees/ assignees/successors-in-interest, of one Jagiro, are not, entitled to the benefits, of the judgments, and, decrees recorded by both, the learned courts below, vis-a-vis, one Jagiro, (g) conspicuously, also when, without, the alienees/successor-in-interest/assignees of Jagiro or persons, who

derive an interest from her, are neither strived to be impleaded, as legal contestants, in the apposite array of litigating parties, nor are permitted to be added, (h) whereas only upon theirs being added, they would hold, the fullest opportunity to contest the arguments raised, before this Court by the counsel, for, the aggrieved defendants/appellant, that, the verdict pronounced, vis-a-vis, Jagiro Devi/ rather bestowing benefits only upon her, and, not upon any of her successors-in-interest or any of her assignees, (i) emphatically also when, only upon, adding of assignees or persons, who through Jagiro hence purportedly derive any valid easementary right(s) from the judgments, and, decrees, pronounced qua Jagiro, may ultimately, upon, being added, in the array of legal contestants, (j) thereupon, may prevail, upon this Court that dehors the reflections existing in the documents, in respect whereof leave, is granted, they are yet entitled to derive benefits, of, the judgment and decree recorded, only vis-a-vis, Jagiro Devi. Consequently, for facilitating all the afore recoursings, it is deemed appropriate, to remand the lis, to enable it the learned trial Court, to allow, the exhibition therebefore of the afore documents, and, after an opportunity being granted, to the Jagiro, to adduce rebuttal evidence thereto. In case Jagiro is not holding any subsisting derivable interest, from, the concurrently recorded judgments, and, decrees, thereupon, it is open for the assignees, whereupon whom, derivation of the rights, as, encapsulated in the judgments and decrees, are ensuing, to through an application, being cast under the provisions of Order 1, Rule 10 CPC, seek their impleadment in the suit, (k) and, upon the afore apposite motion being, cast before the learned trial court, it shall proceed to make a decision thereon, in accordance with law, (j) and, thereafter, upon, an affirmative decision being recorded upon it, he may permit the newly added contestants concerned, to make amendment(s), in the apposite pleadings, and, thereafter if need, may strike any additional issue(s), and, shall permit adduction of evidence thereon.

9. Consequently, CMP No. 414 of 2012 is allowed, and, only for the afore reasons, the instant appeal is allowed, and, judgments impugned before this Court are set aside. The learned trial Court is directed to complete, the, afore mechanism, within, six months from today. The parties are directed to appear before the learned trial Court on 23rd July, 2019. All pending applications also stand disposed of.

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

National Insurance Company Ltd. ....Appellant.

Versus

Smt. Sheela Devi and others ....Respondents.

FAO No. 524 of 2018.
Reserved on : 29th May, 2019.
Decided on : 28th June, 2019.

Motor Vehicles Act, 1988 - Section 166 - Motor accident – Claim application -Liability of insurer, when limited by contract – Effect – Held, when contract of insurance inter se parties itself limits liability of insurer to indemnify award only up to certain amount, then insurer cannot be directed to pay entire amount covered by award – Liability beyond the contracted amount is to burdened upon registered owner of offending vehicle. (Para 3)

Cases referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For Respondents No. 1 to 6: Mr. Sanket Sankhyan, Advocate.
For Respondents No. 7 & 8: Mr. Dhiraj Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal, Bilaspur, upon, Claim Petition No. 34/2 of 2017, as stood, cast therebefore, under, the provisions of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), (i) AND, whereunder, compensation amount, comprised in, a sum of Rs.18,84,400/- alongwith interest accrued thereon, at the rate of 7.5% per annum, was, hence ordered to commence, from, the date of petition till realization thereof, rather stood, assessed, vis-a-vis, claimants, (ii) and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing, for, the appellant/insurer, has, not contested, the, validity, of, rendition, of, affirmative findings, upon, issue No.1, hence appertaining to the demise of Paras Ram, being a sequel of rash, and, negligent manner of driving of the offending vehicle, by respondent No.8 herein, nor he has contested the validity of fastening of the apposite indemnificatory liability, upon, the insurer, vis-a-vis, the afore compensation amount. However, the learned counsel appearing, for the insurer, has with much vigour contended before this Court, (a) that the computation of compensation, in the impugned award, by the learned tribunal concerned, suffers from a gross fallacy, of, mis-appraisal of evidence on record. However, the afore contention reared before this Court by the learned counsel for the insurer, is, a mis-espousal, (b) as a perusal of the impugned award, makes visible echoings, that the per mensem salary drawn, by the deceased, from his being engaged, as a cleaner in Bulker No. HP-24A-7161 owned by M/s Naresh Kumar and Company Pvt. Ltd., rather being comprised in a sum of Rs.7,500/-, besides therewith, hence, diet money, borne in a sum of Rs.50/- per diem being also disbursed to the deceased. Since, the salary certificate stood exhibited as Ex.PW4/A, and, no suggestions, were put to PW-4, during, the course of his being subjected to cross-examination qua Ex.PW4/A being fictitiously drawn, (c) given it being issued, despite, the deceased not being maintained on the rolls, of, the employees of the company concerned, (d) rather when he has in his cross-examination, hence, volunteered, to, make a communication, that, the online data, in respect thereof standing displayed, on the relevant website, of the company concerned, echoing whereof remains unrepulsed, rather begets a formidable conclusion, that, the per mensem salary of the deceased, as determined by the learned tribunal, on anvil of Ex.PW4/A not suffering from any aura, of, any inveracity. Further, thereonwards addition or accretions towards future prospects, as stood levied upon the afore reared per mensem salary of the deceased, from, his employment, as a cleaner, in the truck owned by the company concerned, is in tandem, with the verdict rendered by the Hon'ble Apex Court in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, and, hence obviously does not merit any interference. Moreover, ¼th deduction, as, made, vis-a-vis, the per mensem income of the deceased, rather by the learned tribunal, given, the number of the dependents upon the latters' income, exceeding three, is also in consonance with a plethora, of judgments rendered by courts of law.

Moreover, the application of the requisite multiplier, upon, the afore figure, of, annual dependency, also, is within the domain of the decision, rendered by the Hon'ble Apex Court, in a case titled, as Sarla Verma vs. Delhi Transport Corporation, reported in (2009)6 SCC 121. In sequel, it is to be concluded, that, the compensation amount, as adjudged in the impugned award, does not merit, any interference.

3. However, the learned counsel, appearing for the aggrieved insurer, has contended with much vigour, before this Court, (a) that with Ex. R-4, limiting the liability, of the insurer, vis-a-vis, any action founded, upon, the provisions, encapsulated in the Motor Vehicles Act, rather being limited only to a sum of Rs.7,50,000/-, (b) thereupon, the afore contractually limited apposite liability of the insurer, does, in consonance therewith, enjoin this Court to hence fasten the indemnificatory liability, upon, the insurer, only upto a sum of Rs.7,50,000/- and, any liabilities, vis-a-vis, sums of compensation rather falling beyond the afore sums, of hence the afore contractually limited liability, rather being enjoined to be burdened, upon, the registered owner of the offending vehicle. The afore submission obviously, cannot be rejected, as, it is within the domain of the contract of insurer executed, inter se, the aggrieved insurer, and, the owner of the offending vehicle, and, as embodied in Ex. R-4, especially when authenticity thereof, has, remained unchallenged.

4. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the award rendered by the learned tribunal, is, modified to the afore extent only. In sequel, the insurer of the offending vehicle shall be burdened with the apposite indemnificatory liability, only, in a sum of Rs.7,50,000/-, and, the apposite liability, vis-a-vis, the remaining sum of compensation amount, as adjudged under the impugned award shall be saddled, upon, the registered owner of the offending vehicle. All pending applications also stand disposed of. Records be sent back forthwith.

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

Parshant alias Pintu ...Appellant/Respondent.

Versus

Smt. Shanno Devi & Anr. ...Respondents.

FAO No. 190 of 2019 along
with FAO No. .
Reserved on: 22nd May, 2019.
Decided on : 28th June, 2019

Motor Vehicles Act 1988 – Section 166 – Motor accident – Claim application – Monthly income of deceased – Determination –Held, evidence on record clearly shows that deceased was carpenter himself and had been deploying other workers for executing contracted works of carpentry – Assessment of monthly income at Rs. 7500/- on basis of his being skilled labourer is beyond rule of wholesome appreciation of evidence – Monthly income reassessed at Rs. 20,000/- p.m. – Award modified accordingly. (Para 3)

Case referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant(s): Mr. Abhishek Barowalia, Advocate, in FAO No. 190 of 2019 and Mr. Naresh Kaul, Advocate, in FAO No. 191 of 2019.

For Respondents: Mr. Naresh Kaul, Advocate in FAO No. 190 of 2019 and Mr. Abhishek Barowalia, Advocate in FAO No., 191 of 2019.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The owner-cum-driver of the offending vehicle, and, also the claimants, are, all aggrieved, by the award rendered, by the learned Motor Accident Claims Tribunal-II, Kangra at Dharamshala, District Kangra, H.P., upon MACP No. 44-II/2013/2012, (i) wherethrough, compensation amount comprised in a sum of Rs. 11,01,000/-, stood awarded, vis-a-vis, the claimants, and, thereon stood levied interest, at, the rate of 8% per annum, and, was ordered to commence from the date of petition, and, till realization, of, the afore compensation amount. The apposite indemnificatory liability thereof, stood fastened, upon, registered owner of the offending vehicle.

2. The learned counsel appearing, for, the registered owner, of, the offending vehicle rather restricts his challenge, vis-a-vis, the impugned award, (a) only qua the rendering, of, hence affirmative findings, upon, issue No.1. In making the afore espousal, he submits, that the dependence, made, by the learned tribunal, upon, the FIR embodied in Ex.PW1/A, in its hence rendering the afore findings, rather being a gross mis-dependence, (b) as, the testification, rendered by RW-1 benumbs, the evidentiary worth, if any, of the afore exhibit. However, the afore addressed submission before this Court, is, misplaced, (c) as PW-1, who during the course of his examination-in-chief, rather enabled exhibition, of, the apposite FIR, and, whereon an exhibit mark, bearing Ex.PW1/A was embossed, (d) and, when perusal thereof hence makes trite articulations qua ascription(s), of, culpable negligence being qua one Prashant Singh alias Pintu, (e) and, with the afore echoings occurring in Ex.PW1/A, remaining unscathed, during, the course of his being subjected to the ordeal, of, a rigorous cross-examination, (f) rather contrarily when, in course thereof, no suggestion(s) stood meted to him, for, hence, repulsing the afore echoings borne in Ex.PW1/A, nor with any independent ocular account, vis-a-vis, the occurrence being adduced, (g) rather begets an inference qua the appellant herein acquiescing qua the afore echoings hence holding veracity. Dehors an inference, of, acquiescence, vis-a-vis, the truth, of, the narration, borne in Ex.PW1/A, being erectable, for, hence, ousting the afore propagation reared before this Court, by the counsel, for the appellant, and, when the afore acquiescence, was, erodable, vis-a-vis, its efficacy, by rendition of, an uneroded ocular account, vis-a-vis, the occurrence. However, with RW-1 being an interested witness, and, his solitarily testifying in support, of, the afore espousal qua the relevant vehicle, at the relevant stage, being driven by the deceased, and, rather the latter being negligent, when, reiteratedly is unaccompanied, by any independent ocular account, renders it being construable, to, be a stained and vitiated narration, and, further does enable this Court, to conclude, that (h) the amplitude of the afore acquiescence, both drowning, and, underwhelming, the effects, if any, of, the solitarily testification, rendered by RW-1. Consequently, the submission, of the learned counsel appearing for the registered owner, is rejected.

3. The claimants, through, FAO No. 191 of 2019, sought enhancement of compensation, from, the sums computed in the impugned award, to a sum, as espoused in

the extant appeal. The learned tribunal, had, in the impugned award, determined the per mensem income, of deceased, to be borne in a sum of Rs.7,500/-, and, the afore income was concluded, to, stand generated, from his avocation, as a carpenter/contractor. Even the afore computations, were made, on anvil of the testification rendered by PW-3, yet the afore computation, is, not made strictly, within the rule, of, hence, wholesome appreciation, of, evidence comprised, in the examination-in-chief, and, in the cross-examination, of, the apposite witness. Preeminently, when the afore witness, in his testification, comprised in his examination-in-chief, and, as borne in his affidavit, tendered during the course thereof, and, whereon exhibit mark bearing Ex.PW3/A, stand, embossed, rendering clear echoings qua his deceased son hence performing the work of carpenter, and, also his being engaged in deploying other carpenter(s) along with him, for executing works of carpentry. The afore testification, though, remained uneroded of its efficacy, yet, the learned tribunal while construing, that, hence with his being a skilled workman, rather computed his per mensem derivation, of income therefrom, hence, in a sum of Rs.7,500/-. The afore computation, as, aforestated, is beyond the rule, of a wholesome appreciation, of the evidence, as, comprised in his examination-in-chief, of PW-3, and, in his cross-examination, and, rather adherence, vis-a-vis, the afore rule hence prods this Court, to conclude (a) qua when, his testification borne in his examination-in-chief, wherein, he has testified qua his deceased son, earning an income of Rs.20,000/- from his performing, the work of carpentry, as also, from his deploying workers, for, executing the contracted carpentry works, is uneroded of its vigour, hence, this Court is constrained to conclude, that, the deceased was drawing an income of Rs.20,000/- per mensem, from, his afore avocation.

4. The deceased, is, in the postmortem report, is reflected, to be aged 28 years, at the relevant time. With the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.61, extracted hereinafter:

> “61. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

> (v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.
>
> (vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.
>
> (vii) The age of the deceased should be the basis for applying the multiplier.
>
> (viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. "

expostulating (i) that where the deceased concerned, was a self employed, as is, the apt employment, of, the deceased, (a) thereupon, hikes or accretions, on anvil, of future incremental prospects, vis-a-vis, the salary drawn by him, at the time contemporaneous, to, the ill fated mishap, from his employer, being also meteable thereto. However, before applying the mandate of the aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the postmortem report reflects, the deceased being aged 28 years, at the relevant time, hence with the afore extracted paragraph, mandating, qua, accretions towards future incremental prospects, vis-a-vis, the salary last drawn, by the deceased, being pegged upto 40% thereof, besides being tenably meteable, vis-a-vis, the apposite last drawn salary. Consequently, after meteing 40% increase(s), vis-a-vis, the apposite last drawn salary, thereupon, the relevant last drawn salary, of, the deceased, is reckonable to be Rs.24,000/-, [Rs.20,000/-(last drawn salary of the deceased)+Rs.4,000/-[40% of the last drawn salary). Significantly, the deceased was a bachelor, hence, 50% deduction is to be visited, upon, a sum of Rs.24,000/-, hence, after making, the, apt aforesaid deduction, vis-a-vis, the afore sum, the per mensem dependency, comes to Rs.12,000/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs.12,000/- x 12=Rs.1,44,000/-. After applying thereto, the apposite multiplier of 17, the total compensation amount, is assessed in a sum of Rs.1,44,000/- x 17=Rs.24,48,000/- (Rs. Twenty four lakhs, forty eight thousand only).

5. Apart from the aforesaid compensation amount, the claimants are also entitled for Rs.15,000/- towards funeral charges, and, Rs.15,000/-, towards the loss of estate. Consequently, the claimants are entitled to a total compensation of Rs.24,78,000/- (Rs.twenty four lakhs, seventy eight thousand only).

6. For the foregoing reasons, the appeal filed by the registered owner-cum-driver of the offending vehicle, bearing FAO No. 190 of 2019, is dismissed, whereas, the appeal filed by the claimants, bearing FAO No.191 of 2019 is allowed. In sequel, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants/appellants, are, held entitled to a total compensation of Rs.24,78,000/- (Rs.twenty four lakhs, seventy eight thousand only) along with interest @8%, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, the afore compensation amount, shall be, of the registered owner of the offending vehicle. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation be apportioned in the manner as ordered by the learned tribunal.All pending applications also stand disposed of. Records be sent back forthwith.

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

Royal Sunderam Alliance Insurance Company Ltd. .....Appellant.
Versus
Smt. Mukandra Devi and others .....Respondents.

FAO No. 408 of 2018.
Reserved on : 27th May, 2019.
Decided on : 28th June, 2019.

Motor Vehicles Act, 1988 - Section 166 –Motor accident – Claim application – Defences– Contributory negligence – Proof – Insurer filing appeal against award of tribunal and arguing that indemnificatory liability should also have been fastened on both vehicles involved in accident as it was result of negligence of both the drivers- Held, ascriptions made in FIR allege rash driving only on part of driver of offending vehicle – Chargesheet for rash driving filed before criminal court only against driver of offending vehicle – No other ocular evidence showing that accident was result of negligence on part of drivers of both vehicles – Plea of contributory negligence not embedded on any firm evidentiary material existing on record. (Para 3)

Case referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Mr. Virender Sharma, Advocate.
For Respondents No. 1 & 2:	Mr. Anirudh Sharma, Advocate.
For Respondents No. 3 & 4:	Mr. Rakesh Chaudhary, Advocate vice Mr. Ravinder Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-I, Solan, H.P., upon, MAC Petition No. 29-s/2 OF 2015 (i) whereunder compensation amount, embodied, in a sum of Rs.14,11,000/- alongwith interest accrued thereon, at the rate of 6% per annum, and, commencing from, the date of petition till realization thereof, hence stood, assessed, vis-a-vis, claimants No.1 and 2, (ii) and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing, for the insurer, has contested, the returning of affirmative findings, upon, issue No.1, and, has also contested, the, returning of disaffirmative findings, upon, issue No.4, (a) and, his afore contest(s), has also, facilitated him, to make a further submission, before this Court, (b) that thereupon the impugned award is vitiated, as, assumingly, upon, the compensation amount determined under the impugned award, being maintained by this Court, (c) nonetheless, only upon, the joinder of the owner, driver and the insurer of Innova car bearing No. DL-1YV-8580, would rather facilitate the rendition, of, befitting findings, vis-a-vis, the afore purported co-tortfeasor, in

the relevant mishap, (d) and, would also bring requisite enablements, for, proportionately fastening hence the apposite indemnifiatory liabilities, upon, the insurer of the offending vehicle, and, upon the insurer of the Innova Car bearing No. DL-1YV-8580, (e) whereas, the afore want of, the afore legitimate recoursings, deficlitate the making, of the afore rendition.

3. However, the afore submission addressed before this Court, by the learned counsel, appearing for the insurer/appellant, is rudderless, (i) as it is not founded upon any credible evidence, existing on record, (ii) rather with PW-2 making an uneroded testification, qua in pursuance, to the lodging, of, the apposite FIR, carrying therein ascriptions, vis-a-vis, the driver of the offending vehicle, being rash, and, negligent in driving it, (iii) thereupon, with his being the sole tortfeasor, (iv) and, when he further testifies that after completion of the investigation(s), a report under Section 173 of the Cr. P. C., standing filed rather exclusively against respondent No.3 herein, does cumulatively, beget an invincible inference, conspicuously also when credible ocular account, vis-a-vis, the afore propagation, of the counsel for the insurer, is also not existing on record, rather reiteratedly qua the afore espousal being raised surmisally, and, it being not embedded, on any assured or firm evidentiary material hence existing on record.

4. Be that as it may, the learned counsel appearing for the insurer, has also contended, that (a) the assessment made by the learned tribunal qua the deceased, from his purported avocation, of, his assisting, his father in agriculture and horticulture pursuits, and, from his rendering tuitions to students, hence, rearing, a, per mensem salary of Rs.12,000/-, is, an exercise based upon conjectures, and, requires interference. However, the afore submission also falters, as, the father of the deceased, while stepping into the witness box, and, during course whereof, he tendered into evidence, his affidavit, rather therein his making clear underlinings qua the deceased, as apparent from Ex.PW1/C, to Ex.PW1/G, hence, possessing a masters degree in Physics, (b) and, also a B.Ed. Degree and thereonwards also his making echoings qua his son assisting him, in performing horticulture, and, agriculture pursuits, and, wherefrom, he has testified qua his rearing, an, income of Rs. Two lakhs. Even though, he has further testified, that, his deceased son, also rearing incomes from his imparting tuitions, to students, and, when all the afore testimonies, have, withstood the rigour of an exacting cross-examination, (c) thereupon, even when the students/wards, wheretowhom the deceased imparted tuitions or their respective parents, omitted to hence step into the witness box, to succor, the afore testification, (d) however, wants of theirs hence stepping into the witness box, rather would not render the afore evidence, being discardable, given all the afore testifications, remaining uneroded, vis-a-vis, their vigour, for, wants, of any apposite rebuttal evidence thereto rather being adduced by the respondent, (e) hence, bearing in mind the afore factum, and, also bearing in mind qua the father of the deceased being deprived of assistance(s) being meted to him by his son, in his performing, both agricultural, and, horticultural pursuits, (f) and, when hence he would be required to engage labourers, for assisting him, thereupon, the afore loss of services, to the father of the deceased, is also required to be re-recompensed. However, since, the claimants, have not filed any appeal, before this Court, seeking enhancement of compensation nor they have preferred cross-objections, (g) hence, bearing in mind, the afore unfoldments, and, more precisely the factum of the deceased, being well qualified, and, his qualification, empowering him, to obtain, a, befitting adequately remunerative employment, hence, the quantification, in the impugned award, vis-a-vis, the income of the deceased, hence computed in a sum of Rs.12,000/-, rather cannot be construed to be not firmly bedrocked, upon, any hard evidentiary material nor it is interferable.

5. Be that as it may, even if, the claimants, have not instituted any appeal against the impugned award, nor preferred any cross-objections, within, the instant appeal, yet the afore omission would not cast any bar upon this Court against its granting, in consonance with the verdcit of the Hon'ble Apex Court, rendered in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, future hikes, upon the per mensem income adjudged by the learned tribunal, and, borne in a sum of Rs.12,000/-,given it standing mandated therein, qua the, awarding(s), of, future incremental hikes, vis-a-vis, a deceased engaged, in non governmental sector or being self employed, as, the deceased visibly hereat stood engaged, and, also the age of the deceased, being the requisite parameter. Since the postmortem report reflects, the deceased being aged 24 years, at the relevant time, hence within, the, ambit, of, verdict of the Hon'ble Apex Court rendered in Pranay Sethi's case (supra), and, when, it reiteratedly stands mandated therein, qua accretions towards future incremental prospects, vis-a-vis, the assessed income of, a self-employed deceased, as, the deceased hereat candidly was, being pegged upto 40% thereof, besides being tenably meteable, vis-a-vis, the apposite assessed per mensem income. Consequently, after meteing 40% increase(s), vis-a-vis, the apposite assessed per mensem income, thereupon, the relevant per mensem income, of, the deceased, is, reckonable to be Rs.16,800/-, [Rs.12,000/-(per mensem assessed income of the deceased)+Rs.48,00/-[40% of the last drawn salary). Significantly, the deceased was a bachelor, hence, 50% deduction, is to be visited, upon, a sum of Rs.16,800/-, hence, after making, the, apt aforesaid deduction, vis-a-vis, the afore sum, the per mensem dependency, comes to Rs.8,400/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs.8,400/- x 12=Rs.1,,00,800/-. After applying thereto, the apposite multiplier of 18, the total compensation amount, is assessed in a sum of Rs.1,00,800/- x 18=Rs.18,14,400/- (Rs. Eighteen lakhs, fourteen thousand, four hundred only).

6. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the claimants, under the head, " loss of love and affection" is in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, only under conventional heads, namely, loss to estate, and, funeral expenses, being quantified, only upto Rs.15,000/-, and Rs.15,000/- respectively. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the claimants. Accordingly, in addition to the aforesaid amount of Rs.18,14,400/-, the claimants, are, entitled under conventional heads, namely, loss to estate, and, funeral expenses, sums of Rs.15,000/-, and Rs.15,000/- respectively, as such, the total compensation to which the claimants are entitled comes to Rs.18,14,400 + Rs.15,000/- + Rs.15,000/-= Rs.18,44,400/-(Rs. Eighteen lakhs, forty four thousand, four hundred only).

7. For the foregoing reasons, the appeal filed by the insurer is dismissed, however, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners/claimants/respondents No.1 and 2, are, held entitled to a total compensation of Rs.18,44,400/-(Rs. Eighteen lakhs, forty four thousand, four hundred only), along with interest @ 6 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, compensation amount shall be borne by the insurer of the offending vehicle, i.e. appellant herein. The afore amount of compensation be apportioned amongst the claimants/respondents No.1 and 2 herein, in the manner as ordered, by the learned tribunal. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. All pending applications also stand disposed of. Records be sent back forthwith.

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

Shriram General Insurance Co. Ltd. .....Appellants.

Versus

Smt. Sakina Devi and others ....Respondents.

FAO No. 452 of 2018.
Reserved on : 17th June, 2019.
Decided on : 28th June, 2019.

Motor Vehicles Act, 1988- Section 149 - Motor accident– Claim application– Defence of gratuitous passenger in goods vehicle– Proof– Insurer contending that contents of FIR not showing that deceased was travelling as owner of goods in offending vehicle– He was gratuitous passenger and indemnificatory liability cannot be fastened upon it – Held, mere fact that at time of accident deceased was not accompanying any goods in offending vehicle, will not suggest that vehicle was never hired by him for transporting goods – After unloading of goods such passengers do travel in same vehicle to place from where they had commenced their journey – Passengers do so and are allowed to do so in their capacity as owner of goods or their representatives who hired the vehicle for transportation of goods – In such circumstances indemnificatory liability will have to fasten on insurer – But onus is always upon claimants concerned to prove that deceased had hired vehicle for transportation of goods. (Para 4)

Case referred:

United India Insurance Company Ltd. vs. Suresh K.K. and another, (2008)12 SCC 657

For the Appellant: Mr. Jagdish Thakur, Advocate.
For Respondents No. 1 to 5: Mr. G. R. Palasra, Advocate
For Respondent No. 6: Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal (III), Mandi, upon, Claim Petition No. 15/2015, as stood, cast therebefore, under, the provisions of Section 166, of, the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), (i) AND, whereunder, compensation amount, comprised in, a sum of Rs.17, 36, 912/-alongwith interest accrued thereon, at the rate of 7.5% per annum, was, hence ordered to commence, from, the date of petition till realization thereof, rather stood, assessed, vis-a-vis, the claimants, (ii) and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing, for, the appellant/insurer, has, not contested, the, validity, of, rendition, of, affirmative findings, upon, issue No.1, hence appertaining to the demise of Mansa Ram, being a sequel of rash, and, negligent manner of driving of the offending vehicle, by respondent No.6. The deceased, Mansa Ram, as visible,

on a reading of, the, postmortem report, borne in Ex.PW2/A, begot his end, for the reasons as disclosed therein, (a) and, PW-2, who during the course of his examination-in-chief, hence tendered into evidence, the, postmortem report, and, also enabled its exhibition, and, his also obviously proving the afore exhibit, rather carries disclosures therein qua the afore cause of demise, being a sequel of a road side accident, (b) thereupon, it is to be concluded that the demise of the afore deceased, hence, germinating, from, rash, and, negligent manner of driving of the offending vehicle, by its owner-cum-driver.

3. Be that as it may, the learned counsel appearing for the appellant/insurer, has contended, that (a) with the registration certificate appertaining to the offending vehicle, and, exhibited as Ex.RW1/C, and, it making a categorical echoing qua it being registered, rather as a light goods vehicle, (b) and, when it is construable, to be hence a goods carrier, thereupon, he contends (c) that when the claimants were hence enjoined to adduce cogent proof, vis-a-vis, the deceased, at the relevant time, occupying the offending vehicle not as a gratuitous passenger, rather as the owner, of the goods concerned, (d) whereas, with the FIR borne in Ex.PW3/A, not making any bespeaking in consonance therewith, thereupon, he contends that the deceased hence was travelling in the offending vehicle, as a gratuitous passenger, (e) and further thereonwards, he also makes, a, vehement espousal before this Court that, the, fastening of the apposite indemnificatory liability, upon, the insurer, vis-a-vis, the offending vehicle, hence, registered, as, a goods carrier vehicle, rather warranting interference, by this Court.

4. Primarily, even if, the FIR borne in Ex.PW1/A, and, lodged at the instance of one Rajinder Kumar, an,d not at the instance of the owner-cum-driver, of the offending vehicle, arrayed as co-respondent No.6 herein, though does not, carry, an, explicit narrative therein, vis-a-vis, at the time of happening, of, the ill-fated occurrence, hence involving the offending vehicle, driven at the relevant time, by it co-respondent No.6 herein, it not carrying therein any goods purportedly, rather owned by the predecessor-in-interest, of, the claimants, (a) yet the afore want, of, the afore echoings therein, would not beget a further concomitant conclusion, that, the afore argument(s) addressed, by the counsel for the insurer/appellant, is, weighty nor it can be concluded, that the deceased never hired, for the relevant purpose, the offending vehicle, nor it can be concluded, that, he was travelling as, a, gratuitous passenger therein. Contrarily, dehors, the afore narrative, and, also irrespective of the fact, that at the relevant time, the, goods owned by the deceased, were not borne, in the relevant vehicle, it would not relieve the insurer, vis-a-vis, the burdening of the apposite indemnificatory liability upon it, nor coax this Court to make a conclusion, that the afore indemnificatory liability, hence, saddled upon it, being unsaddleable, as a decision of the Hon'ble Apex Court, rendered in a case titled as ***United India Insurance Company Ltd. vs. Suresh K.K. and another,*** reported in ***(2008)12 SCC 657***, the relevant paragraph No.7 whereof stands extracted hereinafter:-

> "7. A sum of Rs. 1,19,300/- was awarded in favour of the claimant with interest @ 9% pr annum. Appellant preferred an appeal before the High Court in terms of Section 173 of the Motor Vehicles Act. The High Court negatived the contention of the appellant that the word 'goods' was used in Section of the Act, would not be referable to the word 'carried' stating :
>
> > "According to us, the language of the amended provision does not show that the owner or the representative must accompany the goods or his representative who hires the vehicle travels in the hired vehicle from the place of hiring to the place where the goods are to be loaded into the vehicle

> and then proceeds to travel along with the goods. It is also common that after unloading the goods such passengers travel in the same vehicle to the place from where they commenced journey. The passenger does so and is allowed to do so in his capacity as the owner of the goods or his representative who has hired the vehicle for transporting goods. The amended provision makes it explicitly clear that the word `carried' qualifies the owner of goods or his representative and not the goods carried. If goods are found inside the vehicle at the time of the accident, it is a clinching circumstance to establish that the passenger who claims to be the owner of goods or the owner's representative was travelling in that capacity. Chances of passengers or the insured raising false claims in this regard cannot be safe method to ascertain the intention of the Legislature. False claims can be disapproved by appropriate contentions. In our view, such issues are matters of evidence and will not stand scrutiny while construing a beneficial provision intended to compensate the loss caused to innocent victims of motor accidents. The party who claims that the person representative of the owner of the goods shall discharge the burden cast on him. Merely for the reason that the benefit granted will be misused, it will not be proper to give a narrow interpretation to the above provision. We, therefore, hold that the owner or the authorised representative need not invariably be shown to accompany the goods at the time the goods carriage meets with accident causing injury to or resulting in the death of the passenger who is either the owner of the goods or the authorised representative of the owner of the goods.''

rather makes clear explicit, and, categorical expostulations of law, (a) qua passengers, hence, hiring the offending vehicle concerned, for goods being therein carried, along with them, conspicuously, also after, unloading the goods at their apposite destination, hence, proceeding to occupy, the hired apposite offending vehicle, for, theirs returning from, the apposite destination, whereupto they travelled, along with, the, goods, rather to travel to their place of abode, wherefrom they commenced their journey, (b) and conspicuously therein it also stands candidly and tritely expostulated therein, that, in the afore scenario, and, reiteratedly, when the offending vehicle, in contemporaneity, vis-a-vis, the ill event of an accident, besetting it, rather not carrying goods, loaded therein, (c) and, the owner of the good(s), rather continuing to occupy, it, as a passenger therein, and, reiteratedly his occupation, as a passenger in the offending vehicle, continuing after his dispatching, the goods, loaded in the offending vehicle, at their apt destination, hence being facilitative, for, his returning home, (d) rather would yet enjoin(s) the courts of law, to, fasten the apposite indemnificatory liability, upon, the insurer of the offending vehicle, (e) but the relevant discharging onus, especially for avoiding the misuse of the afore expostulation of law, being always cast, upon, the claimants concerned. Succinctly, the claimants, whereuponwhom, the apposite discharging onus, is cast, do appear through Sakina Devi, to ensure its apposite discharging,(f) given the afore during the course of recording of her deposition, tendering in her examination-in-chief, her affidavit, borne in Ex.PW1/A, exhibit whereof carries, articulation(s) qua deceased Mansa Ram, upon, engaging the offending vehicle, for carrying therein "patals", upto Trambel village, and, also after his completing the journey, in the offending vehicle, along with the afore bundles of patals, being loaded therein, rather, his, after delivering the afore patals at Trambel, (f) hence thereafter also continuing to

occupy the offending vehicle, as passenger, for hence his being enabled to arrive, at the place of commencement of his journey. Reiteratedly, the afore despoition also falls, within the expostulation of law, encapsulated, in the judgment (supra), hence, the fastening of the apposite indemnificatory liability, in the impugned award, upon, the insurer of the offending vehicle, does not suffer, from any fallacy nor hence the deceased, is, construable to be a gratuitous passengers, in the offending vehilce.

5. However, the learned counsel, appearing for the insurer/appellant herein, has continued to contend with much vigour, before this Court that with respondent No.6 herein, in his testification, embodied in his cross-examination, acquiescing to an affirmative suggestion put to him, by the counsel for the insurer qua the deceased, hence, occupying the offending vehicle merely as a passenger, (a) hence, he concerts, to, therefrom hence generate an inference, that the deceased was throughout rather occupying the offending vehicle, as, a gratuitous passenger, and, hence, the apposite indemnificatory liability, being not amenable, to be fastened, upon, the insurer. However, the afore inference, as strived to be drawn, by the counsel for the insurer, is, misplaced, and, misfounded, (b) as it appears, that, the afore suggestion appertains, vis-a-vis, the stage rather when the relevant mishap occurred, and, does not, hence enable him to therefrom, make or derive any inference, that the deceased had never engaged the offending vehicle for carrying therein, the bundles of patals, (c) nor qua after the delivery of the afore at Trambel, hence, he was not returning in the offending vehicle, for his being facilitated, to arrive at his homestead, (d) nor he can thereupon, obviously erode, the afore expostulation, of law, as borne in Suresh K.K.'s case (supra), rendered by the Hon'ble Apex Court, (e) wherein rather the travelling, of, the owner concerned, without the goods occurring, in the offending vehicle, especially when prior thereto, he has delivered the goods, at their relevant destination, rather purveys apt leverage, to the registered owner, to make, an, espousal, that, the indemnificatory liability being fastenable upon the insurer. (f) Furthermore, the afore inference, also stands filliped, from, RW-1 acquiescing to a suggestion meted to him, by the counsel for the insurer, while subjecting to cross-examination, that, his, rearing a claim, vis-a-vis, damages caused to the vehicle, before the insurance company, (g) and, when thereto visibly no objection stood raised by the insurer, (h) thereupon, upon, the afore suggestion standing combined with, and, read in conjunction, with the claim form, occurring at page 46 of the record of the learned tribunal, wherein, there occurs, an echoing hence in consonance, with the afore testification rendered by PW-1, (i) and, it also squarely and pointedly echoing qua respondent No.1, after unloading, at the apt destination concerned, hence, the goods of the deceased Mansa Ram, his thereafter performing his return journey, rather in the offending vehilce, (j) and, during the course thereof, the ill-fated mishap hence involving the offending vehicle occurring, rather fortifies an inference, qua the afore expostulation of law, borne in the judgment (supra) hence being standing satisfactorily satiated, and, also hence, the relevant discharging onus, cast upon the claimants, being discharged.

6. Lastly, the learned counsel appearing for the insurer, has, contended with much vigour, before this Court, that the afore echoing occurring in the claim form, and, claim form whereof exists at page 46, of the record of the learned tribunal, hence, being readable, as, carrying, a signification qua the offending vehicle, being engaged, by deceased Mansa Ram, to carry therein, his household luggage, or personal effects, and, he hence contends (a) that when the afore luggage or personal effects, of the deceased Mansa Ram, as stood carried, in the offending vehicle, when rather stand excluded, from the statutory definition, of goods, encapsulated in Section 2(13) of the Motor Vehicles Act, provisions whereof stand extracted hereinafter:-

> "**S. 2(13)** "goods" includes livestock, and, anything (other than equipment ordinarily used with the vehicle), carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle:"

(a) thereupon also it being invincibly concludable, that the patals, as stood, carried in the offending vehicle rather being luggage and, the personal effects, of, the deceased. He also makes a further submission, that, the apposite indemnificatory liability hence being not tenably saddled upon the insurer. However, the afore submission, cannot be accepted by this Court, as, the echoing made in the claim form, existing at page 46 of the records, of the learned tribunal, is, qua bundles of patals being carried, in the offending vehicle concerned, prior to the ill-fated mishap, rather happening, (b) and thereafter with no further explanation , is, concerted to be elicited from RW-1, by the counsel for the insurer, during, the course of his holding him, to cross-examination, vis-a-vis, patals not being carried, in the offending vehicle, at the relevant stage, rather household luggage or personal effects, of, the deceased, being carried at the relevant stage, in the offending vehicle, (c) and, when only upon the afore endeavour being made, it may be possible, to rear a conclusion that hence no patals rather other house hold items or personal effects of the deceased, rather at the relevant time, being carried in the offending vehicle. (d) Reiteratedly, when the afore elicitation, is not concerted, to be unearthed from RW-1, (e) thereupon, it is to be also concluded qua the counsel for the insurer, of the offending vehicle acquiescing qua the patals, being carried, at the relevant stage in the offending vehicle, (e) thereupon, it is to be concluded that the afore patals, obviously not being construable to be either luggage or personal effects of the deceased, rather being construable, to be goods, as, defined under Section 2(13) of the Act, emphatically when the "patals" are not meant, for, the permanent personal use, vis-a-vis, consignee nor, vis-a-vis, the consignor, nor are personal effects or luggage rather are meant, for, community users. Corollary thereof, is that the fastening, of the apposite indemnificatory liability, upon, the insurer of the offending vehicle, vis-a-vis, the compensation amount, by the learned tribunal, does not suffer, from, any infirmity.

7. For the foregoing reasons, there is no merit, in the instant petition, and, it is dismissed accordingly. In sequel, the award impugned before this Court is maintained, and, affirmed. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Smt. Sreshta Devi ……Appellant/Petitioner
Versus
State of H.P. & others ……Respondents.

LPA No 39 of 2017
Reserved on: 11.06.2019
Decided on: 28.06.2019

Constitution of India, 1950- Article 226- Inter-caste marriage- Status of off-springs of Scheduled Tribe woman married to forward caste man- Held, main factor for grant of scheduled tribe certificate to off-springs of a couple where one of spouses is a member of

scheduled tribe, is acceptance of such off- springs by the tribal society as belonging to their community- In case, children are accepted by society, then they shall be deemed to be scheduled tribes- The other factors being whether children had advantageous start in life or suffered socially, economically and educationally- On facts, petitioner and her children are permanent residents of native place of petitioner, a tribal woman- Their names entered in Pariwar Register of that village and have ration card/ voter cards registered there- Gram Panchayat had passed resolution that Local Community already accepted/ regarded petitioner's children as belonging to Gaddi Hali community- The community of their father did not accept them as their own- Order of SDO (Civil) refusing grant of scheduled tribe certificate to children of petitioner set aside- Matter remitted for consideration afresh. (Paras 4 to 6)

Cases referred:

Anjan Kumar vs. Union of India and others, (2006) 3 SCC 257

K.P. Manu vs. Chairman, Scrutiny Committee for verification of community certificate, (2015) 4 SCC 1

Kumari Madhuri Patil and another vs. Addl. Commissioner, Tribal Development and others, (1994) 6 SCC 241

Rameshbhai Dabhai Naika vs. State of Gujarat and others, (2012) 3 SCC 400

For the petitioners. Mr. S.R. Chauhan, for the petitioner.

For the respondent Mr. Kunal Thakur, Ld. Deputy Advocate General, for the respondent.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua,(J)

A very peculiar issue is involved in this case. The question is what would be the status of the off-springs of a Schedule Tribe woman, married to a forward caste man. The Revenue/Competent Authority did not grant Schedule Tribe status to the off-springs. The writ petition claiming such status was dismissed by the learned Single Judge, hence, present appeal has been preferred.

2.(i) Before adverting to the factual position of this case, it would be appropriate to refer to the judgment passed by the Hon'ble Apex Court in ***Rameshbhai Dabhai Naika Vs. State of Gujarat and others****, (2012) 3 Supreme Court Cases 400,* relied upon by the learned Single Judge, while dismissing the writ petition, wherein it washeld by Hon'ble Apex Court as under:-

> *54. In view of the analysis of the earlier decisions and discussions made above, the legal position that seems to emerge is that in an inter-caste marriage or a marriage between the tribal and non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case.*
>
> *55. In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste*

marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the Scheduled Caste/Scheduled tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life any other member of the community to which his/her mother belonged. Additionally, that he was always treated as a member of the community to which her mother belonged not only by that community but by the people outside the community as well." (emphasis supplied)

2(ii) Hon'ble Supreme Court in **K.P. Manu Vs. Chairman, Scrutiny Committee for verification of community certificate**, (2015) 4 Supreme Court Cases 1, held as under:-

"51. In the instant case, the appellant got married to a Christian lady and that has been held against him. It has also been opined that he could not produce any evidence to show that he has been accepted by the community for leading the life of a Hindu. As far as the marriage and leading of Hindu life are concerned, we are of the convinced opinion that, in the instant case, it really cannot be allowed to make any difference. The community which is a recognized organization by the State Government, has granted the certificate in categorical terms in favour of the appellant. It is the community which has the final say as far as acceptance is concerned, for it accepts the person, on reconversion, and takes him within its fold. Therefore, we are inclined to hold that the appellant after reconversion had come within the fold of the community and thereby became a member of the Scheduled Caste. Had the community expelled him the matter would have been different. The acceptance is in continuum. Ergo, the reasonings ascribed by the Scrutiny Committee which have been concurred with by the High Court are wholly unsustainable." (emphasis supplied)

2(iii) In another judgment of the Hon'ble Supreme Court in **Anjan Kumar Vs. Union of India and others**, (2006) 3 Supreme Court Cases 257, it was held as under:-

"6. Undisputedly, the marriage of the appellants' mother (tribal woman) to one Lakshmi Kant Sahay (Kayastha) was a court marriage performed outside the village. Ordinarily, the court marriage is performed when either of the parents of bride or bridegroom or the community of the village objects to such marriage. In such a situation, the bride of the bridegroom suffers the wrath of the community of the village and runs the risk of being ostracized or excommunicated from the village community. Therefore, there is no question of such marriage being accepted by the village community. The situation will, however, stand on different footing in a case where a tribal man marries a non-tribal woman (Forward Class) then the offshoots of such wedlock would obviously attain the tribal status. However, the woman (if she belongs to a Forward Class) cannot automatically attain the status of tribal unless she has been accepted by the community as one of them, observed all rituals, customs and traditions which have been practised by the tribals from time immemorial and accepted by the community of the village as a member of tribal society for the purpose of social relations with the village community. Such acceptance must be by the village community by a resolution and such resolution must be entered in the Village Register kept

for the purpose. Often than not, such acceptance is preceded by feast/rituals performed by the parties where the elders of the village community participated. However, acceptance of the marriage by the community itself would not entitle the woman (Forward Class) to claim the appointment to the post reserved for the reserved category. It would be incongruous to suggest that the tribal woman, who suffered disabilities, would be able to compete with the woman (Forward Class) who does not suffer disabilities wherefrom she belongs but by reason of marriage to tribal husband and such marriage is accepted by the community would entitle her for appointment to the post reserved for the Scheduled Castes and Scheduled Tribes. It would be a negation of constitutional goal.(emphasis supplied)

15. The Scheduled Caste and Scheduled tribe certificate is not a bounty to be distributed. To sustain the claim, one must show that he/she suffered disabilities-socially, economically and educationally cumulatively. The authority concerned, before whom such claim is made, is duty-bound to satisfy itself that the applicant suffered disabilities socially, economically and educationally before such certificate is issued. Any authority concerned issuing such certificates in a routine manner would be committing a dereliction of constitutional duty."

3. We have gone through the complete record of the writ petition and heard learned counsels for the parties. The factual position in the case remains undisputed. Such undisputed and relevant facts can be summed up as hereunder:-

3(i) The father of the petitioner, namely Shri Jodh Singh, son of late Shri Jant r/o village & P.O. Ulansa, Tehsil Bharmour, District Chamba, H.P., belonged to **Gaddi Hali** Community Tribe, which has been enumerated as such in the Constitutional Presidential Order 1950- Himachal Chapter. Thus, Shri Jodh Singh, father of the petitioner was recognized as Scheduled Tribe. He was owner of 05-12-08 bighas of land situated in Mauza Ulansa Parganah Bharmour, Sub-Tehsil Holi, District Chamba.

3(ii) Petitioner is the only surviving daughter of late Shri Jodh Singh. She resided in village & P.O. Ulansa, Tehsil Bharmour, Sub Tehsil Holi, District Chamba, H.P. Petitioner was also recognized as Gaddi Haliand was issued Scheduled Tribe certificates by the Competent Authority. Petitioner served as a JBT teacher.

3(iii) Smt Sreshta Devi/petitioner, married one Shri Madan Kumar, son of Shri Prem Lal, in October, 1985. Shri Madan Kumar, was resident of village Mangla, Tehsil & District Chamba. He belonged to Rajput caste (forward caste). The marriage was solemnized at village Ulansa, in accordance with traditions, customs, rituals, followed by local Gaddi Hali community. Photographs of the marriage of the couple have been annexed with the petition. Local people belonging to Gaddi Hali Community, participated in the marriage ceremonies with all fervour, gaiety and blessed the couple.

3(iv) Marriage of Shri Madan Kumar with the petitioner who belonged to low caste and Scheduled Tribe-Gaddi Halicommunity, was not accepted, by former's family members. He was completely ostracized, by his upper class community. He was also divested from his ancestral moveable and immoveable property at his native village Mangla Tehsil and District Chamba, H.P. So much so that none of his ancestral land, in village Mangla, is in his possession. He has not been allowed to enter in his native village,

either in the house of his father or in the houses of his relatives. In fact his name has been stuck off from the record of rights by his father.

3(v) After marriage, petitioner alongwith her husband, continued to live in her father's home in Village & P.O. Ulansa, Tehsil Bharmour, Sub Tehsil Holi, District Chamba, H.P. Petitioner even though, was the only surviving daughter of her father, yet, in view of the bar on females (in the area) in respect of inheriting their father's property, couldn't inherit her father's property as such. She had no option but to purchase her own father's land, in order to retain the family land. As such, the land owned by her father, eventually became hers, though not by inheritance, but by way of purchase. The couple continued to possess this land and kept on cultivating it. This land is now recorded in the ownership and possession of the petitioner.

3(vi) The couple was blessed with three children namely i) Monika (daughter born in 1986), ii) Sushila (daughter born in 1988) iii) Mr. Vijender Kumar (son born in 1991). All the three children resided in village & P.O. Ulansa, Tehsil Bharmour, Sub Tehsil Holi, District Chamba. All of them took their primary education till 5th standard, in village Ulansa, tribal area. Petitioner and her children were throughout treated, recognized and accepted as belonging to Gadi Hali by the local community. They are ration card holders of village Ulansa. Their voter cards are also of village Ulansa. Their names are entered in Parivar Register of village Ulansa.

3(vii) Village Ulansa is situated at a height of about 8000-8500 feet above sea level. From this height people migrate to low altitude areas during winter. At the relevant time, there were no schools for secondary education in village Ulansa. Petitioner being a JBT teacher, in order to provide, further education to her children post their primary education in Ulasna, got herself transferred to the nearest town i.e., in Government Primary School, Chamba. The couple purchased 3 biswas land in Mohalla Obdi, Tehsil and District Chamba. They never acquired the status of permanent residents of village Obdi. Rather, they remained permanent residents of village Ulansa, had their house & land in village Ulansa, where they lived for education of children. The children got secondary education in Chamba. It has also come on record that one of the daughter of the petitioner namely Sushila also did her M.C.A. from Punjab University**.** Smt. Monika has married a person belonging to Scheduled Caste. It has been asserted by petitioner that her children could not get benefit of reservations & concessions available to Scheduled Tribes under the Constitution of India and faced hardship in respect of admissions & recruitments.

4. Application for issuance of Scheduled Tribe certificate and the inquiry thereupon:-

4(i) The children of the petitioner applied for issuance of Scheduled Tribes certificate, by moving an application dated 01.09.2011, before the learned Collector, District Chamba.

4(ii) On this application, inquiry was entrusted to the Naib Tehsildar, Sub Tehsil Holi, District Chamba, (Revenue Officers). During inquiry following documents were collected by the Inquiry Officers:-

a) Certificate issued on 25.01.2012, by Gram Panchayat, Mangla, to the effect that Smt. Sreshta Devi, and her off-springs were not recorded either in the Pariwar Register or in the Ration Card Register, of village Mangla.

b) Certificate dated 25.10.2013, issued by Gram Panchayat Mangla, certifying that Shri Madan Kumar, was not permanent resident of Village Mangla. It was also certified therein that on account of his marrying a tribal lady in October, 1985, he had been ostracized by his family members and therefore, neither Shri Madan Kumar nor his wife and children reside in Village Mangla.

c) Certificate dated 26.3.2012, issued by Municipal Councillor, Sultanpur Chamba to the effect that the couple resided in village Obdi Post Office Sultanpur, District Chamba, for the higher education of their children. It is also certified therein that the petitioner and her children are permanent residents of Village Ulansa, Tehsil Bharmour, District Chamba. By virtue of petitioner being in Government job and on account of her posting in Chamba, she resided in Mohalla Obdi, Post Office Sultanpur, Chamba, H.P., but she is not permanent resident of Mohalla Obdi. Document is also to the effect that only Shri Madan Kumar, was recorded as ration card holder of Village Obdi, Post Office Sultanpur, Chamba, H.P., and none else.

d) Jamabandis to the effect that Smt. Sreshta Devi, is owner in possession of 05-12-03 bighas of land in Mauza Ulansa, Pargana Bharmour, Sub Tehsil Holi, District Chamba are on record.

e) Gram Panchayat Ulansa, vide resolution dated 30.8.2011 had certified that petitioner is permanent resident of village Ulansa, Tehsil Bharmaour and she & her children are accepted as Scheduled Tribe by the local community.

f) Significantly, not just Gram Panchayat, Ulansa, but the larger body i.e. Gram Sabha, Ulansa, had also passed resolution on 01.04.2012, to the effect that :-

'Sreshta Devi w/o Madan Lal, is permanent resident of Gram Panchayat, Ulansa, whose family is entered at Serial No. 84 of the Pariwar Register with following particulars of the family:-

I) Sreshta Devi, w/o Madan Lal, caste Gaddi Hali.

2) Monika, d/o Madan Lal, caste Gaddi Hali.

3) Sushila, d/o Madan Lal, caste Gaddi Hali.

4) Vijender s/o Madan Lal, caste Gaddi Hali.

It has been resolved by Gram Sabha that the above family belongs to Gaddi Hali. Gaddi Hali Community, accepts this family as such. Families of Vishu Ram and Kalu Ram, also accept this family as such. The resolution is unanimously passed by Gram Sabha.'

Thus, the Local Gaddi Hali, Tribal Community had accepted the off-springs of Smt. Sreshta Devi, as belonging to their own community.

g) Petitioner had been issued Scheduled Tribe certificate. Her pedigree table was made available to the Inquiry Officer. Documents to the effect that the names of petitioner and her children were recorded in 'Pariwar Register' of village Ulansa, had ration cards only in village Ulansa, had voting rights only in village Ulansa, were made available to the Inquiry Officer.

5. **Inquiry report and order passed thereupon:-**

5(a). The statements of the petitioner, her husband were recorded by the concerned authorities. On the basis of inquiry, so conducted and the documents placed before him, the

Naib Tehsildar submitted his report to the Sub Divisional Officer (Civil), Tehsil Bharmour, District Chamba on 29.10.2014. Relevant portion of this report is reproduced hereinafter:-

"उपरोक्त विसय के सन्दर्भ में आपके कार्यालय के पत्र संख्या 2072 दिनांक 18 जुलाई 2014 की अनुपालना में निवेदन है, कि मोनिका पत्री मदन कुमार, सुसीला पुत्री मदन कुमार व विनोद कुमार पुत्र मदन कुमार निवासी गांव उलांसा परगना व तहसील भरमौर जिला चम्बा का अनुसूचित जनजाति का लाभ प्रदान करने हेतु ग्रॉम सभा व वार्ड सभा प्रस्ताव वारे पटवारी पटवार इल्का गरोला को नियुक्त किया गया था। <u>श्रीमति सरिसठा देवी पुत्री जोध सिंह निसासी गॉव उसांला उप–तहसील होली जिला चम्बा हिमाचल प्रदेस की सीाई निसासी है उक्त सायला की जाति गददी हाली से सम्बन्ध रखती है इसके तीनो बच्चे मोनिका सुसील व विजेन्द्र कुमार उक्त सायला के साथ सुरु से ही रिहाईस करते है नौकरी के सिलसिले में श्रीमति सरिसटा देवी चम्बा में रहती है व उन्होने अपना मकान गॉव ओवडी चम्बा में बनाया हुआ है। बीच–2 में यह सब यहॉं पर आते जाते रहते है मुहाल उलसा में इनका अपना मकान है। यहॉं का समुदाय व ग्राम पंचायत उलांसा भी इन्हे स्वीकार करते है और इस समुदाय के साथ इनका मेल मिलान भी है। अत: प्रतिलिपि प्रस्ताव ग्रॉम पंचायत</u> उलांसा व वार्ड सभा इस पत्र के साथ सॅलम्न करके आगामी उचित कार्यवाही हेतु महोदय की सेवा में प्रेसित है।" (emphasis supplied)

5(b) On the basis of above Inquiry Report, the Sub Divisional Magistrate, Bharmour, District Chamba, submitted his report to Deputy Commissioner, vide letter dated 14.11.2014. Relevant part of the report is reproduced hereinafter:-

<u>"चूंकि सरिष्टा देवी के तीनो बच्चो ने पांचवी तक की शिक्षा उलांसा मे ही ग्रहण की है, उनका नाम भी अभी तक ग्राम पंचायत उलांसा के रिकार्ड में ही दर्ज है तथा ससुराल वालों ने भी उसको तथा बच्चो को स्वीकार नही किया है, जबकि मायके वालों व वहां के पूरे समाज (गद्दी समुदाय) द्वारा इन्हें स्वीकार किया गया है (ग्राम सभा प्रस्ताव सतब्न है)। इसके साथ ही सरिष्टा देवी के नाम उलांसा में मलकियती भूमि भी दर्ज राजस्व रिकार्ड है। ससुराल वालों द्वारा स्वीकार न करने व अनुसूचित जनजाति का लाभ न मिलने के कारणवश उन्हें सामाजिक, आर्थिक व शैक्षणिक तौर पर परेशानियों का सामना करना पड़ रहा है।</u>
आपसे अनुरोध है कि मार्गदर्शन करने व निर्देश प्रदान करने की 'पा करें कि क्या अधोहस्ताक्षरी ऐसे मामले जिनमें अनुसूचित जनजाति/अनुसूचित जाति का लाभ प्रदान किया जाना है, यानि जिन्हें अनुसूचित जनजाति/अनुसूचित जाति का दर्जा प्रदान किया जाना है, ऐसे मामलों में उपमण्डलदण्डाधिकारी अपने कार्य क्षे> में स्वतं> रूप से अंतिम निणर्य लेने/आदेश प्रदान करने में सक्षम प्राधिकरण हैं कि नही, ताकि विषय पर आगामी आवश्यक कार्यवाही अमल में लाई जा सके। पूरा प्रकरण मूल रूप में आपके कार्यालय को उचित कार्यवाही एवं आगामी आदेशार्थ प्रेषित है।" (emphasis supplied)

Above letter clearly indicates the finding recorded by the Sub-Division Officer (Civil) to the effect that the children of the petitioner had suffered socially, economically, educationally. He has also recorded the fact that all the three children of Smt. Sreshta Devi studied in village Ulansa till their primary classes, their names are recorded in Gram Panchayat, Ulansa, and that they have not been accepted by their paternal family. It has been noticed by the Collector that their maternal family and the entire tribal society of Gadi Halihas completely accepted them and have passed resolutions to this effect. However, the Collector expressed his doubts regarding his powers to issue Scheduled Tribes certificates in

such like cases and perhaps for that reason, he did not take the proceedings to the logical conclusion and instead sought guidance from higher authority in this regard.

Above letter clearly indicates the finding recorded by the Sub-Division Officer (Civil) to the effect that the children of the petitioner had suffered socially, economically, educationally. He has also recorded the fact that all the three children of Smt. Sreshta Devi studied in village Ulansa till their primary classes, their names are recorded in Gram Panchayat, Ulansa, and that they have not been accepted by their paternal family. It has been noticed by the Collector that their maternal family and the entire tribal society of Gadi Halihas completely accepted them and have passed resolutions to this effect. However, the Collector expressed his doubts regarding his powers to issue Scheduled Tribes certificates in such like cases and perhaps for that reason, he did not take the proceedings to the logical conclusion and instead sought guidance from higher authority in this regard.

5(c). The file, thereafter remained in State Revenue Department/Personnel Department. Two relevant notings in the file are apt for reproduction:-

> **-52**"Ns.41-51 Examined. The A.D. has sought clarification in the 03.10.2008 by the State Government which is relating to status of the offsprings of the couple where one of the spouses is a member of a Scheduled Tribe.
>
> It is clarified that the instructions issued by the Government of India on 03.10.2008 were circulated by State Government vide Department of Personnel's letter No. PER(AP)-C-F(10)-4/2005, dated 18.11.2008 to all Deputy Commissioners in Himachal Pradesh for compliance. The A.D., therefore, may decide the instant case in accordance with the instructions dated 18.11.2008 and in case further clarification is required, matter may be referred to the Tribal Development Department which has constituted a Scrutiny Committee for issuance and verification of Scheduled tribe Certificates vide their notification No. TBD (F)-4-5/ 2002-II dated 13th January, 2009."

Subsequently, the Tribal Department at noting No. 58-59, refused to go into the question on the ground that that the matter pertains to grant of Scheduled Tribes certificate to the children, born to a couple, having solemnized an inter caste marriage and further advised the Personnel Department to take action as per Note No. 52.

5(d). Tribal Development Department, having refused to deal with the question of issuance of such Scheduled Tribes certificates, the matter therefore, again went to the Personnel Department. The Personnel Department, vide letter dated 05.07.2014, directed the Sub-Divisional Magistrate, Bharmaour, to decide the case in accordance with the instructions issued by Government of India on 03.10.2008, circulated by the State Government vide Department of Personnel letter dated 18.11.2008.

5(e) Pursuant to such direction, the Sub Divisional Officer (Civil) Bharmour, got the inquiries conducted again and passed an order on 22.08.2015, rejecting the prayer for grant of Scheduled Tribes certificates in favour of children of the petitioner. A review of this order was sought by the petitioner & her children, vide application dated 13.11.2015. This was also turned down on 04.02.2016. Petitioner preferred CWP No. 294 of 2016, which also came to be dismissed vide impugned judgment dated 06.12.2016. Hence, present appeal.

6. **Order refusing the Scheduled Tribe certificate:-**

6(a). In our considered view, learned Collector, in rejecting the prayer for grant of Scheduled Tribes certificate has traveled beyond the power and jurisdiction vested in him. What has primarily weighed with him and also with the learned Single Judge is the fact that children had their education post 5th class outside village Ulansa, therefore, they cannot be said to have suffered socially, economically and educationally. The collector has even gone beyond the domain of the instructions, issued in this regard by the Government, from time to time. The instructions dated 03.10.2008, circulated vide letter dated 18.11.2008, relied upon by the collector, are to the following effect:-

> *"I am directed to say that a set of legal views on the caste status of such offsprings where one spouse is a not scheduled tribe was already brought out, vide the Ministry of Home Affairs letter No. 39/37/73 SCTI, dated 4th March, 1975 ad 1st May, 1977 (Copy enclosed for ready reference). The matter has, however been further examined in view of a recent judgment of Supreme Court involving the offspring of a couple where the mother belonged to a Scheduled Tribe and the father was Non-Scheduled Tribe (belonging to forward community) in the case of titled Anjan Kumar versus Union of India reported in (2006) 3 SCC 25 wherein the Supreme Court has, been discussing earlier decisions of the court on this issue said that in view of the catena of decisions of the Supreme Court, the questions raised are not more res-integra. The court has further stated that in condition precedent for granting tribe certificate being that one must suffer disabilities, wherefrom one belong. The offshoots of the wedlock of a tribal woman married to a non-tribal husband. Forward class Kayashta in the present case claim Scheduled Tribe Status. The reason being such offshoot was brought in the atmosphere of Forward Class and he is not subjected to any disability.(emphasis supplied).*
>
> *Furthermore, the Supreme Court has stated that the Scheduled Caste and Scheduled Tribe certificate is not a bounty to be disturbed. To, sustain the claim one must show that he/she suffered disabilities-socially, economically and educationally cumulatively. The authority concerned, before whom such claim is made,is duly bound satisfy itself that the applicant suffered disabilities socially, economically and educationally before such certificate is issued, (para-15)*
>
> *It is significant to note that Supreme Court in the said case has also remarked that woman (if she belongs to a Forward Class) cannot claim the status of tribal unless she has been accepted by the community as one of them….. (Para-6) and that by no stretch of imagination, a casual visit to the relative in other village would provide the status of a permanent resident of the village or acceptance by the village community as a member of the tribal community. (para-7)*
>
> *In view of the above, the caste certificate issuing authority may ensure that each individual case is examined in the light of existing fact and circumstance of such cases, keeping in mind the instructions of MHA cited above and the Supreme Court's observation in the case referred above. A copy of the Supreme Court decision in the said case of Sh. Anajan Kumar versus Union of India and others is enclosed for ready reference.*
>
> *It is requested that these instructions may be circulated among all the authorities empowered to issues Scheduled Tribe Certificates."*

6(b) Instructions dated 1975 & 1977 referred in 2008 instructions have not been appreciated by Collector, in the letter and spirit. These being relevant, are reproduced hereinafter:-

"Annexure 20.49

Copy of H.P. Govt. Deptt., of Personnel letter No. PER. (AP-II)- f(4)-7/75, dated 6.7.1977 addressed to all the Secretaries/Joint Secretaries/Deputy Secretaries/Under Secretaries to the Government of Himachal Pradesh and all Heads of Deptts., and copy endorsed to all Deputy Commissioners etc.etc.

Subject:-Caste status of the offsprings of inter- caste married couples.

I am directed to forward herewith a copy of the Government of India, Ministry of Home Affairs letter No. 39/-37/73-SCT. I dated the 21st May, 1977 alongwith its enclosures for information and guidance.

…Enclosure to Annexure 20.49

Copy of Govt. of India, Ministry of Home Affairs letter No. 39/37/73-SCT. I dated 21st May, 1977 addressed to all the Chief Secretaries of all State Governments & Union Territory Administrations and copy endorsed to others.

…

Subject:-Caste status of the offsprings of inter-caste married couples.

I am directed to say that enquiries about the caste status of the offsprings of the inter caste married couples; have been sought from this Ministry by various State Governments/Union Territory Administrations, from time to time. Accordingly, this question has been receiving the attention of this Ministry for quite some time. A set of legal views on the caste status of such offsprings was already brought out vide this Ministry's letter of even number dated the 4th March 1975. The matter has, however, been further examined and the comprehensive legal position about the status of the offsprings born to couples where one or both of the spouses is/are member(s) of Scheduled Castes and/or Scheduled Tribes, is given in the enclosed Annexure (A to D).

2. It is requested that these instructions may be circulated among all the authorities empowered to issue Scheduled Caste and Scheduled Tribes certificates.

3. Hindi version will follow.

Annexure "A"

LEGAL VIEWS ON THE STATUS OF THE OFFSPRINGS OF A COUPLE WHERE ONE OF THE SPOUSES IS A MEMBER OF A SCHEDULED CASTE.

Annexure "B"

LEGAL VIEWS ON THE STATUS OF THE OFFSPRINGS OF A COUPLE WHERE ONE OF THE SPOUSES IS A MEMBER OF A SCHEDULED TRIBE.

The question has arisen whether the offspring born out of wedlock between a couple one of whom is a member of Scheduled Tribe and other is not, should be treated as a Scheduled Tribe or not.

2. It may be stated at the outset the unlike members of Scheduled Castes the members of Scheduled Tribes continue as such even after their conversion to other religion. This is because while Constitution (Scheduled Castes) Order, 1950 provides in Clause 3 that only a member of Hindu or Sikh religion shall be

deemed to be a member of Scheduled Castes, the Constitution (Scheduled Tribes) Order, 1950 does not provide any such condition. This view has been upheld by the Supreme Court in the case reported in AIR 1964 S.C. at p.201.

3. It may be stated that unlike members of Scheduled Castes members of Scheduled Tribe remain in homogeneous groups and quite distinct from any other group of Scheduled Tribes. Each tribe lives in a compact group under the care and supervision of the elders of the Society whose word is obeyed in all social matters. A member committing breach of any prescribed conduct is liable to be excommunicated. The social custom has a greater binding force in their day to day life.

4. In the case of marriage between a tribal with a non-tribal the main factor for consideration is whether the couple were accepted by the triable society to which the tribal spouse belongs. If he or she as the case may be accepted by the society then their children shall be deemed to be Scheduled Tribes. But this situation can normally happen when the husband is a member of the Scheduled Tribes. However, a circumstance may be there when a Scheduled Tribe woman may have children from marriage with a non-Scheduled Tribe man. In that event the children may be treated as Scheduled Tribes only if the members of the Scheduled Tribe community accept them and treat them as members of their own community. This view has been held by the Assam High Court in Wilsom Read V.C.S. Booth, reported in AIR 1958 at p.128 where it has been held.

> *"The test which will determine the membership of the individual will not be the purity of blood, but his own conduct in following the customs and the way of life of the tribe, the way in which he has been treated by the community and the practice amongst the tribal people in the matter of dealing with persons whose mother was a khasi and father was a European".*

Similarly, in the case of Muthuswamy Mudaliar v.s Masilaman Mudaliar, reported in ILR 33, Madras 342, the court held:

> *"It is not uncommon process for a class of tribe outside the pale of caste to another pale and if other communities recognized their claim, they are treated as of that class of caste."*

Similary, in V.V. Giri V.D. Dora, reported in AIR 1959 S.C. 1318 (1327) the Court held:

> *"The case-status of a person in the context would necessarily have to be determined in the light of the recognition received by him from the members of the caste into which he seeks an entry.*
>
> *5. As mentioned above, it is the recognition and acceptance by the society of the children born out of a marriage between a member of Scheduled Tribes with an outsider, which is the main determining factor irrespective of whether the Tribe is matriarchal or patriarchal. The final result will always depend on whether the child was accepted as a member of the Scheduled Tribes or not.*
>
> *6. The general position of law has been stated above. However, each individual case will have to be examined in the light of existing facts and circumstances in such cases.*

6(c). Thus, the above instructions, which are still in force amply make it clear that main factor for grant of Scheduled Tribes certificate to the off-springs, of a couple, where one of the spouses is member of the Scheduled Tribe, is the acceptance of such offsprings by the

tribal society, as belonging to their community. In case the children are accepted by the society then they shall be deemed to be Scheduled Tribes. Para-5 categorically says that final result will always depend on whether the child was accepted as member of the Scheduled Tribes or not. The other factors being whether the children had advantageous start in life or suffered socially, economically and educationally.

6(d) Looking into the order passed by Sub-Divisional Officer (Civil) Bharmour, dated 22.8.2015, one cannot help, but notice that the Scheduled Tribe certificate to the off-springs of the petitioner has been denied, on the basis of mere conjectures, assumptions and presumptions. The Collector has not accorded due credence to the undisputed facts that petitioner and her children do not reside at native village of Sh. Madan Kumar (husband of petitioner). They are permanent residents of village Ulansa, have their names recorded in Pariwar Register of village Ulansa, have voter cards in village Ulansa, ration cards in village Ulansa. Petitioner and her children do not have any such certificate with respect to village Obdi, Post Office Sultanpur, where only the name of their father Sh. Madan Kumar, is entered. Learned Collector has not appropriately considered the fact that Gram Sabha Ulansa, had passed resolutions, to the effect that the local community has always accepted & regarded their children as belonging to the Gaddi Hali community. The community of their father did not accept them as their own.

6(e) Learned Collector has not at all effectively dealt with the instructions, while rejecting the claim of the children, for the issuance of Scheduled Tribes certificate. He has not disputed the factual position or the certificates, which were collected, during the inquiry, conducted by the Revenue Officer. His view in the impugned order is contrary to his own view as reflected in his communication dated 14.11.2014. He has refused to issue Scheduled Tribe certificate to the children of petitioner, primarily on the ground that they had resided at Mohalla Obdi, Chamba town, Tehsil and District Chamba and took higher education there and one of the daughters of the petitioner did M.C.A. from Punjab University, therefore, they cannot be said to be permanent resident of village Ulansa and therefore cannot be said to have suffered in any manner. There reasons have also weighed with the learned Single Judge, in dismissing the CWP No. 294 of 2016, decided on 06.12.2016.

7. In our considered opinion, in view of law laid down by the Hon'ble Apex Court, coupled with the factual position of the instant case, which has not been disputed, considering that Gram Sabha Ulansa, passed resolutions, wherein the petitioner and her children were acknowledged and accepted as belonging to Gadi HaliTribal Community, in view of the fact that the off-springs were certified as permanent residents of village Ulasna, in view of fact that children were raised as Gaddi Hali and were not accepted by their father's community, the impugned order cannot be allowed to sustain. If a tribal person for some reason, be it on account of work or on account of education, etc. leaves his permanent residence, for some other place, it cannot be said that he will loose his status of being permanent resident of his original village. It is profitable to reproduce the instructions issued by the Government of Himachal Pradesh, Department of Personnel hereinafter as under:-

> "Enclosure to Annexure 20.47, Copy of Govt. of India, Mini*stry of Home Affairs letter No. B.C. 12025/2/76 -SCT I dated 22.3.1977.*
>
> *Subject:- Issue of Scheduled Caste and Scheduled Tribe Certificates-Clarification regarding.*
>
> *I am directed to say that many instances have come to the notice of this Ministry wherein certificates of belonging to a particular Scheduled*

Caste/Scheduled Tribe have not been issued strictly in accordance with the principles governing the issue of such certificates. This is presumably due to inadquate appreciation of the legal position regarding the concept of the term "residence' on the part of the authorities empowered to issue such certificates.

As required under articles 341 and 342 of the Constitution, the President has, with respect to every State and Union Territory and where it is State after consultation with the Governor of the concerned State, issued orders notifying various castes and tribes as Scheduled Castes and Scheduled Tribes in relation to that State or Union territory from time to time. The inter-State area restrictions have been deliberately imposed so that the people belonging to the specific Community residing in a specific area, which has been assessed to qualify for the Scheduled Caste or Scheduled Tribe status, only benefit from the facilities provided for them. Since the people belonging to the same caste but living in different States/Union territories may not necessarily suffer from the same disabilities, it is possible that two person belonging to the same caste but residing in different States/Union territories may not both be treated to belong to Scheduled Castes/Tribes or vice-versa. Thus, the residence of particular person in a particular locality assumes a special significance. This residence has not to be understood in the literal or ordinary sense of the word. On the other hand it connotes the permanent residence of a person on the date of the notification of the Presidential Order Scheduling his caste/tribe in relation to that locality. Thus, a person who is temporarily away from his permanent place of abode at the time of the notification of the Presidential order applicable in his case, say for example, to earn a living or seek education, etc., can also be regarded as a Scheduled Caste or a Scheduled Tribes, as the case may be, if his caste/tribe has been specified in that order in relation to his State/U.T. But he cannot be treated as such in relation to the place of his temporary residence notwithstanding the fact that the name of his caste/tribe has been scheduled in respect of that area in any Presidential Order.

8. Competence to issue certificate and procedure.

8(a) A very relevant aspect also needs to be addressed to, in respect of competence to issue Scheduled Tribe certificate & the procedure required to be followed, in this regard. Chapter-28, of H.P. Land Records Manual, which deals in this regard:-

"28.1. The Sub-Divisional Officer (C) and Tehsildar Mohal shall be the competent authorities to issue SC/ST, Backward class and Bonafide Himachali certificates within their respective jurisdictions.

28.4. The applicant shall submit the application in Form-A. The Revenue Officer who receives an application for issuing SC/ST certificate shall enter the application in the register to be maintained by him in Form-R-I. He shall forward the application to the patwari Mohal or Consolidation or Settlement if the estate is under consolidation/settlement operations, for inquiry and report.

28.5. The patwari shall report on the application form regarding his caste/tribe from the revenue records like Shajra Nasab, Mutation register, jamabandi etc. If the applicant is a tenure holder in the estate. He shall also append a copy of the relevant revenue record in support of the caste/tribe with the application. If the applicant does not own or possess any land in the estate, he shall make an inquiry into the matter from the reliable and respectable residents of the estate in which the applicant resides regarding his

caste/tribe as the case may be. He will submit his inquiry report alongwith application to the competent Revenue Officer for further necessary action within a week.

28.6. The Competent Revenue Officer to issue certificate shall satisfy himself about the correctness of the inquiry and report of the patwari. He may make further inquiry as he deems necessary in the matter before issuing the certificate.

After satisfying himself he will issue the certificate to the applicant in Form-B in pursuance of the Act referred to above. He shall obtain the signature of the applicant after issuing the certificate in relevant column of the Register." (emphasis supplied)

8(b) In respect of procedure to be followed in such inquiry, detailed guidelines have been issued by Hon'ble Apex Court in case ***Kumari Madhuri Patil and another Vs. Addl. Commissioner, Tribal Development and others,*** (1994) 6 Supreme Court Cases 241, held as under:-

> 13. The admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Castes or Scheduled Tribes or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine candidates are also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate. The ineligible or spurious persons who falsely gained entry resort to dilatory tactics and create hurdles in completion of the inquiries by the Scrutiny Committee. It is true that the applications for admission to educational institutions are generally made by a parent, since on that date many a time the student may be a minor. It is the parent or the guardian who may play fraud claiming false status certificate. It is, therefore, necessary that the certificates issued are scrutinised at the earliest and with utmost expedition and promptitude. For that purpose, it is necessary to streamline the procedure for the issuance of social status certificates, their scrutiny and their approval, which may be the following:
>
> 1. The application for grant of social status certificate shall be made to the Revenue Sub-Divisional Officer and Deputy Collector or Deputy Commissioner and the certificate shall be issued by such officer rather than at the Officer, Taluk or Mandal level.
>
> 2. The parent, guardian or the candidate, as the case may be, shall file an affidavit duly sworn and attested by a competent gazetted officer or non-gazetted officer with particulars of castes and sub-castes, tribe, tribal community, parts or groups of tribes or tribal communities, the place from which he originally hails from and other particulars as may be prescribed by the Directorate concerned.
>
> 3. Application for verification of the caste certificate by the Scrutiny Committee shall be filed at least six months in advance before seeking admission into educational institution or an appointment to a post.
>
> 4. All the State Governments shall constitute a Committee of three officers, namely, (1) an Additional or Joint Secretary or any officer higher in rank

of the Director of the department concerned, (11) the Director, Social Welfare/Tribal Welfare/Backward Class Welfare, as the case may be, and (III) in the case of Scheduled Castes another officer who has intimate knowledge in the verification and issuance of the social status certificates. In the case of the Scheduled Tribes, the Research Officer who has intimate knowledge in identifying the tribes, tribal communities, parts of or groups of tribes or tribal communities.

5. Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over-all charge and such number of Police Inspectors to investigate into the social status claims. The Inspector would go to the local place of residence and original place from which the candidate hails and usually resides or in case of migration to the town or city, the place from which he originally hailed from. The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He should also examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the castes or tribes or tribal communities concerned etc.

6. The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine" or 'doubtful' or spurious or falsely or wrongly claimed, the Director concerned should issue show-cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgement due or through the head of the educational institution concerned in which the candidate is studying or employed. The notice should indicate that the representation or reply, if any, would be made within two weeks from the date of the receipt of the notice and in no case on request not more than 30 days from the date of the receipt of the notice. In case, the candidate seeks for an opportunity of hearing and claims an inquiry to be made in that behalf, the Director on receipt of such representation/reply shall convene the committee and the Joint/Additional Secretary as Chairperson who shall give reasonable opportunity to the candidate/parent/guardian to adduce all evidence in support of their claim. A public notice by beat of drum or any other convenient mode may be published in the village or locality and if any person or association opposes such a claim, an opportunity to adduce evidence may be given to him/it. After giving such opportunity either in person or through counsel, the Committee may make such inquiry as it deems expedient and consider the claims vis-a-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof.

7. In case the report is in favour of the candidate and found to be genuine and true, no further action need be taken except where the report or the particulars given are procured or found to be false or

fraudulently obtained and in the latter event the same procedure as is envisaged in para 6 be followed.

8. Notice contemplated in para 6 should be issued to the parents/guardian also in case candidate is minor to appear before the Committee with all evidence in his or their support of the claim for the social status certificates.

9. The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the Caste Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate the same. It should communicate within one month from the date of the conclusion of the proceedings the result of enquiry to the parent/guardian and the applicant.

10. In case of any delay in finalising the proceedings, and in the meanwhile the last date for admission into an educational institution or appointment to an officer post, is getting expired, the candidate be admitted by the Principal or such other authority competent in that behalf or appointed on the basis of the social status certificate already issued or an affidavit duly sworn by the parent/guardian/candidate before the competent officer or non-official and such admission or appointment should be only provisional, subject to the result of the inquiry by the Scrutiny Committee.

11. The order passed by the Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution.

12. No suit or other proceedings before any other authority should lie.

13. The High Court would dispose of these cases as expeditiously as possible within a period of three months. In case, as per its procedure, the writ petition/miscellaneous petition/matter is disposed of by a Single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 136.

14. In case, the certificate obtained or social status claimed is found to be false, the parent/guardian/the candidate should be prosecuted for making false claim. If the prosecution ends in a conviction and sentence of the accused, it could be regarded as an offence involving moral turpitude, disqualification for elective posts or offices under the State or the Union or elections to any local body, legislature or Parliament.

15. As soon as the finding is recorded by the Scrutiny Committee holding that the certificate obtained was false, on its cancellation and confiscation simultaneously, it should be communicated to the educational institution concerned or the appointing authority by registered post with acknowledgement due with a request to cancel the admission or the appointment. The Principal etc. of the educational institution responsible for making the admission or the appointing authority, should cancel the admission/appointment without any further notice to the candidate and debar the candidate from further study or continue in office in a post.

Thus, SC/ST certificates are to be issued by Sub Divisional Magistrate, on the basis of reports submitted by the Revenue Officer. It is thereafter, for the Scrutiny Committee, to examine the veracity, legality and validity of such certificates.

This procedure has admittedly not been followed in the instant case. Certificate has been denied by learned Collector on the basis of hypothesis, assumptions, presumptions & conjectures. Resultantly, matter was never examined by the Scrutiny Committee.

9. In view of the aforesaid discussions, the present appeal is allowed. The orders dated 22.8.2015 and 04.02.2016, passed by the Sub-Divisional Officer (Civil) Bharmour, District Chamba, H.P., are quashed & set aside. The judgment of learned Single Judge, dated 06.12.2016, passed in CWP No. 294 of 2016, is also set aside. Matter is remitted back to the Sub Divisional Officer (Civil), Tehsil Bharmour, District Chamba, with a direction to decide the matter of issuance of Scheduled Tribe certificates, to the children of petitioner afresh, keeping in view the observations made in the judgment within 8 weeks, from today. Appeal stands disposed of, so also, pending application(s), if any.

****

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

State of H.P. and others …..Appellants/Respondents.
Versus
Abnash Chander Mehra …..Respondent/Petitioner/Cross-objector.

RFA No. 4036 of 2013 along
with Cross objections No. 4022 of 2013.
Reserved on : 28th May, 2019.
Decided on : 28th June, 2019.

Land Acquisition Act, 1894– Section 34– Taking over of possession of land by Government without acquiring it –Consequences –Possession of land taken by Government in 1985 for construction of road- Notification under Section 4 of Act for its acquisition issued in 2005- Held– On facts, there is no specific evidence of date regarding taking over of possession of land by Govt. for purpose of raising construction of road in 1985- Landowner entitled for additional interest @ 15% of per annum on market value of land towards its utilization by government from January, 1986 till issuance of notification under Section 4 of Act as damages. (Paras 3 & 4)

For the Appellant(s): Mr. Yudhveer Singh Thakur, Dy. A.Gs.
For the Respondent/Cross-objector: Mr. Anand Sharma, Sr. Advocate with Mr. Karan Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The State of Himachal Pradesh, is, aggrieved by the award pronounced by the learned Reference Court, upon, reference petition No. 3FTC/4 of 2008, wherethrough, compensation amount, borne in a sum of Rs.4000/- per square meter stood assessed, vis-a-vis, the lands, of, the respondents herein, and, all the statutory benefits, were, also ordered to be added thereon.

2. The landlowners' lands, were validly acquired, rather for construction of Kather Bye Pass road, and, during the pendency of the land reference petition, before the learned reference Court, sale deeds respectively borne, in Ex.PW1/C, to, Ex.PW1/G, and, in Ex.R-1 and Ex. R-2, were tendered into evidence, (i) each comprising hence valid, and, reckonable sale exemplars, and, theirs purveying facilitation, to the learned reference Court, to, on their anvil, hence, adjudge just, fair, and, reasonable compensation, vis-a-vis, the acquired lands. However, the learned reference Court appears, not to assign any merit thereto, rather appears, to, on anvil of an award rendered, on 17.3.2008, upon, Reference Petition No. 9-S/4 of 2006, by the learned District Judge, Solan, (ii) award whereof appertains, to the acquisition of land situated at Basal Patti Kather, District Solan, H.P., and, whereunder market value, of, therein acquired land stood assessed at Rs.4000/- per square meter, and, hence, in tandem therewith, rather , assess compensation, vis-a-vis, the acquired lands hereat. The previous award, borne in Ex.PW1/B, appertains to a notification issued under Section 4, of the Land Acquisition Act, on 4.6.2005, and, the award hereat, was made by the land acquisition Collector, and, subsequently by the Reference Court, in respect, of, a notification, issued on 22.9.2005, (iii) and, when hence there is proximity in respect of issuance, of, the afore respective notification(s), under Section 4, of, the Land Acquisition Act, for, hence bringing therethroughs rather acquisition, of, lands of the landowners, (iv) and, when the purpose of acquisition, is common inter se the notification issued, in respect whereof, Ex.PW1/B was pronounced, and, vis-a-vis, the lands hereat, (v) and, when the learned Deputy Advocate General, has not been, able to bring forth, any potent evidence, personificatory qua placing, of, reliance thereon being misfounded, (vi) given the lands hereat not bearing proximity in location, vis-a-vis, the lands borne in Ex.PW1/B, (vii) and, the notification in respect whereof Ex.PW1/B, stood rendered also not holding proximity, in time, vis-a-vis, the notification issued, for hence bringing therethroughs, to, acquisition, the lands of the landowners hereat, (viii) and, rather when, for the reasons aforestated, when close proximity, in timing occurs inter se the issuance, of, notification, in respect whereof, award borne in Ex.PW1/B stood rendered, vis-a-vis, the issuance, of, the extant notification, thereupon, the reliance placed by the learned reference Court, upon, Ex. PW1/B, is, both meritworthy, and, sagacious.

3. The plea of the cross-objectors, with respect, to taking of possession, of, their land for construction, of the road, in the year 1985, stands averred in the petition, and, is also testified by the petitioner/cross-objector, in his testification. The afore averment is not denied by the respondents. In their reply to the petition, they have admitted qua the possession of the land of the petitioner being taken in the year 1985. Consequently, the plea of the respondent/cross-objector qua taking of possession of land of the petitioner, for construction of the road, in the year 1985, hence is, cogently proven. Admittedly, notification under Section 4 of the Act was published, on 24.9.2005, and, the land acquisition collector or the learned reference court, has not awarded, any rent or damages, for utilization of land of the respondent/cross-objector, since the year 1985 till 24.9.2005. Consequently, damages were required to be determined by the land Acquisition Collector, at the time of announcing, of, award, qua compensation amount.

4. The learned counsel appearing for the respondent/cross objector has placed reliance, upon, the verdicts, pronounced by the Apex Court in a case titled, as Bahuan Singh and others vs. Land Acquisition Collector, and, another reported in (2016)13 SCC 412, wherein, after considering, and, relying upon a judgment passed in cases R.L. jain (d) by LRs v. DDA, reported in (2004)4 SCC 79, Madishetti Bala Ramul v. Land Acquisition Officer, reported in (2007)9 SSC 650, and Tahera Khotoon v. Land Acquisition Officer, (2014) 13 SCC 613, landowners in the similar circumstances were awarded, an additional interest by way of damages, at the rate of 15% per annum, vis-a-vis, the compensation amount, from

the taking of actual possession, till the date of issuance, of, notification under Section 4 of the Act.

5. Since, in the instant case, there is no specific date, on record with respect to taking of possession, by the State in the year 1985, consequently, the respondent/cross-objector, is, awarded additional interest @15% per annum, on the market value of land, fixed by reference Court, since, 01.01.1986 till the date of issuance, of, notification under Section 4 of the Act, i. e. 24.9.2005, as damages, for utilization of land, for, construction, of, road.

6. For the foregoing reasons, the appeal filed by the State is dismissed, whereas, the cross objections filed by the respondent/cross-objector is allowed, in the afore manner, and, the impugned award is modified to the afore extent. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh ….Appellant
Versus
Naresh Kumar ….Respondent

Cr. Appeal No. 782 of 2008
Judgment Reserved on 15th May, 2019
Date of Decision : 28.6.2019

Expressions – 'Jamatalashi' – Meaning of – Held, jamatalashi means, personal search of an individual – Search of bag does not amount to Jamatalashi. (Para 10)
Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of charas– Whether small, intermediate or commercial quantity? – Determination - Held, amount of contraband recovered from accused cannot held to be more than that what was actually sent to chemical analyst and affirmed by FSL as contraband - On facts, entire recovered stuff was not sent to FSL for examination – Only its sample of 25 gms was sent for chemical examination – Accused can be held to be possessing 25 gms of contraband only. (Para 23)
Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 & 50– Search of bag -Notice u/s 50 of Act given to accused prior to search of bag but defective -Consequences– Held, only search of bag was conducted leading to recovery of contraband– There was no necessity to issue notice as required u/s 50 of Act before searching bag– Notice even if defective will not have any effect on prosecution case. (Para 11)

Cases referred:
Dhan Bahadur vs. State of H.P., 2009(2) Shim.L.C. 203
Gaunter Edwin Kircher vs. State of Goa, (1993)3 SCC 145
Mohan Lal vs. State of Punjab, AIR 2018 SC 3853

For the Appellant: Shri J.S. Guleria and Shri Kunal Thakur, Deputy Advocate General.
For the Respondent: Shri S.K. Sood, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This appeal has been preferred by State against judgment dated 29.8.2009 passed by learned Sessions Judge, Kinnaur at Rampur, in Sessions Trial No. 07 of 2007 titled State of H.P. vs. Naresh Kumar, whereby respondent Naresh Kumar stands acquitted in case FIR No. 109 of 2006 dated 26.11.2006 registered at Police Station Ani under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, (hereinafter referred to as 'the NDPS Act').

2. We have heard Mr. J.S. Guleria, learned Additional Advocate General as well as Mr. S.K. Sood, learned counsel for the respondent, and have also gone through the record.

3. The prosecution case is that the police party, headed by SI/SHO Daya Sagar (PW7), consisting of HC Tain Singh (PW1),HHC Raj Kumar (PW2) and C. Bhup Singh had left the Police Station, Ani, at about 8.40 AM for patrolling and traffic checking towards Shamshar etc. after recording DDR No. 5 dated26.11.2006 (Ext.PX). This police party, at about 10 AM, while patrolling at Shamshar curve (moad), noticed a person coming from Kandu Gadd towards Ani having a plastic bag in his hand, who, on noticing the police party, became perplexed, which caused suspicion leading to inquiry about his name and address and thereafter search of his bag was conducted after giving him notice under Section 50 of NDPS Act, Ext.PW1/A, whereupon charas weighing 1 Kg. 500 grams was recovered from the bag carried by him, out of which two samples of 25 grams each were taken and thereafter entire bulk and two samples were sealed indifferent packets with seal impression 'K' and were taken in possession vide memo Ext.PW1/C. Entire search and seizure proceedings were witnessed by PW1 Tain Sigh and PW Bhup Singh (not examined). Copy of memo was also supplied to the respondent/accused under his signatures and NCB formExt.PW7/A was filled in, in triplicate, specimen seal impressionExt.PW1/F was also taken on NCB Form and separate piece of cloth. After completing the search and seizure proceedings, rukkaExt.PW6/A was prepared by PW7 Daya Sagar and was sent to the Police Station through PW2 HHC Raj Kumar for registration of FIR, who had handed over it to PW6 MHC Lal Singh, whereupon PW6Lal Singh had registered FIR Ext.PW6/B and handed over the copy thereof along with case file to PW2 Raj Kumar for giving it toPW7 Daya Sagar. PW7 Investigating Officer had recorded the statements of witnesses and prepared the site plan Ext.PW7/Band had arrested the respondent giving information about his arrest to his brother Karamvir as per memo Ext.PW1/D, as desired by the respondent/accused.

4. On arrival at the Police Station, PW7 Vidya Sagar had deposited the case property along with documents in the Malkhana through PW6 MHC Lal Singh, who had made entries in Malkhana Register in this regard, copy of extract whereof isExt.PW6/C.

5. On 27.11.2006, PW7 Daya Sagar had prepared the special report Ext.PW3/A and the same was delivered to SDPO Ani through PW4 HHC Santosh Kumar at 10.15 AM on the same day. PW3 Om Parkash, the then Reader to SDPO Ani, after receiving the said special report, had entered the same in his register at Sr. No. 1625.

6. On 28.11.2006 PW6 Lal Singh through PW5 HHC Neel Chand had sent one sample of recovered contraband to Central Forensic Science Laboratory, Chandigarh for chemical analysis vide RC No. 73 of 2006 Ext.PW6/D. However, the sample was not accepted in the Laboratory and was returned back for completing certain formalities and

after removing the objections, the sample of recovered contraband was again taken to CFSL Chandigarh on4.12.2006. Report Ext. PC was received from CFSL Chandigarh, wherein it was found that it was a sample of charas. On completion of investigation, challan was presented in the Court.

7. On the basis of record, placed before it, the trial Court, on finding prima facie complicity of respondent/accused in the commission of offence, framed the charge under Section 20of NDPS Act against the respondent wherein the respondent had pleaded not guilty and claimed trial.

8. Prosecution has examined seven witnesses and has produced the documentary evidence to establish its case, whereas after recording statement under Section 313 Cr.P.C, respondent had chosen to examine HC Anup Kumar, as DW1. On conclusion of trial, the trial Court has acquitted the respondent/accused, hence the State is in appeal.

9. As per prosecution story, the place of apprehending the respondent and recovering the contraband from his possession, is secluded one and as at that time no independent witness was available on the spot, therefore, PW1 Tain Singh and PW Bhup Singh were associated as the witnesses to the search and seizure by the Investigating Officer. Prosecution has examined Investigating Officer SI/SHO Daya Sagar (PW7), HC Tain Singh (PW1) and HHC Raj Kumar (PW2) as spot witnesses to the recovery of contraband, whereas C. Bhup Singh was given up by learned Public Prosecutor being a witness of the same sequence. PW6 has performed the duty of MHC for registering of FIR, after receiving Ruka, accepting the deposit of case property in Malkhana by entering the same in Register. PW3 Om Parkash,PW4 HHC Santosh and PW5 Neel Chand have performed their duties respectively as Reader to SDPO(PW3), carrier of special report to SDPO Ani (PW4) and carrier of the sample to CFSL Chandigarh twice (PW5). PW1, PW2 and PW7 in their depositions in Court have substantially corroborated the prosecution case.

10. PW7 Daya Sagar, Investigating Officer, in his deposition in Court, has corroborated the prosecution case. Two witnesses PW1 Tain Singh and PW2 Raj Kumar, by and large, have corroborated the prosecution story except both of them have added that personal search of accused was conducted and nothing incriminatory was found from his personal search, whereas prosecution case ,as placed on record in notice U/s 50 of NDPS Act, (Ext.PW1/A), seizure memo (Ext.PW1/C), Rukka(Ext.PW6/A) and FIR (Ext.PW6/B) as well as in deposition of PW7Investigating Officer is that polythene bag being carried by the respondent was only searched. Not only in above referred documents, prepared on 26.11.2006, but in special report dated27.11.2006 (Ext.PW3/A) also, it is mentioned that after obtaining oral as well as written consent of respondent, Jamatalashi of his polythene bag was carried out. No doubt, Jamatalashi means personal search, but here in the present case, everywhere on the documents, it is categorically mentioned that Jamatalashi of bag was undertaken. It appears that poor Investigating Officer was not even having the knowledge of meaning of word 'Jamatalashi' so used for conducting the search of polythene bag. He has used the words 'Jamatalashi of polythene bag was undertaken'. The fact that no personal search of respondent was carried out is also substantiated from the facts that neither there is any personal search memo available on record, nor has been referred in any of the documents prepared during search and seizure proceedings undertaken during search of bag being carried by the respondent in his hand.

11. Incident is of 26.11.2006, whereas PW1 and PW2have been examined in Court on 15th February, 2008. It appears that they have tried to become more wise by adding the procedural fact on record for the fact that notice under Section50 of NDPS Act was given to accused and his written consent for his personal search to the police was also

undertaken thereon. The fact remains that neither as per documents on record nor as per statement of Investigating Officer, PW7, it can be construed that personal search of respondent was ever conducted at the time of recovery of contraband. Therefore, keeping in view the manner in which contraband was recovered from the possession of respondent, provisions of Section 50 of NDPS Act are not applicable. As there was no necessity to issue the notice under Section 50 of NDPS Act, any defect in the said notice/consent memo (Ext.PW1/A) hardly makes any difference. The trial Court in its reasons for rejecting the claim of prosecution has also observed that accused was apprised his right to have searched before the Gazetted Officer, Magistrate or the Police and as third option to search before the police, other than two options of Gazetted Officer or Magistrate, was observed to have been given to respondent, notice under Section 50 of NDPS Act was found defective, resultantly vitiating the entire search and seizure procedure. As observed supra, provision of Section 50 of NDPS Act was not applicable in the present case, even if it is considered applicable, as per record, fact referred by the trial Court that third option of search by police has been extended or communicated to the respondent has been found false as evident from consent memo Ext.PW1/A and seizure memoExt.PW1/C. Anyhow, in given facts and circumstances of present case, Section 50 of NDPS Act is not applicable as no personal search of accused has been claimed to have been conducted.

12. It is true that keeping in view the stringent punishment for commission of offence under the NDPS Act and also issue of personal liberty of accused, Legislature as well as the Courts have provided and evolved safeguards to protect the personal liberty by insisting for joining of independent witnesses at the time of carrying out search and seizure procedure during apprehension of transportation/recovery of contraband. However, it may not be possible, in all times, to associate and join independent witnesses on account of non-availability for various reasons. Therefore, considering that police/official witnesses are also like other witnesses, where the deposition of official/police witnesses have been found cogent, reliable, trustworthy and convincing, the Courts have not hesitated from punishing the culprits even in absence of independent witness. However, where the integrity and veracity of official/police witnesses are doubtful, the Courts have always given its benefit to accused on the basis of cardinal principle of criminal jurisprudence that where there is doubt then benefit is to be extended to the accused.

13. In the present case, there is no major infirmity or discrepancy or contradiction in the depositions of official witnesses in Court with respect to the prosecution case as put forth in the challan except the one, as referred supra. It has also come on record that during cross examination of witnesses,PW1 Tain Singh has explained that no private witness was available and therefore, no such witness could be associated.PW2 Raj Kumar has also stated like this. Similarly, PW7Investigating Officer, in his cross examination, though has admitted that passage was thoroughfare but has explained that spot of recovery was secluded place and therefore, any witness from locality could not be associated. To these three witnesses, no suggestion has been put about availability of witnesses on the spot or possibility of presence of any independent witness at some distance or with regard to any habitation nearby the place where contraband was recovered from the accused/respondent. Therefore, non-joining of independent witnesses, as explained by official witnesses, has not been questioned by and on behalf of the respondent.

14. In his statement under Section 313 Cr.P.C, the respondent has taken the ground that on 25.11.2006 at about8.30 AM, he had reached Luhri by a mini bus and at that time HC Tain Singh had misbehaved with him and had taken him to the Police Post and had also taken Rs.42,000/- from his pocket where after, at about 11.30 AM, police from the Police Station, Ani had come and taken him to Ani and thereafter a false case was foisted

upon him. Strangely enough, no such question/suggestion was ever put to PW1 HC Tain Singh during his cross examination or PW2 Raj Kumar who were examined in February, 2008. However, the suggestion has been put to PW7,who was examined in April, 2008, that HC Tain Singh had hot exchange with the accused at Luhari when he was going in bus from Karsu to Rampur leading to foisting of case upon respondent. There was no suggestion to PW1 and PW2 regarding this altercation in February, 2008, whereas allegations of altercation with HC Tain Singh were alleged for the first time in April, 2008 in cross examination of PW7 and in May, 2008, instatement under Section 313 Cr.P.C., grabing of Rs.42,000/- from the pocket of accused was also added. Had it been the true, the respondent would have made a complaint to the appropriate authority at the initial stage and respondent did not raise any such issue neither immediately after his arrest or foisting of false case upon him, nor also during the cross examination of relevant material witnesses. Therefore, this defence appears to have beena result of an afterthought.

15. Learned counsel for the respondent, by referring documents Ext.PW1/A, Ext.PW1/B, and Ext.PW1/D, has submitted that there are cutting, over-writing and discrepancies over these documents with reference to name of witness Bhup Singh which indicates that these documents have not been prepared on the spot and also that C. Bhup Singh was not present on the spot and these documents have been prepared and signed at the Police Station. In the memo of consent Ext.PW1/A, word “Aarkshi”(constable) has been written by doing over writing on the name of Raj Kumar. It is a fact that C. Raj Kumar was also present on the spot and Bhup Singh and Tain Singh were also present and I.O. had associated Tain Singh and Bhup Singh as witnesses to the search and seizure procedure, whereas through Raj Kumar the Ruka was sent to the Police Station. Therefore, writing the name of Raj Kumar instead of Bhup Singh during the process of preparing consent memo and later on correcting it as Bhup Singh is not fatal to the prosecution case.

16. Similarly, in Ext.PW1/B C. Bhup Singh has been mentioned as HC Bhup Singh and in Ext.PW1/D, he has been mentioned as C. Bhup Ram. In these three documents, C. Bhup Singh has signed as Bhup Singh and his signatures in these documents have neither been disputed nor are different in nature. On these three documents, the signatures of C. Bhup Singh are identical. Therefore, we find that cuttings/over-writing so pointed out by learned counsel for the respondent are not material in nature. Perusal of document Ext.PW1/D clearly indicates that this document has been prepared in natural course as after signatures of respondent, a little space is left for mentioning the name of witness and same has been mentioned in that small place. Had these documents been prepared, as alleged by learned counsel for the respondent, these natural cuttings and adjustments would not have been there in these documents.

17. Prosecution has not examined C. Bhup Singh by giving up him. Investigating Officer has appeared as PW7 and two other witnesses PW1 and PW2 have corroborated the major portion of his statement, which is in consonance with prosecution case. In their cross examination, nothing favourable to the accused was elicited. Therefore, giving up the examination of C. Bhup Singh being a witness of same sequence is also not fatal to the prosecution. Had there been any material contradiction or discrepancy going to the root of genesis of prosecution case, there would have been necessity to examine C. Bhup Singh compulsorily.

18. Learned counsel for the respondent has also pointed out that there is lapse on the part of police in depicting movement of samples sent to CFSL Chandigarh in correct manner. He has pointed out that in RC dated 28.11.2006(Ext.PW6/D), there is reference of departure of PW5 Neel Chand along with sample of charas and other relevant documents, whereas the said sample was delivered in CFSL Chandigarh on5.12.2006 and in extract of

Malkhana register (Ext.PW6/C) also, sending of sample to CFSL Chandigarh has been claimed on 28.11.2006 and there is no explanation as to where PW5 Neel Chand, along with sample, remained from 28.11.2006 to5.12.2006. PW5 HHC Neel Chand, in his deposition in Court has categorically stated that the sample was handed over to him on28.11.2006 which was returned by CFSL Chandigarh with objections and in turn, he had handed over it back to MHC LalSingh,PW6, who again had handed over it to him on 4.12.2006which was deposited by him in CFSL Chandigarh and receipt thereof was handed over to PW6 on 7.12.2006. In his crossexamination, there is no suggestion to him that he had not approached the CFSL Chandigarh after receiving it on 28.11.2006and that there was no objection raised by CFSL Chandigarh and he had taken the sample somewhere-else or the sample was replaced by him. The nature of cross examination is such that instead of doubting the claim of prosecution it stands further clarified by PW5 Neel Chand during his cross examination by explaining that sample was taken to Chandigarh on 30.11.2006after getting the docket prepared from Kullu. Judicial notice of the fact can be taken that during winter season journey from Ani to Kullu consumes a complete one day i.e. about 12 hours journey. Further PW6 Lal Singh has committed irregularity by not entering the return of sample in Malkhana on 30.11.2006 and thereafter handing over the same on 4.12.2006 after removing the objections, but keeping in view the other overwhelming evidence on record proving the recovery of charas from conscious possession of respondent and the fact that in cross examination of PW5 Neel Chand, his version, stated in examination in chief, has not been disputed, this faulty performance of duty by PW6Lal Singh is not affecting the merits of the case of prosecution against the respondent.

19. Learned counsel for the respondent has also raised the issue that in the present case, complainant as well as Investigating Officer is one and same Officer and therefore, keeping in view the pronouncement of Apex Court in Mohan Lalvs. State of Punjab reported in AIR 2018 SC 3853, the respondent is entitled for acquittal and has rightly been acquitted by the trial Court. This plea is not available to respondent as the Apex Court in case Varinder Kumar vs. State of Himachal Pradesh reported in 2019 SCC OnLine SC170 has clarified that the judgment passed in Mohan Lal's case shall not affect the status of cases instituted/filed prior to the said judgment, rather this judgment shall have the prospective applicability/effect and all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal's case supra shall continue to be governed by the individual facts of the case.

20. From the aforesaid evidence on record, prosecution has been able to establish that there was recovery of contraband from the possession of respondent on 26.11.2006 as claimed by prosecution. Therefore, presumption under Sections 35 and 54 of NDPS Act comes into play and in such a situation, there is reverse onus on the accused to prove the case otherwise. In the present case, the respondent is resident of District Kaithal, State of Haryana and he was found at a place which is interior place of Himachal Pradesh and respondent has not brought anything on record to justify his presence in such a remote area of Himachal Pradesh for any other lawful reason except for indulging in the trafficking of drugs.

21. In the absence of independent witness on record, we have scrutinized the evidence of official witnesses with more carefulness and as discussed above, we find that there is cogent, reliable, trustworthy and convincing evidence on record which establishes that accused was found in possession of charas as alleged by prosecution and therefore, he is liable to be convicted for the same.

22. The trial Court has failed to appreciate the evidence on record in right perspective and has acquitted the accused on the grounds which were not material in

nature or having impacton the veracity of prosecution case and also relied upon the factors which were not material so as to doubt the veracity of prosecution case. Rather, as discussed above, evidence on record has established the prosecution case qua the recovery of charas from the conscious possession of respondent. Therefore, the judgment passed by the trial Court acquitting the respondent is set aside and respondent is convicted for commission of offence under Section 20 of NDPS Act.

23. As quantum of recovery is concerned, as per prosecution case, 1 Kg. 500 grams charas was recovered from the respondent and after taking out two samples of 25 grams each, the remaining contraband was sealed in parcel and samples were also sealed in two different parcels. Bulk of charas claimed to be recovered from the respondent is Ext.P2 but during investigation and thereafter also, only one sample of 25 grams of charas was sent to CFSL Chandigarh for chemical analysis and as per chemical analyst report Ext.PX the sample was found to be of charas.

24. As per ratio laid down by the Apex Court in Gaunter Edwin Kircher vs. State of Goa, reported in (1993)3 SCC145 the amount of contraband, recovered from the respondent, cannot be held more than that which was sent to the Chemical Analyst and was affirmed by the Forensic Science Laboratory as a contraband. The failure to send the entire mass for chemical analysis would result to draw inference that said contraband has not been analyzed and identified by CFSL as the charas.

25. Learned Single Judge of this Court in Dhan Bahadurvs. State of H.P. reported in 2009(2) Shim.L.C. 203, after relying upon the judgment in Gaunter Edwin Kircher's case supra, has held that only analyzed quantity of contraband can be said to have been recovered from the respondent. Applying the ratio of law laid down by the Apex Court and followed by learned Single Judge of this Court, we find that in the present case quantity of recovered contraband is to be taken as 25 grams only and therefore, respondent can be convicted for recovery of 25grams charas from his conscious possession for which punishment has been provided under Section 20(b)(ii)(A) for a term which may extend the six months or with fine which may extend to Rs.10,000/- or/with both.

26. Respondent was arrested by police on 26.11.2006and he remained in custody during the entire trial till pronouncement of final judgment on 29.8.2008. Therefore, he has already served the sentence more than the period prescribed for commission of offence proved on record committed by him. Therefore, no further sentence is required to be imposed upon him. The bail bonds, so furnished by the respondent stand discharged. Appeal is allowed in aforesaid terms. Record be sent back forthwith.

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

Shri Udi Ram .....Appellant/defendant.
Versus
Sh. Anant Ram Negi ......Respondent/plaintiff.

RSA No. 437 of 2015.
Reserved on : 27th May, 2019.
Decided on : 28th June, 2019.

Specific Relief Act, 1963 – Sections 10 & 15 – **Indian Registration Act, 1908** – Section 17 (1A) - Specific performance of unregistered agreement to sell - Permissibility **–** Held, Unregistered agreement to sell even if it was executed after the amendment made in Indian Registration Act vide Amendment Act 2001 and possession under it, was delivered to proposed vendee, still it can be specifically enforced by him against vendor – There is no bar to enforce unregistered agreement to sell by instituting suit for specific performance for executing a registered sale deed. (Para 9)

Cases referred:
Didar Singh vs. Nasib Kaur, and, others, 2012(2), Civil Court Cases, 428 (P&H)
S. Kalawati Devi vs. V.R. Somasundaram and others, 2010(2) Shimla Law Journal (SC) 770

For the Appellant: Mr. R.S. Chandel, Advocate.
For the Respondent: Mr. Y.P. Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit, for, rendition of a decree for specific performance of contract of sale, executed inter se him, and, the defendant, stood decreed, by the learned trtial Court, and, in an appeal carried therefrom by the aggrieved defendant, hence, before the learned first appellate court, also begot, a verdict in affirmation thereto. The defendant, is, aggrieved from the concurrent judgments, and, decrees recorded against him, upon, civil suit No. 120/1 of 2009, and, upon Civil Appeal No. 14-T/13 of 2013/12, hence, has, thereagainst instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that the plaintiff has filed a suit for specific performance of agreement dated 22.2.22009 vide which the defendant had agreed to sell the land comprised in Khata No.74, Khatauni No.208, Khasra No.795, 797 and 798, Kita 3, measuring 5-13 bighas, situated in Chak Bagain, Pargana Shilla Ghoond, Tehsil Theog, District Shimla, H.P. along with single storeyed house having three rooms for sale consideration of Rs.5,00,000/-. The oral agreement to sell was entered into in the month of January, 2009, at that time, the possession of suit land was delivered to the plaintiff. The plaintiff had planted 500 apple plants over the suit land. The sale deed was to be executed on or before 30.09.2009. The plaintiff requested the defendant to receive the balance sale consideration of Rs.2,00,000/- as the plaintiff is still ready and willing to perform his part of agreement. Despite the legal notice of 28.7.2009, the defendant threatened to alienate the suit land in favour of the third person. On 22.8.2009, the wife and, son of defendant started interference in the suit land and forcibly tried to dispossess the plaintiff. The matter was reported to the police and FIR No.136/2009 has been registered at police station Theog. The defendant failed to execute the sale deed. The plaintiff has prayed that the decree for specific performance of contract of sate dated 22.2.2009 be passed in his favour and further prayed that decree for permanent prohibitory injunction be passed against the defendant restraining him from interfering with the possession of the plaintiff over the suit land in any manner.

3. The defendant contested the suit and filed written statement, wherein he has taken taken preliminary objections qua the suit of the plaintiff as framed is not competent, plaint deserves to be rejected as the agreement is neither registered nor properly stamped. On merits. The defendant has denied that he had entered into an agreement to

sell the suit land for sale consideration of Rs.5,00,000/-. The defendant further denied that he has executed any agreement. The agreement is a forged and fabricated document in view to grab the land of the defendant. The plaintiff had obtained the signatures of the defendant on blank papers on the pretext of exchange of land. It is denied that the earnest money to the tune of Rs.3,00,000/- were paid by the plaintiff to the defendant. The oral agreement has also been denied. It is also denied that in the month of January, 2009, the possession was delivered to the plaintiff. It is denied that the plaintiff has planted the apple orchard over the suit land. The defendant claimed that the electricity meter is also in his name. The defendant further averred that the plaintiff on 22.8.2009 tried to trespass into the house along with 4-5 persons, and, gave beating to the son of the defendant, threw the articles belonging to the defendant and outraged the modesty of wife of the defendant, as, the FIR was registered against the plaintiff at police station Theog. The question of readiness and willingness to perform the agreement does not arise at all as no agreement has been executed.

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

1. Whether the plaintiff is ready and willing to perform his part of the agreement dated 22.2.2009, as prayed for? OPP
2. Whether the plaintiff is entitled for specific performance of agreement dated 22.2.2009, as prayed for?OPP.
3. Whether the plaintiff is entitled for permanent prohibitory injunction as prayed for?OPP
4. Whether the suit is not properly framed as alleged?OPD.
5. Whether the suit is liable to be rejected as alleged?OPD.
6. Whether the defendant has agreed to exchange his land with the plaintiff, as alleged?OPD
7. Whether the plaintiff has obtained the signature of the defendant over the agreement dated 22.2.2009 on the pretext of filing of the application for exchange as alleged?OPD.
8. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by, the defendant/appellant herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

6. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 4th May, 2016, this Court, admitted the appeal, instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial question of law:-

> Whether on account of mis-appreciation of the pleadings and law and also misreading of the oral as well as documentary evidence available on record, the findings recorded by both courts below are erroneous and, as such, the judgment and decree impugned in this appeal, being perverse and vitiated is not legally sustainable?

Substantial question of Law No.1 :

7. The contract of sale, executed inter se the contesting litigants, was entered into, on 22.2.2009. The learned counsel appearing for the appellant/defendant has contended with much vigour, before this Court, that since the contract of sale stood executed subsequent, to an amendment being made to Section 17(1)(A), of, the Indian Registration Act, provisions whereof stand extracted hereinafter:-

> "The documents containing contracts to transfer for consideration, any immovable pro9perty for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered, if they have been executed on or after the commencement of the Registration and, other related laws (Amendment) Act, 2001, and, if such documents are not registered on or after such commencement, then, they have have not effect for the purpose of the said Section 53A."

(a) and when the afore extracted provisions, hence peremptorily, require qua any document rather embodying therewithin, a contract of sale, vis-a-vis, any immovable property, hence containing a value of more than Rs.100/-, and, entered subsequent, to, the afore amendment taking place, vis-a-vis, the provisions of Section 17 (1)(A) of the Indian Registration Act, (b) and when therethrough, the possession, of, immovable property, has been evidently delivered, vis-a-vis, the purchaser, as uncontrovertedly hereat, possession, of, the suit property, stands delivered by the defendant to the plaintiff, (c) thereupon, hence, it being compulsorily registrable, (d) and, when uncontestedly, the contract of sale hereat, embodied in Ex.PW1/A, is, not registered, rather in consonance with the afore requirement of law, (e) thereupon, he contends, that the afore document hence being neither readable in evidence, nor became admissible in evidence, rather was required to be impounded, and, thereafter, he contends, that the rendition of a decree of specific performance, with respect to the suit property, embodied in Ex.PW1/A, by both the learned courts below, being shaky, and, infirm.

8. However, the afore submission, as, addressed before this Court by the learned counsel, appearing for the aggrieved defendant/appellant herein, is, a gross mis-dependence, upon, the afore provisions of law, (a) given the afore amendment made to Section 17(1)(A) of the Indian Registration Act, being interpreted by the Hon'ble Apex Court in a case titled as ***S. Kalawati Devi vs. V.R. Somasundaram and others***, reported in ***2010(2) Shimla Law Journal (SC) 770***, and, in a judgement rendered by the Orissa High Court and reported in ***AIR 2002, Orissa 77***, (b) both the verdicts whereof, pronounce a candid, view that a document, containing sale of immovable property, hence holding, a value more than Rs.100/-, though, requiring it being compulsorily registered, (c) and, also make trite expostulation qua when a suit for specific performance is founded, upon, an unregistered contract of sale of immovable property, embodying therein rather property, holding a value of more than Rs.100/-, and, when therethrough, the afore contract, of, sale is, strived to be enforced, through, rendition, of a decree for specific performance of contract, (d) rather, not, on a combined interpretation, of, the provisions of Section 49 of the Registration Act, alongwith the proviso to Section 49 of the Registration Act, being either discardable, nor inadmissible, nor unreadable, (e) rather it being admissible evidence, vis-a-vis, strivings by the plaintiff concerned, for his, on anvil thereof, hence, staking a claim, for rendition, of, a decree for specific performance. Moreover, as propounded, in a judgment rendered, in a case, titled as ***Didar Singh Vs. Nasib Kaur, and, others,*** reported in ***2012(2), Civil Court Cases, 428 (P&H)***, even, if in, pursuance to execution, of, though a compulsorily registrable contract, of sale hence possession, of the property, as,l enclosed therein rather standing delivered to the plaintiff, by the defendant, (f) yet even on the afore

anchorage, no leverage being drawable, by the defendant, from, the provisions borne, in Section 53-A, of, the Transfer of Property Act, (g) and, further thereonwards, it also stands explicitly pronounced therein, that, dehors the afore bar or embargo being peremptorily erectable, against the plaintiff, upon, his previously receiving possession, or in contemporaneity, vis-a-vis, the execution, of, the contract of sale, of the suit property, embodied in Ex.PW1/A, though a compulsorily registrable contract of sale, (h) and, when in consonance therewith, he is rather baulked to seek rendition of a decree, of, specific performance, rather on anvil of the mandate borne in Section 53-A of the Transfer of property Act, conspicuously, upon, its remaining unregistered, (i) yet the plaintiff not being barred, to, on anvil thereof, claim rendition of a decree for specific performance, (j) and, nor the plaintiff's suit for specific performance, anchoraged, upon, an unregistered contract of sale, being oustable nor any unregistered contract of sale, being hence construable rather to be completely nullified. Reiteratedly, the subtle nuance, of the afore verdict, is qua, that the salutary purpose, of, the mandate engrafted in Section 53A of the Transfer of Property Act, being, qua, it being used as a sword, than, as a shield, (k) with a concomitant effect, vis-a-vis, it working adversarially only qua the defendant/counter-claimant, than qua the plaintiff, thereupon, the effect, if any, of, possession of the suit property being delivered, to the plaintiff, stands, fully negated, nor hence, the plaintiff is debarred to institute, a suit, for rendition of a decree for specific performance, of, contract , of, sale.

9. In summa, even if the contract of sale stood executed subsequent to the requisite amendment, made to the provisions of Section 17(1)(A), of, the Indian Registration Act, and, even if, possession of the suit property, was delivered, by the plaintiff to the defendant, (i) and, even if, the contract of sale embodied, in, Ex.PW1/A rather peremptorily enjoined its being registered, and, uncontestedly, when it is not registered, (ii) nonetheless, the plaintiff is not debarred, to enforce the unregistered contract of sale, by his instituting, a suit for specific performance of contract of sale, against the defendant, (iii) nor in pursuance thereto he is barred to seek a decree against the defendant for executing, with him, a, registered deed of conveyance.

10. Be that as it may, the factum of execution of Ex.PW1/A, has been proven by the plaintiff, and, his testification, vis-a-vis, the completest execution, of Ex. PW1/A, also stands corroborated by PW-2. The defendant though, in his deposition has not denied the existence, of his signatures, on Ex.PW1/A, yet, he in his testification, rather projected qua his being beguiled, (a) to append his signatures upon Ex.PW1/A, (b) under the pretext of it being, executed in lieu of exchanges of some lands, inter se him, and, the plaintiff. However, when he further, in his cross-examination, has admitted qua his working, as a Senior Assistant in HPPWD, and, his being a matriculate, (c) thereupon, he is concluded to comprehend the recitals borne in Ex.PW1/A, and, furthermore, when he has not disputed, the authenticity of his signatures, as exist, upon, Ex.PW1/A, (d) hence he cannot also contend, that, the plaintiff beguiled him, under, the afore pretext, to, hence emboss his signatures upon Ex.PW1/A, and, sequel thereof, is that, when hence assured proof, is adduced, vis-a-vis, the completest satisfactory execution Ex.PW1/A, and, also vis-a-vis, with the apt fullest volition, of, the executants concerned, (e) thereupon, the contract of sale, strived, to be enforced, through, rendition of a decree, for specific performance, of, the afore agreement, is, rather a striving bearing tandem, with the afore proclamation of law, and, enjoins it being affirmed. Predominantly also with the defendant, admitting qua a part of the sale consideration, comprised in a sum of Rs.3 lakhs standing received by the defendant, from, the plaintiff, hence, in contemporaneity, vis-a-vis, the execution of Ex.PW1/A. Furthermore, when the plaintiff, has shown, his readiness and willingness to perform his part of contract, and, with recitals also being carried in Ex.PW1/A, that, upon refusal by the defendant, to execute the sale deed, vis-a-vis, the suit property, borne in Ex.PW1/A,

thereupon, the plaintiff being reserved with a right, to enforce Ex.PW1/A, by recoursing all the remedies available under law, thereupon, the concurrent adversarial decrees, as, stand pronounced against the defendant, by both the learned courts below, do not deserve, any interference.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, as well as by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below have not excluded germane and apposite material from consideration. Accordingly, the substantial question, of law is answered in favour of the plaintiff/respondent, and, against, the defendant/appellant.

12. In view of the above discussion, the instant appeal is dismissed, and, the impugned judgments, and, decrees are maintained and affirmed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

United India Insurance Co. Ltd. .....Appellant.

Versus

Asha Devi and others .....Respondents.

FAO No. 574 of 2018.
Reserved on : 18th June, 2019.
Decided on : 28th June, 2019.

Motor Vehicles Act, 1988 - Section 149 (2)(a)(ii) - Motor accident - Claim application – Defence of fake driving licence – Proof – Held, insurer did not lead any evidence to prove that driving licence of driver of offending vehicle was fake – Copy of driving licence placed on record clearly indicating that its holder was authorised to drive the offending vehicle – Insurer failed to discharge its onus of proving driving licence of driver of offending vehicle as fake.(Para 4)

For the Appellant:	Mr. Ashwani Sharma, Sr. Advocate with Mr. Mayank Sharma, Advocate.
For Respondents No. 1 to 4:	Mr. Kulwant Chauhan, Advocate vice Mr. Sanjeev Kumar Suri, Advocate.
For Respondent No. 5:	Mr. Karan Veer Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal Una, District Una, H.P., upon, MACP No. 53/2017, as stood, cast therebefore, under, the provisions of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), (i) AND, whereunder, compensation amount,

comprised in, a sum of Rs.8,78,792/-alongwith interest accrued thereon, at the rate of 9% per annum, was, hence ordered to thereon commence, from, the date of petition till realization thereof, rather stood, assessed, vis-a-vis, claimants, (ii) and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing, for, the appellant/insurer, has, not contested, the, validity, of, rendition, of, affirmative findings, upon, issue No.1, hence appertaining to the demise of Balwant Chand, being a sequel of rash, and, negligent manner of driving of the offending vehicle, by Pawan Kumar, respondent No.5 herein.

3. The learned counsel appearing for the insurer has contended before this Court that (a) since the deceased, as borne, from, his salary certificate, embodiedin Ex.PW2/A, stood, engaged as a part time worker, (b) thereupon, he contends that the apposite, and, relevant accretions or hikes working towards future incremental prospects, vis-a-vis, his salary of Rs.4,500/- per mensem, as stood, drawn by him, in contemporaneity, vis-a-vis, the relevant mishap, being rather ridden with an inherent fallacy, as, (c) the afore rendition of part time services hence by the deceased, are obviously construable, to be merely temporary in nature, and, when the services of the deceased, were disengagable, at any time, (d) rather hence the apt corollary therefrom, is, qua it, being highly speculative to conjure any inference qua permanence of his employment, nor reiteratedly, it can be inferred qua the afore hikes, vis-a-vis, his last drawn salary rather being meteable thereon. However, the afore submission would be weighty, and, tenacious, upon, evidence being adduced qua the terms, of, engagement of the deceased by his employer (d) with clear unravelings borne therein, vis-a-vis, the services of the deceased surviving only upto a specific period of time, and, the duration of his services, not being, beyond the contractual tenure of services. However, when the afore evidence, is, amiss thereupon it has to be concluded that the part time engagement, of the deceased, as, a part time worker, by his employer rather being amenable to be visited with extensions, and, continuances in service, (e) and, obviously hence also his being facilitated to obtain regularization, in service under his employer, (f) besides his also being visited with concomitant therewith benefits of enhancements or increases, in his per mensem salary, (g) wherefrom, it is to be concluded that the afore meteings of hikes, towards future incremental prospects rather not warranting any interference by this Court.

4. The learned counsel appearing for the appellant/insurer has contended before this Court (a) that with Ex.RW2/B making echoings qua the driving licence held, by the driver of the offending vehicle rather being fake, and, unauthentic, thereupon, the fastening of the apposite indemnificatory liability, upon, the insurer rather warranting interference. However, the afore submission also cannot be countenanced by this Court, as, Ex. RW2/B is signatured by the District Transport Officer, Mon, Nagaland, (b) and, when the author of Ex.PW2/B hence stand enjoined to step into the witness box, for, proving, the contents borne therein, whereas, his omitting to step into the witness box, hence, the recitals borne, in Ex.PW2/B rather carry no probative vigour. Moreover, Ex.PW2/B, merely carries an echoing qua the office of District Transport Officer, Mon, Nagaland, being not, in a position to furnish any information, as, RW-2 sought therefrom, whereupon, it cannot be assuredly concluded, qua the afore information being unauthentic. Moreover, the insurer has not endeavoured to elicit, through the aegis of the Court, the apposite record appertaining, to the driving licence, of the driver of the offending, maintained in the office of District Transport Officer, to, hence prove the afore espousal qua the driving licence, as held by the driver, of the offending vehicle, rather being fake. On the contrary, the copy of driving licence, borne in Ex.RW1/B, unveils, that its holder standing authorised to drive, the offending vehicle, and, it also holds the seals and signatures, of the issuing authority,

thereupon, it acquires an aura, of, authenticity, given neither the seals nor the signatures, as, occurring thereon, standing, proven to be fake or fictitious.

5. For the foregoing reasons, there is no merit, in the instant petition, and, it is dismissed accordingly. In sequel, the award impugned before this Court is maintained, and, affirmed. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, ACJ AND HON'BLE MRS. JUSTICE JYOTSNA REWAL DUA, J.

Sh. Garu Lal. ……Petitioner.
Versus
State of H.P. & ors. ……Respondents.

CWP No. 1233 of 2019
Date of decision: June 20, 2019.

Land Acquisition Act, 1894 – Section 18 (3) – Refusal of Land Acquisition Collector (Collector) to send reference to District Judge on ground of delay – Writ against – Whether maintainable? - Held, against an order of collector refusing sending of reference to District Judge on ground of delay, aggrieved party has alternative remedy to challenge it by way of revision u/s 18 (3) of Act – Writ petition, challenging order of collector is not maintainable. (Para 2 & 3)

For the petitioner	: Mr. V.S. Chauhan, Senior Advocate with Mr. Ajay Singh Kashyap.
For the respondents	:Mr. Ashok Sharma, Advocate General with Mr. Narender Guleria, Addl. AG, Mr. J.S. Guleria and Mr. Kunal Thakur, Dy. AGs for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Acting Chief Justice. ***(Oral)***

Notice. Mr. Narender Guleria, learned Additional Advocate General appears and accepts service of notice on behalf of respondents No. 1 and 2. In the nature of the judgment, we propose to pass in this writ petition, no notice need be issued to respondent No. 3.

2. As a matter of fact, the grouse as brought to this court by filing the present writ petition is that the second respondent did not refer the matter to the District Judge as required under Section 18 of the Land Acquisition Act on the ground of delay. The point in issue is squarely covered against the petitioner by the judgment of this Court dated November 26, 2018 passed in ***CWP No. 2741 of 2018***, titled as ***Surat Ram and another*** versus ***State of H.P. & others*** in which it has been held that against an order passed under Section 18 of the Land Acquisition Act by the Collector, the remedy under sub-section (3) of Section 18 of the Act is to challenge the same by way of filing a revision petition.

3. This writ petition is, therefore, not maintainable. The same is accordingly disposed of with liberty reserved to the petitioner to avail the alternative remedy under sub-section (3) of Section 18 of the Land Acquisition Act. In the matter of limitation, the petitioner shall be entitled to the benefit of Section 14 of the Limitation Act as he has been pursuing the remedy in the wrong forum.

4. Pending application(s), if any, shall also stand disposed of.

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

Smt. Veena Sood ….Petitioner.
Versus
Sh. Ramesh Kumar Sood and another ….Respondents.

CR No.: 232 of 2018
Reserved on: 21.06.2019
Decided on: 26.06.2019

Code of Civil Procedure, 1908– Order VII Rule 14 (3)**-** Production of documents at later stage – Essential requirements– Held, plaintiff can produce additional documents at later stage of trial only on satisfying court that despite exercise of due diligence, he could not produce them earlier or same were not within his knowledge.(Para 15)

Case referred:
Salem Advocate Bar Association, TN. vs. Union of India, (2005) 6 SCC 344

For the petitioner: Mr. Naresh Sharma, Advocate.
For the respondents: Mr. Y.P. Sood, Advocate, for respondent No. 1.
None for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition, the petitioner has assailed order dated 07.09.2018, passed by the Court of learned Civil Judge, Court No. 3, Shimla in Civil Suit No. 371-1 of 18/8, vide which, an application filed by her, who is the plaintiff before the learned Trial Court under Order 7 Rule 14 read with Section 151 of the Code of Civil Procedure for placing on record certain documents and proving the same by leading additional evidence, has been dismissed.

2. Brief facts necessary for the adjudication of present petition are as under:

Petitioner/plaintiff (hereinafter referred to as 'the plaintiff') has filed a suit for declaration that she has inherited the estate of Smt. Durga Devi @ Durgi Devi and defendants have no right, title or interest in the estate of Smt. Durga Devi and for permanent prohibitory injunction for restraining the respondents/defendants (hereinafter referred to as 'the defendants') or any other person claiming through or under the

defendants any right, title or interest over the estate of Durga Devi and from interfering with or managing the estate of Durga Devi.

3. In these proceedings, plaintiff filed an application under Order 7 Rule 14 read with Section 151 of the Code of Civil Procedure for placing on record certain documents and for proving them by leading additional evidence. As per the plaintiff, though she had examined 15 witnesses, however, one witness cited from the office of Medical Superintendent IGMC, Shimla had intentionally not brought the summoned record and made false statement that the record summoned by the plaintiff was not maintained in the hospital. As per plaintiff, in this regard, she filed an application under Right to Information Act and sought information from PIO of IGMC, Shimla. Her application was initially rejected on 06.07.2015 by the PIO. Appeal filed by her against the said order was also rejected on 08.09.2015. Feeling aggrieved, she preferred a second appeal before the State Information Commissioner, which was allowed on 09.03.2016 and information sought by her was supplied to her (plaintiff) on 06.04.2016. After receipt of the said information, she filed the application intending to place the said documents on record with a prayer for permission to prove the same in accordance with law. The details of the documents are spelled out in para-6 of the application, which are as under:

"a. Photostat copy of the application filed by the applicant under R.T.I. Act.

b. Photostat copy of the order dated 06.07.2015 passed by PIO, IGMC, Shimla, H.P.

c. Photostat copy of the Appeal filed by applicant before Principal-cum-Appellate Authority, IGMC, Shimla, H.P.

d. Photostat copy of the order dated 08.09.2015, passed by Principal-cum-Appellate Authority, IGMC, Shimla, H.P.

e. Photostat copy of the Second Appeal filed by applicant before Ld. State Information Commissioner, Shimla, H.P.

f. Certified copies of the information pertaining to Smt. Durga Devi supplied by PIO (20 pages). And order dated 09.03.2016 passed in Appeal No. 0400/2015-16."

4. As per the plaintiff, the documents supplied by the PIO, IGMC, Shimla were relevant to decide the controversy and the same were necessary to prove her case. It was also mentioned in the application that as the documents were supplied to the plaintiff under the Right to Information Act, there was no chance of the same being manufactured or otherwise.

5. The application was resisted by the non-applicants, *inter alia,* on the ground that the same was filed at a highly belated stage with *malafide* intent. Filing of the application was an afterthought and the same was based on record which appeared to have been fabricated in order to create false evidence. As per respondent, plaintiff had summoned witnesses from IGMC, Shimla alongwith record of admission and death of Smt. Durga Devi. The witness in issue Shri Madan Singh Chauhan, Senior Assistant from IGMC, Shimla was examined as PW-15 on 20.02.2015 and had categorically stated in his statement that no record with respect to handing over of the dead body was maintained in IGMC nor any such entries were there in the original record. It was further mentioned in the reply that had there been record with respect to handing over of the dead body of late Smt. Durga Devi existed, then the plaintiff should have filed it alongwith the suit. It was further mentioned in the reply that the plaintiff could not be permitted to take undue advantage of her own negligence and lapses and permitted to fill up lacunae.

6. This application had been dismissed by way of impugned order. While dismissing the application, learned Trial Court has held that in case the application was allowed, then the documents sought to be placed on record being *per se* not admissible, would have to be proved by examining witnesses, who would have to step in the witness box and that it would amount to relegating the clock to the date, i.e., 24.06.2015, when plaintiff's right to produce evidence was closed. It further held that allowing the application would amount to re-opening of the case. Documents intended to be placed on record were not relevant for deciding the dispute. Fact regarding handing over the dead body of Durga Devi or pertaining to her admission/discharge from the hospital had little relevance in ascertaining the issues involved in the suit. Learned Court also held that there was no law or rule that only a person who was related to a dead person could claim the body. It further held that in what manner said facts would prove adoption of the plaintiff was also not stated by her and therefore also, the documents intended to be placed on record were not important.

7. Be that as it may, I have heard learned counsel for the parties and have also gone through the impugned order as well as other documents appended with the petition.

8. As per record, on 24.06.2015, an adjournment was sought by the plaintiff to lead further evidence, however, the request was declined by the learned Trial Court and evidence was ordered to be closed and said order when assailed before this Court, was upheld vide order dated 04.09.2015.

9. Order 7 Rule 14 (3) of the Code of Civil Procedure provides that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the plaint.

10. Coming to the facts of the present case, the application under Rule 14 of Order 7 of the Code was, *inter alia*, filed to place on record documents which were obtained by the plaintiff under the Right to Information Act. These documents were provided to her under the Right to Information Act, pursuant to her second appeal having been allowed by the State Information Commissioner on 09.03.2016. In other words, after the second appeal of the petitioner/plaintiff was allowed on 09.03.2016, the documents were supplied to her under the Right to Information Act on 06.04.2016. The application was filed by her to place them on record and to prove the same by leading additional evidence on 26.04.2016, meaning thereby that the application was filed within a month of the receipt of documents.

11. The genesis of the filing of the application was that PW-15-Madan Singh Chauhan, who was a witness sited from the office of Medical Superintendent, IGMC, Shimla had intentionally not brought the summoned record and had made false statement that the record summoned by the plaintiff was not maintained by IGMC, Shimla. As per the plaintiff, now as the said record was supplied to her, the same be allowed to be taken on record and proved as per law.

12. It has not been disputed that PW-15, i.e., witness from the office of Medical Superintendent, IGMC, Shimla had not brought the requisitioned record and had stated in the Court that no such record was maintained at IGMC, Shimla. It is not in dispute that the record which was called from IGMC, Shimla *inter alia* pertained to the admission of deceased Smt. Durga Devi in the hospital and handing over of her dead body after her death. Incidentally, a perusal of the reply filed by the non-applicants, who were opposing the said application demonstrates that the stand taken by the non-applicants in the reply was that

the filing of the application was just an afterthought, as the plaintiff intended to fill up lacunae and further that the documents which were intended to be placed on record appeared to have been fabricated in order to create false evidence.

13. Learned Trial Court while dismissing the application erred in not appreciating that prayer of the plaintiff was to place those documents on record, which as per her, PW-15 had intentionally not brought on record by wrongly stating in the Court that said record was not available in the hospital and said application was opposed by the non-applicants on the ground that the plaintiff wanted to fill up the lacunae in her case and the documents appeared to be fabricated.

14. Learned Court erred in not appreciating that when the requisitioned record summoned through PW-15 was not brought, it could not be said that the plaintiff was trying to fill up lacunae in her case. It erred in not appreciating that there was no merit in the contention of the non-applicants that the documents, which plaintiff intended to place on record were fabricated documents, as the documents which were intended to be placed on record, admittedly, were those which had been provided to her under the Right to Information Act. This demonstrates that learned Trial Court has not dealt with the application upon proper appreciation of the contention made in the application as also in the reply. Learned Trial Court was more influenced and swayed by the fact that on an earlier date, i.e., on 24.06.2015, said Court had rejected the request of the plaintiff for grant of opportunity by way of adjournment to lead evidence and that said order on challenge, had been upheld by this Court. Learned Trial Court erred in not appreciating that as the information stood supplied to the plaintiff after 24.06.2015, therefore, said order had no bearing with the prayer which was made by the plaintiff in application filed under Order 7 Rule 14 of the Code.

15. It is settled law that on a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just {See *Salem Advocate Bar Association, TN. Vs. Union of India, (2005) 6 Supreme Court Cases 344}*.

16. In the present case, the plaintiff had spelled out cogent reasons as to why the documents, which she intended to place on record, could not be placed on record earlier. In this background, the findings returned by the learned Trial Court that the application filed by the plaintiff could not be allowed as the same would relegate the Clock back to the date, i.e., 24.06.2015 are perverse findings, especially in view of the fact that the documents which the plaintiff intended to place on record were not in her possession as on 24.06.2015 when her request for adjournment to lead evidence was denied by the learned Court below. The subsequent findings returned by the learned Trial Court that the documents were not important and had no relevance with the controversy, subject matter of the *lis* between the parties, in my considered view, were totally uncalled for, because learned Court should not have ventured into the said area while dismissing the application of the plaintiff on other grounds.

17. Accordingly, as this Court is of the view that the impugned order is *per se* bad and not sustainable in the eyes of law, this petition is allowed and the impugned order dated 07.09.2018 is ordered to be set aside. As a natural corollary, the application filed by the plaintiff under Order 7 Rule 14 of the Code of Civil Procedure is allowed and the documents appended with the same are ordered to be placed on record. Learned Trial Court is directed to permit the plaintiff to prove the documents in accordance with law. This, however, will be subject to payment of cost of Rs.5000/- by the plaintiff to the defendants.

18. Parties are directed to appear before the learned Trial Court on ***22nd July, 2019.*** The petition stands disposed of, so also pending miscellaneous applications, if any.

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

Jiwan Lal and another .....Petitioners.
Vs.
Shiv Ram and others .....Respondents.

CMPMO No. 304 of 2019
Date of Decision: 04.07.2019

Code of Civil Procedure, 1908- Order XXII Rule 4 (4)– Application seeking exemption from bringing on record legal representatives of deceased defendant– Disposal of– Held, order of trial court dismissing such application is not supported by any reason– Order of trial court in rejecting or allowing such application should have been reasoned one– Petition allowed– Order set aside -Matter remanded. (Para 3)

For the petitioners: Mr. Dheeraj K. Vashisht, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge(*Oral):*

By way of this petition, the petitioners have prayed for quashing of order dated 06.04.2019 (Annexure P-4), passed by the Court of learned Senior Civil Judge, Court No. 1, Amb, Una in Case No. 215-I-2009, whereby an application filed by the petitioners under Order XXII Rule 4(4) read with Section 151 of the Code of Civil Procedure, wherein a request was made that petitioners/plaintiffs be permitted not to bring on record the legal representatives of deceased defendant No. 24, has been dismissed.

2. Mr. Dheeraj K. Vashisht, learned counsel for the petitioners has argued that the impugned order is not sustainable in the eyes of law, primarily on the ground that no reasons have been assigned by the learned Court below as to why the prayer made in the application did not find merit with it, especially in view of the fact that qua other defendants in the same suit, similar application filed by the petitioners/plaintiffs was allowed by the learned Court below.

3. Having heard learned counsel for the petitioners, this Court concurs with him to the extent that the impugned order, vide which, the application filed by the present petitioners has been dismissed, is a cryptic order. This Court expects that when an adjudication is made by the learned Court below either on applications or otherwise, then the orders to be passed, ought to be reasoned and speaking. This Court is not at all commenting as to what final order should have been passed by the learned Court below on the application filed by the petitioners/plaintiffs, but all that this Court is observing, is that the said application ought to have been disposed of by passing a speaking and reasoned order, wherein the reasons should have been well spelled out as to why that particular order was being passed by the learned Court below.

4. Accordingly, the present petition is partly allowed. While setting aside the impugned order dated 06.04.2019, the matter is being remanded back to the learned Trial Court with the direction that the Civil Miscellaneous Application filed by the present petitioners/plaintiffs shall be revived and heard afresh and thereafter, the same shall be disposed of by passing a speaking and reasoned order. This Court is again clarifying that what final order is to be passed by the learned Court below shall be the domain of the learned Court below, however, this Court expects that the application shall be disposed of by the learned Court below by passing a reasoned and speaking order.

The petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Sh. Deepak ....Petitioner

Versus

State of H.P. and another ....Respondents

Arb. Case No. 10 of 2019
a/w Arb. Case Nos. 12 to 23 of 2019.
Decided on: 14.06.2019

Arbitration and Conciliation Act, 1996- Section 11(6)- Appointment of arbitrator- Circumstances– Held, building contract inter-se parties providing for arbitration clause for adjudication of disputes arising out of such contract– Contractor claiming non-payment despite completing work within stipulated time– Chief Engineer not appointing arbitrator despite request of contractor- Question whether contractor executed work as per terms of contract would be looked into by arbitrator during arbitration proceedings– Petition allowed- Arbitrator appointed by court. (Para 4)

For the petitioner(s): Mr. J.S. Bhogal, Senior Advocate with Mr. Tarunjeet Singh Bhogal and Ms. Sristhi Verma, Advocates.

For the respondents: Mr. Narinder Guleria, Addl. A.G with Mr. Kunal Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, ACJ (Oral)

This judgment shall dispose of all these applications filed under Section 11(6) of the Arbitration and Conciliation Act, with a prayer for appointment of Arbitrator to adjudicate the disputes having arisen during the course of construction of the work namely, "C/o R/R Damges to RCD Road Km 21/195 to 92/695 (SH:- Hiring of Excavator cum loader [Pock Lane] for removal of slips at various RD's ([Portion Dodra to Kawar]). The agreement number, date thereof, date of completion of the work and the cost of work awarded is tabulated hereinbelow:-

Arbitration Case No. 10 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD Road Km 21/195 to 92/695	128 of 2016-17.	23.12.2016	25.3.2017	2,20,500/-

Arbitration Case No. 12 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD Road Km 21/195 to 92/695	126 of 2016-17.	23.12.2016	28.1.2017	2,20,500/-

Arbitration Case No. 13 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD Road Km 21/195 to 92/695	127 of 2016-17.	23.12.2016	16.1.2017	2,20,500/-

Arbitration Case No. 14 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to link road to village Jiskoon Km 0/00 to 8/00.	122 of 2016-17.	23.12.2016	4.1.2017	2,20,500/-

Arbitration Case No. 15 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to link road to village Jiskoon Km 0/00 to 8/00.	121 of 2016-17.	23.12.2016	15.1.2017	2,20,500/-

Arbitration Case No. 16 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to link road to village Jiskoon Km 0/00 to 8/00.	33 of 2016-17.	8.7.2016	31.7.2016	2,20,500/-

Arbitration Case No. 17 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD road KM 21/195 to 92/695.	130 of 2016-17.	23.12.2016	5.4.2017	2,20,500/-

Arbitration Case No. 18 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD road KM 21/195 to 92/695.	32 of 2016-17.	8.7.2016	20.7.2016	2,20,500/-

Arbitration Case No. 19 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD road KM 21/195 to 92/695.	30 of 2016-17.	8.7.2016	20.7.2016	2,20,500/-

Arbitration Case No. 20 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD road KM 21/195 to 92/695.	125 of 2016-17.	23.12.2016	25.4.2017	2,20,500/-

Arbitration Case No. 21 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD road KM 21/195 to 92/695.	124 of 2016-17.	23.12.2016	6.5.2017	2,20,500/

Arbitration Case No. 22 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD road KM 21/195 to 92/695.	123 of 2016-17.	8.7.2016	1.8.2016	2,20,500/

Arbitration Case No. 23 of 2019

Name of work	Agreement number	Date of agreement	Date of completion	Claim
C/o R/R Damages to RCD road KM 21/195 to 92/695.	129 of 2016-17.	23.12.2016	4.1.2017	2,20,500/-

2. The work in terms of the agreement executed between the parties was to be completed within 15 days from the date of issuance of letter of award. Accordingly, the work was completed by the petitioners-Contractors within the stipulated period, as indicated in the tabulated information hereinabove. The entries qua measurement of the work executed were made by the respondents in the measurement book. The Executive Engineer concerned also certified the work so executed on the spot. However, the payments, irrespective of the final bill prepared and submitted were not made to the Contractors. The procedure prescribed under the contract agreement for resolution of disputes is contained in Annexure C-1. Therefore, when the respondents failed to make the payment to the petitioners as per bills they raised, the Chief Engineer, HPPWD, Shimla zone was requested vide Annexure C-2 to appoint Arbitrator to adjudicate the disputes having arisen between the parties on both sides. The Arbitrator(s), however, was not appointed, hence these applications with a prayer to appoint the Arbitrator for adjudication of the disputes having arisen between the parties.

3. In reply, the award of the work to the petitioners-Contractors has not been disputed. It is, however, submitted that no work was found to be executed on the spot. The entries made by the Junior Engineer, incharge in the MB were verified on inspection of the site and it transpired that work was never executed by the petitioners-Contractors. The entries in the MB were accordingly cancelled. Therefore, according to the respondents, there exist no disputes which need to be adjudicated upon by the Arbitrator.

4. On hearing Mr. J.S. Bhogal, learned Senior Advocate assisted by Mr. Tarunjeet Singh Bhogal and Ms. Srishti Verma, Advocates representing the petitioners and learned Additional Advocate General on behalf of the respondents as well as going through the record, the claims and counter-claims as laid on both sides constitute disputes within the meaning of Clause 25 (Annexure C-1) of the contract agreement. The petitioners-Contractors have executed the work awarded to them or not is a question to be gone into during the course of arbitral proceedings and adjudicated by learned Arbitrator. Therefore, it cannot be believed by any stretch of imagination that there exist no disputes between the parties in these applications. Keeping in view, work awarded, identical in nature and at a meager cost of Rs.2,20,500/- for each work, the parties on both sides agreed for appointment of single Arbitrator to adjudicate the disputes in all these cases. Consequently, Shri J.S. Mahantan, District and Sessions Judge (Retd.) is appointed as Arbitrator to enter upon the reference in these matters and adjudicate the claims/counter-claims to be laid by the parties on both sides. In view of the paltry amount of Rs.2,20,500/- involved in each case, the fee of learned Arbitrator is fixed as Rs. 1,00,000/- in lump sum in all the cases, out of which Rs.50,000/- shall be paid to him in advance within two weeks after he enters upon the reference and remaining well before the pronouncement of the award.

5. All the petitions are accordingly allowed and stand disposed of, so also the pending application(s), if any.

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

Prabhi Devi …..Petitioner
Versus
Smt. Shankri Devi …..Respondent

CMPMO No. 223 of 2019
Decided on 18.6.2019

Code of Civil Procedure, 1908- Order VIII Rule 1A(3) –Additional documents– Filing of – Leave of court– Grant of– Trial Court dismissing defendant's application for placing copy of Pariwar register on record at later stage– Petition against– Held, document corroborates version of defendant as pleaded in her written statement– In normal circumstances, defendant would not have withheld it purposely which indicates that said document was not in her possession or knowledge prior to filing of said application– Document intended to be placed on record would enable court to adjudicate controversy in hand in just and proper manner- Defendant permitted to place on record such document with costs assessed at Rs.11,000/- Petition allowed– Order of trial court set aside. (Paras 5 to 7)

Case referred:
Salem Advocate Dist. Bar Association vs. Union of India, AIR 2005 SC 3353

For the petitioner : Mr. Ajay Shandil, Advocate.
For the respondent : Mr. Rajiv Rai, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant petition filed under Article 227 of the Constitution of India lays challenge to order dated 4.4.2018, passed by the learned Civil Judge, Court No.3, Ghumarwin, District Bilaspur, H.P. in CS No. 120-1 of 2017-12, whereby an application under Order 8 Rule 1 A (3) CPC having been filed by the petitioner-defendant (in short "the defendant") for placing on record copy of Pariwar Register of the family came to be rejected.

2. Having heard learned counsel for the parties and perused material adduced on record by the respective parties vis-à-vis reasoning assigned in the impugned order passed by the learned court below, this Court finds no illegality and infirmity in the same, because bare perusal of application (Annexure P-4) filed under Order 8 Rule 1 A (3) CPC, nowhere suggests that plausible explanation, if any, is rendered on record by the defendant that despite due diligence, she could not produce the record earlier with regard to her marriage with deceased Ram Dass.

3. In the instant case, respondent-plaintiff (in short "the plaintiff") filed suit for declaration and permanent prohibitory injunction under Sections 34, 37 and 38 of the Specific Relief Act to the effect that she is owner in possession of the suit land, description where of is given in the plaint (Annexure P-1). In the suit referred herein above, plaintiff while seeking injunction, in alternative, also prayed for suit for possession, if she is

dispossessed by the defendant forcibly from any part of the suit land. Plaintiff averred in the plaint that she is a legally wedded wife of late Sh. Ram Dass, so of Sh. Khawaja, resident of village Rohin, Tehsil Ghumarwin, District Bilaspur and no issue was born out of the said wedlock and Sh. Ram Dass expired on 6.6.2012.

4. Defendant by way of written statement while denying the contents of the plaint contended that plaintiff had left the society of deceased Ram Dass 35 years prior to his death, whereafter defendant was residing with him and was enjoying possession of the suit land with Ram Dass. She further pleaded that by virtue of will dated 4.7.1998, duly registered in the office of Sub Registrar Ghumarwin, her name came to be recorded in the revenue record as co-sharer. Defendant claimed that plaintiff has no right over the suit land and she being wife of the deceased Ram Dass and by virtue of registered will dated 4.7.1998, is in lawful ownership of the property in question.

5. Application under Order 8 Rule 1 A (3) CPC admittedly came to be filed after closure of evidence of the defendant, who by way of aforesaid application sought permission of the court to tender on record copy of Pariwar Register of the family of Ram Dass. However, as has been noticed herein above such application came to be rejected vide impugned order dated 4.4.2018 passed by the court below on the ground that there is nothing to establish that despite due diligence, documents intended to be placed on record by way of instant application were not accessible earlier.

6. Though careful perusal of record, especially, impugned order reveals that matter repeatedly came to be adjourned at the behest of the defendant and there is no plausible explanation rendered on record that despite due diligence defendant failed to place on record document i.e. Pariwar Register, but having taken note of the fact that document intended to be placed on record by the defendant would enable court below to adjudicate the controversy at hand in just and fair manner, this Court is of the view that court below ought to have allowed the application at hand by granting one opportunity to the defendant to place on record copy of Pariwar Register. Admittedly, copy of pariwar register intended to be placed on record corroborates version of the defendant as stated in written statement having been filed by her with regard to her marriage with deceased Ram Dass. Needless to say, document, if permitted to be placed on record, would be required to be proved in accordance with law by the defendant and as such, no prejudice, whatsoever, would be caused to the opposite party in case prayer made in the present application is allowed.

7. No doubt, in case titled *Salem Advocate Dist. Bar Association v. Union of India AIR 2005 SC 3353*, Hon'ble apex Court has held that party intending to place on record additional document must satisfy the court that proposed evidence was not within his/her knowledge or the evidence could not have been led earlier despite the exercise of due diligence, but this Court is of the view that Pariwar Regiter, which is crucial for adjudication of the case would have been not ordinarily withheld by the defendant, if it was readily available with her. Though explanation rendered on record does not appear to be plausible, but keeping in view the nature of document intended to be placed on record and its bearing on the case, this Court is certainly compelled to draw a conclusion that in normal circumstances, defendant would not have withheld it purposely, but since same was not in her custody or knowledge prior to her filing application under Order 8 Rule 1 A (3) CPC, prayer to place the same on record came to be filed at a belated stage.

8. Consequently in view of the detailed discussion made herein above, present petition is allowed and impugned order 4.4.2018 is quashed and set-aside and the petitioner defendant is permitted to place on record the documents intended to be placed by her before the court below, subject to payment of costs of Rs. 11,000/- payable to the

respondent/plaintiff. Learned counsel undertake to cause presence of respective parties before the Court below on **23.7.2019**, enabling it to proceed with the matter in accordance with law. Petition stands disposed of, so also pending application, if any.

Copy **dasti**.

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

CWP No. 1416 of 2019 a/w
CWP Nos. 1417, 1418 & 1419 of 2019.
Decided on: 28.06.2019

Constitution of India, 1950 - Articles 14 & 15 - Doctrine of equality - Prospectus and Application Form for the year 2019-2020 for admission to medical colleges against state quota seats – Petitioners, children of bonafide Himachalis who are working outside the state in private sector, seeking admission against state quota seats at par with children of bonafide Himachalis working outside the state with central/ State government departments etc. – Held, laying down essential educational requirements and domicile in particular state as eligible criteria to seek admission in MBBS course against state quota seats is legally permissible – Exclusion of children of Himachali parents working outside in private employment from admission against state quota seats is based on a reasonable differentia - It is not violative of Article 14 of Constitution of India – (Para 5)

CWP No. 1416 of 2019
Abhinandan Sharma ....Petitioner
Versus
State of H.P. and others ......Respondents

CWP No. 1417 of 2019
Kartikay Awasthi ....Petitioner
Versus
State of H.P. and others ....Respondents

CWP No. 1418 of 2019
Anuj Sharma ....Petitioner
Versus
State of H.P. and others ....Respondents

CWP No. 1419 of 2019
Saatwik Sharma ....Petitioner
Versus
State of H.P. and others ......Respondents

Case referred:
Shivam Sharma vs. State of H.P., CWP No. 1353 of 2018 decided on 13.07.2018

For the petitioner(s): Mr. Sanjeev Bhushan and Mr. B.C. Negi, Senior Advocates with Mr. Sunil Mohan Goel, Mrs. Abhilasha Kaundal and Mr. Nitin Thakur, Advocates.

For the respondents: Mr. Ajay Vaidya, Sr. Addl. A.G for respondents No. 1 and 2.(in all the petitions).
Ms. Manjula Kumari, Advocate vice Mr. Neel Kamal Sharma, Advocate for respondent No.3 (in all the petitions).

The following judgment of the Court was delivered:

<u>**Dharam Chand Chaudhary, J.**</u> <u>(Oral)</u>

<u>**CMP No. 5816/2019 in CWP No. 1416/19**</u>

<u>**CMP No. 5820/2019 in CWP No. 1417/19**</u>

<u>**CMP No. 5822/2019 in CWP No. 1418/19**</u>

<u>**CMP No. 5824/2019 in CWP No. 1419/19**</u>

Allowed and disposed of.

<u>**CWP No. 1416 of 2019**</u>

<u>**CWP No. 1417 of 2019**</u>

<u>**CWP No. 1418 of 2019**</u>

<u>**CWP No. 1419 of 2019**</u>

Notice. Mr. Ajay Vaidya, learned Senior Additional Advocate General appears and accepts service of notice on behalf of respondents No. 1 and 2-State and Ms. Manjula Kumari, Advocate vice Mr. Neel Kamal Sharma, Advocate on behalf of respondent No.3-University.

2. The petitioner in these cases have approached this Court with identical set of prayers, therefore, one set of prayers is extracted below:-

"(i) That this Hon'ble Court may kindly be pleased to issue writ of mandamus directing the respondents to include the category of the petitioner i.e. children of Private Sector Employees of bonafide Himachali as eligible to compete for 85% State Quota especially in view of the judgment passed by this Hon'ble Court dated 13.07.2018 and 31.07.2018, and further hold the action of the respondent of not including the category of the petitioner in the prospectus-cum-application form as bad in law.

(ii) That this Hon'ble Court may kindly be pleased to issue a writ of certiorari quashing Clause IV(A) 2(iv) of the Prospectus and application Form 2019-20 whereby children of bonafide Himachali who are working with Central Government/Undertaking or Autonomous bodies established by the Central Government are being given benefit of 85% State Quota Seats, with the further direction by issuing writ of mandamus directing the respondent that in case children of Central Government employees are to enlarge the benefit of 85% State Quota then the petitioner category may also be included in the same.

(iii) That this Hon'ble Court may further direct the respondents to allow the petitioner to apply for online application before 29.06.2019 and participate in counselling scheduled from 5.7.2019 to 11.07.2019 (and thereafter) for admission to MBBS/BDS courses for the academic session 2019-20 in IGMC Shimla/ Dr. RPGMC Tanda at Kangra and other

medical and dental colleges being offered by Government and private medical and dental courses."

3. The points in issue in these writ petitions came up for consideration before this Court in a bunch of writ petitions, lead case whereof was CWP No. 1353 of 2018 titled Shivam Sharma V. State of H.P., decided on 13.07.2018, (Annexure P-5 to CWP No. 1417 of 2019) with the following observations:-

"30. We find the present a case where dropping the category of petitioners from Prospectus for the purpose of the exemption is on the basis of reasonable classification because the category of the petitioners and the exempted category 3(ii) are distinct and separate and there is rationale relationship between such classification and the object sought to be achieved by deletion of category 3(iv) and Note 1 appended below it. The classification is based upon various considerations like topography of the State, socio-economic condition of the people, scarcity of good schools, tutors and coaching centres for the children studying in the schools situated in the State and that the meritorious Himachali children gets a chance of admission in the MBBS/BDS courses to serve the State. The paramount consideration, of course, is to provide better medical facilities to the people of the State, especially in snow bound and remote areas. Therefore, there is a nexus between the basis of such classification and the object i.e. dropping the provisions in the Prospectus qua providing exemption to the category of the petitioners, sought to be achieved.

31. It is held by the Hon'ble Apex Court in ***Transport and Dock Workers Union & ors. Vs. Mumbai Port Trust & anr., (2011) 2 SCC 575,*** that differential treatment always does not amount to violation of Article 14 of the Constitution. It violates the same only when there is no reasonable basis for the differentiation. Since, as noticed supra, the exclusion of the category of the petitioners from exemption is based on intelligible differentia and there is a nexus between such exclusion and the object sought to be achieved, therefore, there is no question of violation of Article 14 of the Constitution of India in this case. Support in this regard can be drawn from the judgment of the Apex Court in ***Shayara Bano vs. Union of India & ors. & connected petitions, (2017) 9 SCC 1.*** The relevant text thereof reads as follows:

"101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

32. True it is that it is not possible to the State to provide employment to all, however, those who are residing outside the State in connection with their service in private sector or being in private occupation, must also know that their children can seek admission in the Medical/Dental colleges situated in the State only on having passed two examinations out of the four mentioned below clause 1 of item IV(A) of the Prospectus. Therefore, their children like the children of those who are permanently residing in the State can also pass two examinations from the schools situated in the State. They cannot be heard of any grievance nor that declining the exemption to their children is discriminatory or violative of Article 14 of the Constitution of India. Mr. Sunil Mohan Goel, Advocate, though has tried to draw support from the judgment of this Court in ***Vikram Singh Negi's case*** cited supra, however, unsuccessfully because observations in the judgment came to be made while examining the legality and validity of the exemption provided to the exempted category 3(ii). True it is that the Court at that time had no occasion to compare the rights of the petitioners to seek exemption vis-à-vis the right of the exempted category 3(ii), however, for the reasons recorded hereinabove and also to be recorded hereinafter, we find no similarity in the category of the petitioners with exempted category 3(ii). We agree with further submission made by Mr. Sunil Mohan Goel, that the eligibility criteria i.e. requirement of passing two examinations out of four from the Schools situated in the State of Himachal Pradesh held legal and valid by this Court in ***Gagan Deep's case*** (supra) should have been applied in letter and spirit. The eligibility criteria should have been applied as it is, however, the policy makers have exempted most probably subsequently some of the categories mentioned in clauses 2, 3 (i) to 3(iii) of main item IV (A). Such benefit was available to the category of the petitioners also in the recent past, however, as discussed hereinabove, the same now stands withdrawn from the current academic session 2018-19. We leave it open to the policy makers to re-consider the desirability of continuing such concession to these categories in future for the reason that when the persons falling under these categories claim themselves to be Himachalis having roots in the society can conveniently make their children to study in the schools situated in their respective areas or elsewhere in the State of Himachal Pradesh, if interested in seeking admission in the Medical/Dental Colleges situate in the State. Their children having not studied from the schools situated in the State amply demonstrate that they have been proclaiming themselves to be a Himachali merely to avail such concession.

(Per: Dharam Chand Chaudhary, J.)

4. Per majority view also, the exemption from condition of passing two examinations from the recognized schools situated within the State of Himachal Pradesh by the candidates whose parents are residing outside the State in connection with their private occupation has been held to be rightly deleted from the Prospectus. However, the dis-agreement is only to the limited extent of taking away such exemption from the children of those employees residing out of State of Himachal Pradesh in connection with their employment in private sector, treating them at par, those under Clause 3(ii) of the main item IV(A) in the Prospectus for the previous year. The disagreement qua deletion of Clause 3(iv) of the main item IV(A), therefore, otherwise was also partial.

5. Any how, the State of Himachal Pradesh had preferred the Special Leave to Appeal (C) No. 23025-23026/2018 in the Hon'ble Supreme Court of India against the majority view taken in *Shivam Sharma's* case supra. In view of the judgment of the Apex Court in Writ Petition (c) No. 766 of 2018 titled Rajdeep Ghosh Vs. State of Assam and others, the Apex Court though not inclined to interfere therewith, however, with the observations that the same be not treated as a precedent. Therefore, the petitioners, in these writ petitions, cannot press in service the majority view taken in *Shivam Sharma's* case cited supra. Not only this but the Apex Court in *Rajdeep Ghosh's* case cited supra has taken similar view of the matter as taken by one of us (Dharam Chand Chaudhary, J.) in *Shivam Sharma's* case, while holding that to lay down the essential educational requirements, residential/ domicile in a particular State as the eligibility criteria to seek admission in the MBBS/BDS/Ayurvedic course against the State Quota Seats is legally permissible. The ratio of the judgment in *Rajdeep Ghosh's* case reads as follows:-

> "32. As held in the aforesaid decisions, it is permissible to lay down the essential educational requirements, residential/domicile in a particular State in respect of basic courses of MBBS/BDS/Ayurvedic. The object sought to be achieved is that the incumbent must serve the State concerned and for the emancipation of the educational standards of the people who are residing in a particular State, such reservation has been upheld by this Court for the inhabitants of the State and prescription of the condition of obtaining an education in a State. The only distinction has been made with respect to post graduate and post doctoral super specialty course.
>
> 33. Rule 3(1)(c) of the Rules of 2017 lays down the requirement of obtaining education in the State and relaxation has been given to the wards of the State Government employees or Central Government employees or to an employee of Corporation/Agency/instrumentality under the Government of Assam or the Central Government, whether on deputation or transfer on regular posting from obtaining education from class VII to XII for the period his/her father or mother is working outside the State. As urged on behalf of the petitioners the employees of other State Government but residents of Assam, similar relaxation ought to have been made cannot be accepted. Thus, their exclusion cannot be said to be irrational and arbitrary. The wards of the employees in the service of other States like Government employees of Arunachal Pradesh, in our opinion, form a totally different class. When the wards are obtaining education outside and the parents are working in Arunachal Pradesh as Government employee or elsewhere,they are not likely to come back to the State of Assam. As such Government of Assam holds that they should provide preference to State residents/institutional preference cannot be said to unintelligible criteria suffering from vice of arbitrariness in any manner whatsoever, thus, Rule 3(1)(c) framed by the Government of Assam is based on an intelligible differentia and cannot be said to be discriminatory and in violation of Article 14.
>
> 34. With respect to the private employees also, the submission was raised that wards of private employees working outside the State ought to have been placed at the similar footing as that of the wards of the State Government/Central Government employees etc. In our opinion, when once parents have moved outside in a private employment and wards obtaining education outside, they are not likely to come back, thus, their exclusion as aforestated footing cannot be said to be irrational or illegal.

> 35. It was urged that some of the students may obtain admission in other States for the purpose of better coaching. Relevant data has not been placed on record by the petitioners that in Assam coaching is not available. Apart from that, when they can afford to obtain coaching in States, they stand on a different footing, they are the one who belongs to an affluent class who can afford expensive education in other States and it is not necessary that they should be adjusted in State quota seat, they can stake claim for All India Quota Seats for the State of Assam. They can stake their claim with respect to open seats within the State of Assam. The exclusion is not total for them. However, with respect to the State quota seats, since it is open to the State Government to lay down the educational as well as domicile requirement, incumbents must fulfill the criteria. The criteria so laid down in Rule 3(1)(c) of Rules of 2017, cannot be said to be ultra vires of Article 14 of the Constitution of India."

6. The observations hereinabove made by Hon'ble the Apex Court, therefore, substantiate the view of the matter taken by one of us (Dharam Chand Chaudhary, J.) in the judgment rendered in *Shivam Sharma's* case, reproduced hereinabove.

7. Being so, the points raised in these writ petitions are squarely covered against the petitioners by the law laid down in *Rajdeep Ghosh's* case cited supra. We, therefore, find no merit in these writ petitions and the same are accordingly dismissed, so also the pending application(s) if any.

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

Karam Singh & others. .....Petitioners
Versus
Tek Chand & another .....Respondents.

Civil Revision No. 134 of 2018
Decided on : 1.7.2019

Code of Civil Procedure, 1908-Section 47– Decree of permanent prohibitory injunction– Execution of– Whether judgment debtor can be asked by way of mandatory injunction to remove obstruction caused by him on path- Executing court directing judgment debtor (JD) to remove stones stacked by him over path– Petition against– JD submitting that in execution of decree of prohibitory injunction, he cannot be asked to remove stones kept on path since there was no decree of mandatory injunction against him– Held, necessary effect of decree of permanent prohibitory injunction is that any obstruction raised upon suit path being amenable for removal by JD– Court is to ensure vigor of conclusive and binding decree of prohibitory injunction and not to render it nugatory and redundant. (Para 3)

For the petitioners: Mr. Romesh Verma, Advocate.
For the respondents: Mr. Devender K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The dismissal of the JDs objection, against, the execution, of, a binding and conclusive decree, of, permanent prohibitory injunction, wherethrough, the plaintiffs' suit, for restraining the, JDs, from causing any obstruction, upon, suit khasra Nos. 1562/5, 1562/13, and, khasra No. 1567/2, as, depicted in tatima, borne in Ext. PW1/A, stood decreed, hence constrains them, to, institute the instant petition, before this Court.

2. The learned counsel, for the aggrieved JDs, contends with much vigor, before this Court (a) that since the execution petition, embodied in Annexure P-7, makes, a, disclosure, qua the purported obstruction, of, the suit path, rather occurring on 10.3.2013, comprised in erection of stones, by the JDs thereon, (b) and, when also the learned first appellate Court, upon, a, first appeal being reared therebefore by the plaintiffs, against the afore judgment and decree, rendered, by the learned Civil Judge (Senior Division) in Civil Suit No. 89, of 2004, (c) and, wherein they espoused, vis-a-vis, rendition of decree of mandatory injunction, for, removal by the JDs, of the afore obstruction, made upon, the suit land, (d) and, with the learned first appellate Court, hence dismissing the appeal, (e) thereupon, unless a Regular Second Appeal was filed, against declining, of, the afore relief of mandatory injunction, for, hence directing the defendants, to, remove, the afore obstruction, upon the suit land, (f) thereupon the verdict rendered vis-a-vis, the defendants, acquiring conclusivity, and, the learned Executing Court being barred, to, order for removal of obstruction, if any, created by the JDs, upon, the suit bath, (g) given the learned Executing Court hence evidently , going beyond the decree. However, the afore contention, reared before this Court, by the learned counsel for the JDs, is not accepted by this Court, (i) as the afore submission, is rested upon his, not reading the relief clause, of the plaint, wherein the plaintiffs, had espoused for rendition, of a decree, vis-a-vis, the defendants, for, the latters being restrained from causing any nuisance or obstruction, to, the plaintiffs, vis-a-vis, the user by them, of, suit khasra numbers, as a suit path, (ii) and, when, upon, the afore relief canvassed, in, Civil Suit No.89 of 2004, a conclusive and binding decree stood granted, vis-a-vis, the plaintiffs/decree holders, (iii) thereupon, obviously, it also bears, the, necessary effect, qua any obstruction raised, upon the suit path, even during the pendency of the Civil Suit, being amenable for removal by the JDs, (iv) for thereupon, ensuring qua hence the vigor of the conclusive, and, binding decree, of, permanent and prohibitory injunction, rendered upon the afore espousal, of the plaintiffs, being not rendered both nugatory, and, redundant.

3. Even otherwise, the declining of relief, to, the plaintiffs-decree holders, by the learned First Appellate Court, vis-a-vis, rendition, of, decree, of, mandatory injunction, cannot operative as a bar, upon the learned Executing Court, to, efficaciously execute, the, conclusive and binding decree, of permanent prohibitory injunction, rendered vis-a-vis, the suit khasra numbers, (a) given a reading of the apposite rendition unfolding qua only for want, of best evidence, in respect of the afore obstruction, being raised by the JDs, upon, the suit khasra numbers, hence, it, declining the decree, of mandatory injunction, and, whereas, the afore evidence being, yet, elicitable rather by the learned Executing Court.

4. Once the learned Executing Court, has, made a order to ensure the fullest and efficacious execution, of, a binding and conclusive decree of permanent prohibitory injunction, rendered vis-a-vis, the user of the suit path, by the plaintiffs-decree holders, (i) thereupon recourses, vis-a-vis, the, aegises of the revenue officers, is, necessary, (ii) moreso, for, ensuring execution, of, necessary determination(s) of dimensions thereof, (iii) thereupon the dismissal of the JDs objection, vis-a-vis, the conclusive, and, binding decree of permanent prohibitory injunction, cannot be, interfered with. However, the learned executing Court is directed, to elicit, the report of the demarcating officer, for determining qua any obstruction, upon, the suit path, being raised, in any manner by the petitioners

herein, (iv) and, upon receiving of the afore report, of the Local Commissioner, the learned Executing Court, is, directed to order for removal, of the requisite obstructions, made upon, the suit path. The parties are directed to appear before the learned Executing Court, on **25.7.2019**.

5. In view of the above observations, there is no merit in the instant petition, and, the same is accordingly dismissed. All pending applications if any, also stand disposed of. Records be sent back forthwith.

6. Any observation made herein above shall not be taken as any expression of opinion on the merits of the case, and, the learned Court concerned, shall decide the matter uninfluenced, by any observation made hereinabove.

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

Seema Hastu ….Appellant
Versus
National Insurance co. Ltd. & another …..Respondents.

FAO No. 174 of 2018
Decided on : 2.7.2019

Motor Vehicles Act, 1988– Section 166– Motor accident– Claim application- Compensation towards leave availed by claimant during treatment, medical rest and hiring services of domestic help etc – Grant of - Held, in absence of any evidence as to kind of leave i.e., earned leave or medical leave taken by claimant during hospitalization and medical rest no compensation can be granted on ground that claimant could have got that leave (earned leave) encashed at time of retirement - Similarly in absence of necessary evidence qua availing of services of domestic help during prolonged hospitalization and subsequent to recuperation compensation cannot be awarded to claimant. (Paras 3 & 4)

For the appellant: Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.
For the respondents: Mr. Deepak Bhasin, Advocate, for respondent No.1.
Mr. Divya Raj Singh, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The disabled claimant standing, aggrieved, by the award, rendered, by the learned Motor Accident Claims Tribunal, Chamba, Division Chamba, H.P. (for short "MACT"), upon, M.A.C. No. 35 of 2017, has, hence through the instant appeal before this Court, sought enhancement of the compensation amount, assessed therethrough, vis-a-vis, her.

2. The disabled claimant, stood entailed, with a 40% disability, as reflected in the disability certificate, borne in Ext. PW-4/A, and, hence her counsel contends, that, the learned MACT concerned, has failed to assess compensation, (a) qua her, despite, hers

remaining hospitalized for six months, and, during the afore prolonged period of her hospitalization, hers' being granted earned leave, and, thereupon, on her superannuation, there hence occurring diminutions, vis-a-vis, the period, of, leave encashment, and, thereupon hers standing entitled, qua monetary values thereof being recompensed. However, the afore submission, addressed before this Court, by the learned counsel for the appellant, is destabilized, (i) as a thorough reading, of her testification, embodied in her affidavit, affidavit whereof stands borne, in, Ext. PW-1/A, and, exhibit whereof stood tendered, during the course, of, her examination-in-chief, rather not, carry any echoings in tandem therewith nor any documentary evidence, hence stood adduced, with echoings carried therein, vis-a-vis, the nature, of, leave applied, for, by the disabled claimant, (b), and, it carrying, the, concomitant effect, (ii) vis-a-vis, hence gross reductions, in the disabled claimants' entitlement, for, availing the requisite leave encashment, on her superannaution, standing encumbered hence upon her.

3. Furthermore, the learned counsel for the disabled claimant, also, contends that the afore gross percentum, of disability, entailed upon her, also rendering her, incapacitated to perform, domestic services rather both, during, the, prolonged period of her hospitalization, and, also subsequent, to, her recuperation, and, hence when she was constrained, to, engage the services, of, helping hand(s), (a) and hence the expenditures, incurred in respect(s) thereof, being also enjoined to be assessed, as compensation, vis-a-vis, her, (b) given there occurring, a, direct nexus, inter-se, the disability entailed, upon her, and, the domestic service(s)/helps, performing, the, afore hitherto chores, as, stood performed by her. Moreover, the afore submission is also bereft of any vigor, as no echoing, in tandem therewith, stands borne in her affidavit, adduced, into evidence, as Ext. PW-1/A nor any befitting documentary evidence, also, stands not adduced rather on record.

4. Be that as it may, the learned counsel, for the claimant, submits that the learned MACT, had awarded, vis-a-vis, the disabled claimant only, a sum of Rs. 1,88,222/-, under, the head "medical expenses", despite, the factum that, the claimant had tendered into evidence, certain exhibited medical bills, carrying therein monetary value(s), rather beyond the afore amount(s). The medical bills, were permitted to be exhibited, by the learned counsel for the insurer, and, the effect of the learned counsel, for the insurer permitting, hence, exhibition marks being made upon, the, afore bills also renders incapacitated, the learned counsel, for, the insurer, to, before Court, make any contentions, qua given the amount(s), borne in the afore exhibits, being beyond the claim, reared by the claimant, in the claim petition, hence the disabled claimant, being entitled, only to the sums reflected in paragraph-14, of the claim petition. Furthermore, though, the learned counsel for the insurer, has contended, that the disabled claimant, during, the course of her cross-examination, rather voluntarily rendering, a, testification, vis-a-vis, the expenses incurred, towards the treatment, of, her injuries, as, stood entailed upon her, especially at private hospitals, being partly reimbursed, to her, (b) and, therefrom he makes, a contention, that, the total of the medical expenditure(s), borne in the relevant exhibits, being not assessable as compensation, vis-a-vis, the disabled claimant, under, the head "medical expenses". However, even the afore submission, cannot be accepted, by this Court, as thereafter, the learned counsel, for the insurer, appearing before the learned Tribunal below, did not, ensure adduction into evidence, of, documentary evidence qua all the expenditure(s) incurred by her, towards her medical treatment rather standing reimbursed to her, and, wherefrom, rather, it was fathomable, qua the precise amounts, of, the medical expenses, as, stands borne, in the relevant exhibits, standing not reimbursed to her, or, vis-a-vis, the precise amounts thereof standing reimbursed to her. Consequently, the effect, of the afore omission, is, qua, the learned counsel, for the insurer being disabled, to, contend qua the entire amount, as, stands carried, in, the relevant exhibits, being not reimbursable, to her.

Consequently, excepting the amount(s), adjudged, vis-a-vis, the disabled claimant, as compensation to her, under, the head "medical expenses", the remainders' thereof, as, borne in the relevant exhibits, also, stand assessed, as compensation to her, under the head, "medical expenses".

5. For the foregoing reasons, the appeal filed, by the disabled claimant, is in, the afore manner hence partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified, and, the afore modified amount, shall carry thereon interest @ 9%, per annum, from, the date of petition, till deposit, of the apposite amount. All pending applications also stand disposed of. Records be sent back forthwith.

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

Vinay Dhawan ……….Petitioner

Versus

State of Himachal Pradesh ……….Respondent

Cr.MP(M) No.1089 of 2019

Decided on: 5.7.2019

Code of Criminal Procedure, 1973- Section 439- Regular bail– Grant of in case involving offence of murder– Allegations of police being that petitioner 'VD' in furtherance of common intention of other co-accused, including his father 'RD' made assault on deceased with swords, knives etc.- And when deceased fell down 'RD' ran over deceased under his vehicle– Held, witnesses examined during investigation not specifically saying about presence of petitioner– Initial investigation even of police doubted involvement of petitioner in crime as they had filed application for his discharge– Before application could be decided, involvement of petitioner in incident shown through supplementary statement of complainant– Complainant retracting his initial version of assault with daggers and swords– Prosecution case doubtful qua petitioner– Chargesheet stands filed in court– Guilt of accused yet to be decided by trial court– He cannot be allowed to incarcerate in jail for indefinite period– There is no chance of his fleeing away from justice– Petition allowed– Accused granted conditional bail. (Paras 7, 8 & 10)

Cases referred:

Dataram Singh vs. State of Uttar Pradesh & Anr., Criminal Appeal No. 227/2018, decided on 6.2.2018

Jeet Ram vs. State of HP, Latest HLJ 2003 (HP) 23

Manoranjana Sinh Alias Gupta vs. CBI, 2017 (5) SCC 218

Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, (2010) 14 SCC 496

Sanjay Chandra vs.Central Bureau of Investigation, (2012)1 SCC 49

For the Petitioner : Mr. Satyen Vaidya, Senior Advocate with Mr. Ajay Kochhar and Mr. Vivek Sharma, Advocates.

For the Respondent : Mr. Sanjeev Sood, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

<u>Sandeep Sharma, Judge</u> (oral):

Bail petitioner namely Vinay Dhawan, who is behind bars since 7.5.2018, has approached this Court in the instant proceedings filed under Section 439 of Cr.PC, praying therein for grant of regular bail in connection with FIR No. 110/18, dated 7.5.2018, under Section 302 read with Section 34 of IPC, registered at P.S. Baddi, District Solan, H.P.

2. Sequel to order dated 13.6.2019, SI Mehar Singh Chauhan, P.S. Baddi, District Solan, H.P., has come present alongwith records. Mr. Kunal Thakur, learned Deputy Advocate General, has also placed on record status report prepared on the basis of investigation carried out by the Investigating Agency.

3. Record made available to this Court reveals that on 7.5.2018, complainant namely Jagmohan got his statement recorded under Section 154 Cr.PC., at PS Baddi, District Solan, H.P., alleging therein that on 6.5.2018, at 5:00 pm, when he had gone to his fields near Omexe colony, he saw deceased Harjinder Pal getting the construction of room done in his field. He further alleged that at 6:00 pm, above named Harjinder Pal went to his shop i.e. Kanishk Gasage and thereafter at 8:00pm, accused Ramesh, who runs City Cable at Baddi, came on the spot alongwith his son and other four five people. Firstly, above named accused hurled abuses at deceased Harjinder Pal and thereafter gave him merciless beatings using swords, daggers and knives etc. As per complainant, when deceased Harjinder fell on road on account of beatings given to him by the accused Ramesh Dhawan, present bail petitioner and with other persons, accused Ramesh Dhawan ran over his vehicle bearing HP12H-0389 (XUV) over the deceased Harjinder Pal. Complainant as well as other persons present on the spot tried to stop Ramesh Dhawan and other persons, but he succeeded in fleeing away from the spot. Complainant Jagmohan with the help of other people took the deceased Harjinder Pal to CHC Baddi. On the basis of aforesaid statement made by the complainant, formal FIR as detailed herein above came to be lodged against the accused namely Ramesh Dhawan and Vinay Dhawan i.e. present bail petitioner. As per investigation Ramesh Dhawan, who allegedly ran over the vehicle over the deceased Harjinder Pal absconded and subsequently, he was arrested at Sales Tax Toll at Baddi, whereas present bail petitioner, who happens to be son of Ramesh Dhawan, came to be arrested from his house on the same day.

4. Record reveals that during investigation though complainant maintained that present bail petitioner Vinay Dhawan was also present on the spot at the time of alleged incident alongwith his father Ramesh Dhawan, but all other witnesses associated by Investigating Agency save and except another witness Munish, nowhere stated something specific with regard to presence of the present bail petitioner Vinay Dhawan. Even initial version put forth by the complainant Jagmohan that at the first instance, deceased Harjinder Pal was given beatings by the co-accused Ramesh Dhawan and other persons with the aid of swords, daggers and knives never came to be corroborated by other witnesses of spot associated by the Investigating Agency. Record reveals that since police in preliminary inquiry arrived at a conclusion that presence of the present bail petitioner Vinay Dhawan is doubtful on the spot on the alleged date of incident, it moved an application under Section 169 Cr.PC for discharge of present bail petitioner, but before this application could be decided by the court below, complainant Jagmohan along with person namely Raghubir, approached the police with an intention to give supplementary statement. In supplementary statement, complainant Jagmohan though denied that at the time of alleged incident, knives, daggers and swords were used by the accused Ramesh Dhawan and other persons, but maintained that on the date of alleged incident, present bail petitioner Vinay Dhawan was also present on the spot alongwith his father. Another person namely

Raghubir also supported aforesaid version put forth by the complainant. After recording of aforesaid fresh statements given by the complainant and person namely Rahubir, police withdrew the application filed by it under Section 169 Cr.PC. Now investigation in the case is complete and challan stands filed in the competent court of law.

5. Mr. Kunal Thakur, learned Deputy Advocate General while fairly acknowledging factum with regard to completion of investigation and filing of challan contends that there is overwhelming evidence available on record suggestive of the fact that present bail petitioner was also present on the spot along with his father Ramesh Dhawan at the time of the alleged incident. He further contends that keeping in view the overall evidence collected on record by the Investigating Agency, it cannot be said that present bail petitioner did not play any active role at the time of alleged incident and as such, keeping in view the gravity of offence alleged to have been committed by the present bail petitioner along with his father Ramesh Dhawan, present petition deserves to be dismissed. Lastly, Mr. Thakur, contends that this court cannot lose sight of the fact that one person has lost his life in the alleged incident, who was allegedly crushed to death by the bail petitioner and another co-accused Ramesh Dhawan.

6. Mr. Satyen Vaidya, learned Senior counsel duly assisted by Mr. Ajay Kochhar and Mr. Vivek Sharma, Advocates, contends that bare perusal of statements given by the witnesses associated by the Investigating Agency, especially, subsequent statement given by the complainant on 15.5.2018, clearly suggests that present bail petitioner has been falsely implicated. Mr. Vaidya, contends that bare perusal of statements made by witnesses associated by the Investigating Agency nowhere suggests that present bail petitioner first gave beatings to the deceased and thereafter, crushed him under the tyres of his vehicle, which in fact was being driven by his father Ramesh Dhawan. Mr. Vaidya while specifically referring to the subsequent statement made by the complainant on 5.5.2018, made a serious attempt to persuade this Court to agree with his contention that version put forth by the complainant cannot be believed, because initially he alleged that deceased Harjinder Pal was beaten by Ramesh Dhawan using swords, knives and daggers, but subsequently, he in his supplementary statement categorically retracted from earlier statement and claimed that present bail petitioner was also present. Lastly, Mr. Vaidya contends that even as per CDR details, tower location of the bail petitioner was not found to be of the alleged spot of incident.

7. Having heard learned counsel for the parties and perused record made available to this Court, this Court finds that initially, complainant in his statement recorded on 7.5.2018, alleged that accused Ramesh Dhawan along with his son came to the spot and hurled abuses on deceased Harjinder Pal. He also alleged in that statement that thereafter deceased Harjinder Pal was given beatings by the accused Ramesh Dhawan and other 4-5 people using swords, knives and daggers, but interestingly, this witness in his supplementary statement, which he got recorded on 15.5.2018, took a u-turn and stated that his initial statement to the effect that deceased Harjinder Pal was given beatings with the aid of swords, knives and daggers was not correct and as such, there appears to be force in the argument of Mr. Satyen Vaidya, learned Senior Counsel that version put forth by the complainant is required to be taken into consideration with utmost caution, especially, when none of other witnesses associated by the Investigating Agency fully corroborated the version put forth by the complainant.

8. It is not in dispute that after preliminary inquiry, police had filed an application under Section 169 Cr.PC seeking discharge of present bail petitioner, whose presence on the spot was found to be highly doubtful. But as has been noticed herein above, complainant having noticed filing of application under Section 169 Cr.PC got his fresh

statement recorded on 5.5.2018, retracting from his earlier statement with regard to use of knives, swords and daggers, but reiterated that present bail petitioner Vinay Dhawan was also present on the spot. Careful perusal of both the statements made on 7.5.2018 and 15.5.2018, otherwise nowhere suggests that present bail petitioner crushed deceased Harjinder Pal under the tyres of vehicle, because he in both the statements has categorically stated that accused Ramesh Dhawan ran over the vehicle over the body of the deceased Harjinder Pal. Medical evidence adduced on record clearly suggests that deceased Harjinder Pal died on account of crush injuries suffered by him. Even if version put forth by all the witnesses associated by the Investigating Agency is presumed to be correct, in that situation also, there is nothing to suggest that present bail petitioner played role, if any, in crushing the deceased Harjinder Pal, who admittedly died on account of injuries suffered by him on account of his being crushed under the vehicle, which was allegedly being driven by the accused Ramesh Dhawan.

9. Needless to say, mere insertion of Section 34 IPC is not sufficient to hold the present bail petitioner guilty of having committed offence punishable under Section 302 of IPC, rather prosecution in this regard is required to prove that the present bail petitioner alongwith other co-accused had come to the spot with prior preparation and with an intent to kill the deceased, which evidence at this stage is lacking. **See.** Judgment passed by a coordinate Bench of this Court in case titled **Jeet Ram v. State of HP, Latest HLJ 2003 (HP) 23**.

10. Though aforesaid aspects of the matter are to be considered and decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but this Court having perused material available on record at this stage, sees no reason to let the bail petitioner incarcerate in jail for an indefinite period, especially when challan stands filed in the competent court of law and nothing is required to be recovered from the bail petitioner. Otherwise also, this Court was unable to lay its hand to any evidence led on record suggestive of the fact that in the event of petitioner's being enlarged on bail, he may flee from justice and temper with the evidence. Leaving everything aside, this Court is alive of the fact that guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution by leading cogent and convincing evidence and as such, it would not be appropriate to curtail his freedom for an indefinite period.

11. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court has further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is***

that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

12. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in

support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

13. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** **(**2012)1 Supreme Court Cases 49; held as under:-

> ***"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."***

14. In **Manoranjana Sinh Alias Gupta** versus **CBI** 2017 (5) SCC 218, The Hon'ble Apex Court has held as under:-

> ***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of***

> ***the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."***

15. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

> ***(i). whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
>
> ***(ii). nature and gravity of the accusation;***
>
> ***(iii). severity of the punishment in the event of conviction;***
>
> ***(iv) danger of the accused absconding or fleeing, if released on bail;***
>
> ***(v). character, behaviour, means, position and standing of the accused;***
>
> ***(vi) likelihood of the offence being repeated;***
>
> ***(vi) reasonable apprehension of the witnesses being influenced; and***
>
> ***(vi) danger, of course, of justice being thwarted by grant of bail.***

16. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 2,00,000/- with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court Solan/Nalagarh, with following conditions:

> ***(a). He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***
>
> ***(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***
>
> ***(c). He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and***
>
> ***(d) He shall not leave the territory of India without the prior permission of the Court.***

17. It is clarified that if the petitioner misuses the liberty or violate any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

18. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone. The petition stands accordingly disposed of.

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

Dr. Joginder Singh Chauhan & anr. .....Petitioners

Versus

Praveen Dulta Chauhan & Ors. .....Respondents

CMPMO No. 424 of 2017
Reserved on: 03.05.2019
Decided on: 21.05.2019

Guardian and Wards Act, 1890 - Section 25 **–Child Access and Custody Guidelines alongwith Parenting Plan adopted by High Court of Himachal Pradesh** – Custody of minor or visitation rights - Grant of – Relevant considerations – Boy aged 8 years residing with mother and maternal grandparents on account of strained relations between his mother and father – Multiple litigation between two in different courts – Husband committing suicide allegedly on account of torture of wife and her relatives and FIR for abetment to commit suicide also registered against wife and her parents on basis of suicide note of deceased – Paternal grandparents praying for custody of minor child – Held, child has been deprived of love and affection of his parental grandparents – Custody of child should remain with mother so that she could bring him up with due care – Parental grandparents given visitation rights once in week for eight hours from morning to evening – During school vacations, they would be having custody of child for one week. (Paras 13 to 16)

For the petitioners: Mr. B.C. Negi, Sr. Advocate with Mr. Peeyush Verma, Advocate.
For the respondents: Mr. Neeraj Gupta, Sr. Advocate with Ms. Poonam Gehlot, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India has been maintained by the petitioners against the order dated 24.07.2017, passed by learned Civil Judge (Sr. Div.), Shimla, H.P. in CMA No. 103-6 of 2016, whereby the application filed by the petitioners under Section 25 of the Guardian and Wards Act, read with Section 151 of the Code of Civil Procedure for interim directions with regard to the custody of minor respondent No. 4, Master Vedant, has been partly allowed and they were held entitled for visitation rights of respondent No. 4, Master Vedant once in a week, i.e. every Sunday.

2. Briefly stating facts giving rise to the present petition are that marriage between respondent No. 1 and son of the petitioners was solemnized on 09.12.2010 and out of wedlock of their son and respondent No. 1, a male child was born on 31.08.2011. After the said marriage respondent No. 1 refused to perform household chores and her behavior towards the family was not cordial. On account of disputes between the son of the petitioners and respondent No. 1, several cases were initiated and during intervening night of 01.12.2016 and 02.12.2016, their son committed suicide, leaving behind a suicide note stating details of facts and circumstances of his death. Subsequently, a case under Section 306 of the Indian Penal Code was registered against respondents No. 1 to 3, at Police Station New Shimla, H.P. and after their arrest, minor respondent No. 4, Master Vedant, has been left all alone in the custody of relatives of the respondents. Hence, the application

under Section 25 of the Guardian and Wards Act, read with Section 151 CPC has been filed by the petitioners.

3. Learned trial Court vide order dated 24.07.2017, partly allowed the application of the petitioners and held them entitled for visitation rights of respondent No. 4, Master Vedant once in a week, i.e. every Sunday. However, their prayer for custody of minor has been rejected. Hence the present petition.

4. Mr. B.C. Negi, leaned Senior Counsel appearing on behalf of the petitioners has argued that paternal grand parents after loosing their son have esteem love and affection with the grand son and at this old age they wanted to have the custody of their grand son. Mr. Negi, learned Senior Counsel has further argued that though paternal grand parents are affluent enough to invest anything for the welfare of the grand son and similar is the situation with respect to maternal grand parents, however, the paternal grand parents need the custody of the child, as he is from their blood and afterall he has to inherit them.

5. On the other hand, Mr. Neeraj Gupta, learned Senior Counsel appearing on behalf of the respondents has argued that the litigation *inter se* the parties, after the death of the father of the child, had made the relations of parties so strained that it is difficult for the child to accept the paternal grand parents and in these circumstances, the petition is liable to be dismissed, as the paternal grand parents have visitation rights as per the order of learned Court below.

6. In rebuttal, Mr. Negi, learned Senior Counsel has argued that it is very difficult for the paternal grand parents to meet the child in the house of the respondents and the purpose of visitation rights will only be solved, if the custody of the child is given temporarily at least to the paternal grand parents. In support of his arguments, Mr. Negi, has placed reliance upon Child Access and Custody Guidelines alongwith Parenting Plan, which are adopted by this High Court.

7. To appreciate the arguments of learned counsel for the parties, this Court has gone through the records in detail.

8. It is true that minor child has been deprived of love and affection of the father due to litigation going on *inter se* the couple at that time on their small matters, which is yet to be adjudicated upon by the criminal Court, where those proceedings are pending. Late Mr. Nitin Chauhan, seems to have been a strong bond with the child and with his family. Which is evident from the fact that he has ended his life, as per the averments which has come on record. The child is now studying in D.A.V. Sr. Secondary School, New Shimla and as disclosed by the parties when present in the Court, the paternal grand parents are residing in New Shimla and maternal grand parents alongwith their daughter (mother of minor) and the child are residing below Khalini. Whenever child goes to school, he goes by passing near the house of his paternal grand parents.

9. It has been vehemently contended by the parties that the mediation in this case was tried many a times, however, no fruitful purpose has been achieved. Even this Court has also tried to make the parties to arrive at some compromise and though the paternal and maternal grand parents attended the Court, but maternal grand parents seems to be annoyed for getting them involved in a criminal case.

10. This Court has considered the aspect that the child who has to get the love and affection of both grand parents, has been deprived of getting love and affection of paternal grand parents. At this stage, this Court has also considered the aspect that it is Smt. Praveen Dulta Chauhan, the mother, who is to be granted custody of the minor child,

but, at the same point of time, the emotions of paternal grand parents are also required to be considered for granting the visitation rights and especially in the circumstance when they see their son in the grand child.

11. The grand son of the petitioners is eight years of age and studying in first class. This Court has taken into consideration the Child Access and Custody Guidelines alongwith Parenting Plan as adopted by this High Court and as per these guidelines, *the basic principles of the Courts are to ensure that the child/children get(s) to spend equal or substantial and significant time to be showered with love and affection from both the parents irrespective of parent's conflict and efforts should be made by parties and if necessary Court should direct parties to mutually agree upon a visitation schedule to be drawn up alongwith Marriage Counselor within a maximum period of 60 days. Pending, finalization of mutual final overnight visitation agreement, an interim access has to be worked out immediately*. In the present case inspite of various conciliatory/ mediatory proceedings nothing has come up, so it is now for the Court to decide about the visitation rights.

12. Now coming to the visitation rights of non-custodial parents for children above 36 months and older. The guidelines provides that, *the non-custodial parent shall be entitled to weekend visitation every other weekend or every weekend one night every week. Every other weekend visitation shall begin Friday at 6:00 p.m. and end at 6:00 p.m. on Sunday. If every weekend visitation is opted then every week overnight visitation shall begin either from every Friday at 6:00 p.m., and end on Saturday 6:00 p.m. Or from every Saturday 6:00 p.m. and end at 6:00 p.m. on Sunday. It is not the responsibility of the custodial parent to provide food or shelter for the child during the non-custodial parent parent's visitation.*

13. This Court has taken into consideration all the material which has come on record and the factum of pendency of the criminal proceedings against maternal grand parents and mother and taking into consideration the welfare of the child, this Court concludes that the custody of the child should remain with the mother and she should bring up the child with due care, love and emotions. She should give so much love to the child and her maternal parents should also shover so much blessings on the child that he should never feel the loss of his father in his life throughout and always see till he gets mature, his maternal grand father as his father. So, the custody of the child is required to be given to the mother, living with her parents.

14. As far as maternal grand parents are concerned taking into consideration the fact that they are prosperous enough to bestow any monitory favour to the minor child, but the paternal grand parents who had lost their son and have hopes on the grand son to come and inherit them one day, are also required to be given visitation rights to the child. Now once holding that visitation rights are required to be given to the paternal grand parents, whether granting them visitation rights in the house of maternal grand parents will meet the ends of justice? The answer is "no", because there will be a stress and atmosphere of negativism, as maternal grand parents are facing criminal trial for the allegations with respect to the death of their son-in-law.

15. In these circumstances, this Court finds that paternal grand parents are required to be given visitation rights in such a manner that they can take away the minor who is eight years of age once in a week on holiday for eight hours from morning to evening to have a feeling of oneness with their grand son. When the holidays will come, this Court leave it to the parties to decide exact time of week among themselves that in the first year the custody of the child be given to the paternal grand parents at least for seven days intermediately or continuously to get acquainted with the grand paternal parents.

16. This Court having failed to get the parties mediated, even though the mediator has made many efforts, has now to bound the parties as under:

> ***(i) That on every weekend for eight hours grand maternal parents and mother of the child will hand over the custody of the minor to paternal grand parents, who will return the child in the evening to the maternal grand parents and mother at their residence.***
>
> ***(ii) Whenever there will be vacation in the school, the custody of the child will be given for one week, which mutually the parties will decide, i.e. with breaks or continuously to the paternal grand parents for the first year and for increase or decrease of the same, if need be, the parties are at liberty to approach this Court.***
>
> ***(iii) It is expected from the parties that they should love the child. Loving the child does not mean that they should do something to make the child comfortable, it means that they should do something with which the child develops and progress to become a very able, competent, smart person in the times to come. Afterall the mother, maternal grand parents and paternal grand parents have a vital role to play throughout the life of the child and till the time he gets mature enough to understand his well-being. This Court expects the parties to do best as per their intellectual, physical and monitory capacities for the welfare of the child.***
>
> ***(iv) It is also expected that the interest of the child should be acquainted with the activities, when taken on weekends making the physical and mental growth by providing him sports articles and good books to read and to be taught, including religious epics.***

This Court is making these observations, as the custody of the child has been decided by the order of the Court and the parties have failed to mediate themselves.

17. With the aforesaid direction, the petition, so also pending application(s), if any, stands disposed of.

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

State of Himachal Pradesh ……Appellant
Versus
Joban Dass ……Respondent

Cr. Appeal No. 332 of 2009
Reserved on: 09.05.2019
Decided on: 21.05.2019

Punjab Excise Act, 1914 (as applicable to state of HP) -Section 61 (1)(a) – Recovery of illicit liquor- Proof – Prosecution alleging recovery of can containing illicit liquor from accused – Trial court acquitting accused- Appeal by state- Held, spot of alleged recovery surrounded by about 30 houses – No independent person called to join investigation before conducting search – Non-joining of independent persons when easily available makes

prosecution case doubtful – Evidence of police witnesses not inspiring any confidence – Appeal dismissed- Acquittal upheld. (Paras 6 & 7)

Cases referred:
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
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. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General with Mr. Raju Ram Rahi, Deputy Advocate General.
For the respondent : Mr. H.K.S. Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present appeal, under Section 378 of the Code of Criminal Procedure, has been maintained by the appellant-State of Himachal Pradesh, assailing the judgment of acquittal, dated 01.01.2009, passed by learned Sub Divisional Judicial Magistrate, Rampur Bushahr, District Shimla, H.P. in Criminal Case No. 94-3 of 2006, under Section 61-1-14 of Punjab Excise Act (hereinafter to be called as "the Act"), as applicable to State of Himachal Pradesh.

2. Briefly the facts giving rise to the present appeal as per the prosecution story are that on 18.03.2006, at about 7:15 p.m., when HC Kewal Singh, HHC Sunder Singh, No. 304 and Constable Shiv Ram were present at place Labana Sadana in execution of their routine patrolling duty, they found a person carrying a plastic can in his right hand. The person on seeing the police party got perplexed and on suspicion he was arrested. During his personal search, he was found in conscious and exclusive possession of one plastic can, containing three bottles of illicit liquor. After separating one nip as sample, both the nips as well as sample were sealed with seal 'A' and taken into possession. FIR was registered against the accused at Police Station Jhakri. Site plan was prepared and statements of witnesses were recorded. On receipt of chemical examiner report, final police report was prepared and presented before the learned trial Court.

3. Prosecution, in order to prove its case, examined as many as six witnesses. Statement of the accused was recorded under Section 313 Cr. P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 01.01.2009, acquitted the accused for the commission of offence, punishable under Section 61-1-14 of the Act, hence the present appeal.

4. Learned Additional Advocate General, has argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. On the other hand, learned counsel for the accused-respondent has argued that the alleged quantity of three bottles of illicit liquor stated to be recovered from the respondent is a concocted story, as no independent witness was associated by the police. Even the Investigating Officer in his statement has specifically stated that he does not find it appropriate to associate any independent witness. So, the prosecution has failed to prove the guilt of the accused-respondent beyond the shadow of reasonable doubt and, therefore, the well reasoned judgment of acquittal, passed by the learned trial Court needs no interference. In rebuttal,

learned Additional Advocate General has argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and as there was no independent witness was available on the spot, after re-appreciating the evidence, the judgment of acquittal passed by learned trial Court be set aside and accused be convicted for the commission of offence, he was charged with.

5. To appreciate the arguments of learned counsel for the parties, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

6. The most incriminating evidence against the accused in the instant case is seizure memo, Ext. PW-2/A, vide which plastic can, Ext. P-1 alongwith nip sample was taken into possession. The seizure memo was signed by the accused, as well two official witnesses. Both these witnesses, i.e. Sunder Singh and Shiv Ram has appeared in the witness box as PW-2 and PW-4. As per the statements of these witnesses on 18.03.2006 at about 7:15 p.m. they found a person carrying a plastic can in his hand. Both these witnesses have admitted that on the spot there were about 30 houses, however, they did not associate any independent witnesses. Similarly, PW-6, Investigating Officer has also admitted that there is close vicinity nearby the spot, but he did not find it proper to associate any independent witness.

7. After going through the evidence of PW-2, PW-4 and PW-6, who are official and material witnesses of this case, this Court finds that when independent witnesses were available on spot the Investigating Officer should have associate them. However, the Investigating Officer simply stated that he does not find it proper to associate independent witnesses. The non joining of the independent prosecution witnesses when they were available, makes the prosecution case doubtful with respect to recovery of three bottles of illicit liquor. At the same point of time the testimony of official witnesses are required to be scrutinized with care and caution, when their statements are not confidence inspiring and in the case in hand also, the statement of official witnesses are not confidence inspiring. In these circumstance, after taking into consideration the evidence, which has come on record and testimonies of the witnesses, even after re-appreciating the evidence, this Court finds that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and the well reasoned judgment of acquittal, passed by the learned trial Court, needs no interference.

8. 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.

9. 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.

10. In **Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,**the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal :

> ***"42. From the above decisions, in ourconsidered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

11. 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 CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant

Versus

Rakesh Mohan Gautam ......Respondent

Cr. Appeal No. 462 of 2008
Reserved on: 23.04.2019
Decided on: 21.05.2019

Indian Penal Code, 1860- Section 304-A- Death by medical negligence– Proof– Prosecution alleging that accused by his medical negligence caused death of sister of complainant – Trial court acquitting accused – Appeal against – Evidence on record revealing (i) victim visited hospital of accused for kidney ailment and her X-ray examination showed that she had kidney stone and needed operation (ii) during operation she died and death certificate indicated reason of death as perforation and rupture of intestine– (iii) accused gave fair treatment to deceased and made every possible effort for her betterment–

Held, death of deceased was a sheer accident– Accused had no mens rea and was not negligent in conducting operation– Appeal dismissed– Acquittal upheld.(Paras 10 to 13)

Cases referred:
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
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. S.C. Sharma, Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General with Mr. Raju Ram Rahi, Deputy Advocate General.
For the respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present appeal, under Section 378 of the Code of Criminal Procedure, has been maintained by the appellant-State of Himachal Pradesh, assailing the judgment of acquittal, dated 12.02.2008, passed by learned Chief Judicial Magistrate, Kullu, District Kullu, H.P, in criminal case No. 223-1/2003/28-II/2005, under Section304-A of the Indian Penal Code (for short "IPC").

2. Briefly the facts giving rise to the present appeal as per the prosecution story are that on 22.04.2002, Kamla Devi (since deceased) sister of complainant, Bhag Singh visited the hospital of respondent-accused for kidney stone problem. The respondent gave her medicines, conducted her X-ray and advised her to come again for medical checkup. Consequently, on 29.04.2002, the deceased again visited the hospital of the accused, where her X-ray was conducted and it was disclosed to her that she is having stone in her kidney and to remove the stone, an operation is required to be conducted. On 08.07.2002, the deceased accompanied by Bhag Singh went to the hospital of the accused and she was admitted for operation. On 09.07.2002, she was taken to operation theatre, however, after sometime, the accused told the complainant that patient was running 103 degree fever. It was also told by the accused that there is a hole in intestine of the deceased. At that time, no anesthetist was available. The condition of the deceased deteriorated and ultimately at 10:00 p.m. she died. It has been alleged by the complainant that the accused had operated her sister for kidney stone, but it was revealed in the death certificate that the reason of the death was perforation and rapture of intestine. Consequently, the incident was reported to the police and FIR was registered against the accused on the allegations that the deceased died on account of negligence on his part. During the course of investigation, police took into possession the relevant records from the hospital of the accused, as well as medical treatment records of the deceased. The spot map was also prepared and after completion of investigation, *challan* was presented in the Court

3. Prosecution, in order to prove its case, examined as many as ten witnesses. Statement of the accused was recorded under Section 313 Cr. P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 12.02.2008, acquitted the accused for the commission of offence, punishable under Section 304-A of IPC, hence the present appeal.

4. Learned Additional Advocate General, has argued that the judgment of acquittal, passed by the learned trial Court is without appreciating the evidence to its true perspective and after re-appreciating the evidence correctly, the accused be convicted, as the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. 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 beyond the shadow of reasonable doubt and, therefore, the well reasoned judgment of acquittal, passed by the learned trial Court needs no interference.

5. To appreciate the arguments of learned counsel for the parties, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

6. **PW-1**, Bhag Singh and **PW-2**, Meera Bai, while appearing in the witness box have deposed that the deceased went to the hospital of the accused on 22.04.2002 and again she was told to come to the hospital. Consequently, on 29.04.2002, the deceased again visited the hospital for medical check up and she was told to conduct operation for kidney stone problem. On 08.07.2002, the deceased was admitted in the hospital for operation and on 09.07.2002, when she was inside the operation theatre, the accused told that the deceased was running 103 degree fever and at about 5:00 p.m., the accused told that the patient was having a hole in her intestine. As per PW-1 and PW-2, the accused preferred to conduct the operation without the help of any anesthetist expert. At about 9:00 p.m., the deceased expired. As per the statement of PW-1, the death of the deceased took place due to negligence on the part of the accused. PW-1, in his cross-examination, admitted that the accused had advised him to conduct the operation of the deceased from some other hospital, however, he insisted that he wanted to keep the patient in S.R. Hospital.

7. **PW-3**, Bhanu Sharma, Laboratory Technician in the hospital of the accused has deposed that on 09.07.2002, the operation of the deceased was conducted by the accused and at that time, Dr. Anurag Sharma, MBBS, Dr. Sohan Singh, BMS and Farmacist Gopal Singh were present there. She further deposed that accused himself had administered anesthesia to the patient.

8. **PW-4**, Dr. Satish Malhotra, has deposed that during the month of July, 2002, PW-1 came to him with medical reports issued by S.R. Hospital of the accused. He further deposed that from the perusal of the documents issued by the hospital, it was clear that the patient was being treated for kidney stone. However, the death certificate was revealing that the cause of death was due to intestine. As per this witness, if any person is having perforation in the intestine, it would not be possible for him/her to stand and walk. He deposed that as per PW-1 on the relevant day, he and the deceased came on foot for about 5/6 kms. But, the deceased could not have walked 5/6 kms with perforation in intestine.

9. **PW-5**, Ghamir Chand, Retd. SHO, Police Station Kullu, has prepared the challan. **PW-6**, HC, Upender Singh, has deposed that during investigation of the case, he recorded the statements of the witnesses and took into possession certain documents from the hospital of the accused. **PW-7**, ASI Rinchain Gialchhen, has deposed that he also carried out the investigation, during which, he took into possession treatment chart, as well as death certificate of the deceased, vide recovery memo, Ext. PW-7/A. **PW-8**, Ludermani, uncle of the deceased has also deposed the facts, as stated by the complainant Bhag Singh. **PW-9**, ASI Mathru Ram has proved FIR, Ext. PW-1/A. **PW-10**, S.I. Rup Singh, another Investigating Officer of the case, has deposed that after visiting the spot, he prepared spot map, Ext. PW-10/A. He also took into possession prescription slip and X-ray films, vide recovery memo,

Ext. PW-1/B. The relevant registers from the hospital of the accused were also taken into possession vide recovery memo, Ext. PW-10/B. He also took into possession other relevant record of treatment of the deceased, vide recovery memo, Ext. PW-10/C.

10. It is admitted case of the prosecution that on 22.04.2002, the deceased visited the hospital of the accused for kidney stone problem and thereafter on 29.04.2002, she was advised for operation in order to remove kidney stone, on which date, her X-ray was conducted and medicines were given to her. After 29.04.2002, the deceased did not visit the accused till 08.07.2002 and this fact proves that during the aforesaid period, the deceased was having no pain in the abdomen, or any other problem. Meaning thereby, that the medicines prescribed by the accused on 29.04.2002 had positive result.

11. Now coming to the medical evidence and Ext. PB, Ext. PW-1/D and Exts. PN & PM in this regard are very important evidence which have come on record. Ext. PM reveals that on 08.07.2002 at about 4:00 p.m., the deceased was medically examined by the accused in his hospital for severe abdomen pain. The accused had also shown the position of pain and tenderness by diagram, which reveals that on 08.07.2002, pain and tenderness was detected on the left side, whereas on 22.04.2002, pain was detected on the right side of the abdomen. Which proves that the deceased had developed new tenderness and pain on the left side on 08.07.2002 and her earlier problem, i.e. the pain on the right side was fully cured. Whereas, Ext. PB shows that all the necessary tests of the deceased were carried out by the accused. The X-ray and ultrasound reports of the deceased show that air and fluid level was causing obstruction in the intestine and to remove the said obstruction from the intestine, the accused preferred the surgery of the deceased for her improvement. Ext. PM further reveals that the accused had taken precaution before conducting surgery, as the deceased was put to nil oral diet. On 08.07.2002, the deceased was medically checked at 6:00 p.m. and 8:00 p.m. and on both occasions patient was having no pain. Meaning thereby that medical treatment started at 4:00 p.m. had given positive results. On 09.07.2002 at 12 O'Clock (midnight), the deceased was again examined and no new complaint was noticed. However, tenderness was noticed on the left side. In the morning of 09.07.2002 at about 6:00 a.m. and 10:00 a.m. the deceased was again medically checked up. Thereafter, on the same day at 1:00 a.m., the condition of the patient deteriorated and 103 degree fever was noticed. The blood pressure of the deceased had also dipped and it was 90/60 at that time. Accordingly, the accused advised for immediate surgery. Ext. PW-1/D further reveals that before surgery, the accused had advised to conduct operation from some other hospital, however, complainant Bhag Singh and Kamla Devi insisted that they wanted to keep the patient in S.R. Hospital of the accused and this fact has been admitted by the complainant in his cross-examination.

12. The another important document, i.e. Ext. PN, is treatment chart of the deceased. As per the allegation of the prosecution, the accused conducted the operation of the deceased without the help of anesthetist expert. However, as per Ext. PN, the operation of the deceased was conducted by the accused on 09.07.2002 at about 3:30 p.m. with the monitoring anesthesia by Dr. Anurag Sharma, Mr. Gopal and Bhanu Guleria, Assistants. PW-3, Smt. Bhanu, has specifically deposed in her evidence that at the time of operation, Doctor Anurag Sharma was present, whereas the accused had administered anesthesia and only in one part, the body of the deceased was under the influence of anesthesia. In these circumstances, it is clear that the accused is a qualified doctor, as well as surgeon and at the time of operation, one another MBBS, Dr. Anurag Sharma was assisting him.

13. After going through the medical evidence in detail, this Court finds that the accused gave fair treatment to the deceased and made every possible effort for her betterment. So, the learned trial Court has rightly come to the conclusion that death of the

deceased was sheer an accident, wherein the accused was having no *mens rea* in any manner whatsoever. Meaning thereby that the accused was not rash and negligent in causing death of the deceased while conducting her operation. In these circumstance, after taking into consideration the medical evidence, which has come on record and testimonies of the witnesses, even after re-appreciating the evidence, this Court finds that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and the well reasoned judgment of acquittal, passed by the learned trial Court, needs no interference.

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. In **Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,**the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal :

> ***"42. From the above decisions, in ourconsidered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***(2) The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
>
> ***(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***
>
> ***(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.***
>
> ***(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."***

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 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.

Shri Bharat Bhushan Vaid .....Petitioner

Versus

State of H.P. and others ....Respondents

Cr. Revision No. 308 of 2018
Reserved on: 17.05.2019
Decided on: 29.05.2019

Code of Criminal Procedure, 1973– Sections 156 (3) and 173– Cancellation report– Protest petition– Disposal of– Magistrate committing protest petition of complainant to court of session without considering it and without issuing summons to accused (R 2 to R 4)- Petition against– Held, role of Magistrate is little more than of a simple post office– He is to decide protest petition if filed and to summon persons to whom he on material on record prima facie finds to be involved in commission of offences- He may also direct further investigation in the matter– Order of Magistrate committing protest petition to court of Session set aside– Matter remanded with direction to proceed in accordance with law.(Para 7)

Case referred:

Dharam Pal vs. State of Haryana, (2014) 3 SCC 306

For the petitioner: Petitioner present in person.

For the respondents: Mr. S.C. Sharma and Mr. P.K. Bhatti, Additional Advocates General with Mr. Raju Ram Rahi, Deputy Advocate General, for respondent No. 1.
Mr. Shrawan Dogra, Senior Advocate with Mr. Deven Khanna and Mr. Harsh Kalta, Advocates, for respondents No. 2 and 3.
Mr. N.S. Chandel, Senior Advocate with Mr. Vinod Gupta, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Section 397, read with Section 401 of the Code of Criminal Procedure has been maintained by the petitioner against the order dated 04.08.2018, passed by learned Additional Chief Judicial Magistrate, Kasauli, District Solan, H.P., in case No. 133/2 of 2018/17, whereby learned Chief Judicial Magistrate finds it just to forward the petition of the petitioner to the Court of learned Sessions Judge at the time of committal and issued summons against accused Jagbhushan Kapil, mentioned in column No. 1.

2. The petitioner in person has argued that the learned Magistrate below vide impugned order has committed the trial to the learned Sessions Judge and has not exercised his jurisdiction to summon respondents No. 2 to 4. He has further argued that the learned Magistrate has failed to exercise his jurisdiction in the facts and circumstances of the case to order for further investigation which was necessary to meet the ends of justice. In support of his arguments "that learned Magistrate was required to exercise his jurisdiction", the petitioner has referred the law laid down by Hon'ble Supreme Court in ***Dharam Pal*** vs. ***State of Haryana***, (2014) 3 SCC 306 and has argued that respondents No. 2 to 4 were in column No. 2 of the police report presented before the learned Magistrate under Section 173(2) of the Code of Criminal Procedure. The petitioner argued that the learned Magistrate should have exercised the powers under Section 173(8) of the Code of Criminal Procedure and order for the further investigation of the case, as there was sufficient material before him to do so.

3. On the other hand, Mr. Shrawan Dogra, learned Senior Counsel for respondents No. 2 and 3 while inviting the attention of this Court to Sections 190, 193, 209, 319 and 173(8) of the Code of Civil Procedure and the law as referred hereinabove, has vehemently argued that the learned Magistrate cannot apply mind and take cognizance of the offences which are exclusively triable by the Court of Session, as he can neither conduct the inquiry, as the legislature has amended the Code purposely to avoid the cognizance to be taken by the Magistrate, because cognizance can only be taken once either by the learned Magistrate or by learned Sessions Judge. He has further argued that the order passed by learned Court below is as per law and the revisional powers of this Court are not required to be exercised to look into that order, as the same was passed after appreciating the law correctly and to its true perspective. Mr. Dogra, further argued that as far as the application of mind under Section 173(8) of Cr. P.C. is concerned, it has to be exercised by the Court of competent jurisdiction and in the cases exclusively triable by the Sessions Judge(s), the Magistrate(s) has/have no authority/jurisdiction to apply mind to that aspect also. So, in these circumstances order passed by learned Magistrate is as per law and suffers from no infirmity.

4. Mr. S.C. Sharma, learned Additional Advocate General has argued that the impugned order needs no interference by this Court, as it was passed as per the law.

5. Mr. N.S. Chandel, learned Senior Advocate, has argued that the Magistrate after complying with the provisions of Sections 204 to 207, comes to the conclusion that the case is triable by the Sessions Judge has to commit the case to the learned Sessions Judge without going into other merits of the case as per the spirit of law. Lastly, he has argued that as the impugned order passed by learned Magistrate is as per law, the same needs no interference.

6. The judgments of Hon'ble Supreme Court relied upon by learned counsel for the parties when gone into, makes it clear that the Magistrate has to do the following acts when report is placed before him:

> **(a) He has to see whether the case is triable by him or not.**
>
> **(b) If he comes to the conclusion that the case is triable by the Court of Session, he has to commit the case to Sessions Court for trial.**
>
> **(c) In case there is a protest petition he has to consider and dispose of the same in accordance with law.**

Now coming to the protest petition, it is settled law that any person can maintain protest petition before the Magistrate and whether the Magistrate has to consider that protest

petition while taking into consideration the Police report or not, the answer is "***yes***", because without considering the protest petition the Magistrate cannot make up his mind with respect to proper provision to be applied in the facts and circumstances. Simply to say that role of the Magistrate is just as a Post Office is not acceptable. The role of a Magistrate is though passive. This passive role is required to be considered in appropriate respect, as the Hon'ble Supreme Court in ***Dharam Pal*** vs. ***State of Haryana*** and ***Balveer Singh*** vs. ***State of Rajasthan*** has held that Magistrate has to also apply its mind with regard to accused persons mentioned in column 2 of the police report, merits of the case and whether re-investigation is required or not and thereafter he has to summon them, supply them the copies of challan and then direct them to appear before the learned Session Judge, where the case is committed as per law.

7. The role of the magistrate is little more than a simple Post Office, as he has to decide the protest petition, he has to summon the persons to whom he finds that they are accused even if they are not named as accused by the police and kept in column 2 of the police report, if from the facts on record he comes to conclusion that their act is culpable and there is *prima facie* case against them. This the Magistrate can only do after considering the protest petition and applying his mind to that. The role of the Magistrate while committing is not so passive that he is only to forward the papers.

8. The Hon'ble Supreme Court in ***Dharam Pal*** vs. ***State of Haryana***, (2014) 3 SCC 306 has given a view regarding the role, which Magistrate has to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) Cr. P.C. The relevant extract of the judgment is as under:

> ***"33. As far as the first question is concerned, we are unable to accept the submissions made by Mr. Chahar and Mr. Dave that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate has no other function, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code of array any other person as accused in the trial. In other words, according to Mr. Dave, there could be no intermediary stage between taking of cognizance under section 190(1) (b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Sessions Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event the Sessions Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same.***
>
> ***34. The view expressed in Kishun Singh case, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report, which power the Sessions Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173(2) of the Code, he was helpless in taking recourse to such a course of action while the Sessions Judge***

> ***was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.***
>
> ***35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) Cr. PC. In that event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the accused named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter."***

9. Similar view has been taken by the Hon'ble Supreme Court in ***Balveer Singh*** vs ***State of Rajasthan***, wherein in sub-para 15.1 it has been held as under:

> "***15.1. The Magistrate has ample powers to disagree with the final report that may be filed by the police under Section 173(2) of the Code and to proceed against the accused persons dehors the police report. The Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) of the Code. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being prima facie satisfied that a case had been made out to proceed against the accused named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter. Further, if the Magistrate decides to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same is found to be triable by the Sessions Court.***

10. So, in these circumstances, This Court finds that learned Magistrate was required to consider the protest petition, order for further investigation, summon respondents No. 2 to 4 and direct them to appear before the learned Sessions Judge after supplying them the copies of the chargesheets, if the Magistrate comes to the conclusion that they are accused persons, as it is for the Magistrate to firstly apply its mind with respect to the facts, which have come in the protest petition and the party, has a right to appeal against the order of the Magistrate and to preserve this right of the party, the protest petition is required to be remanded back to learned Additional Chief Judicial Magistrate, Kasauli, District Solan, H.P. to adjudicate the same as per the law. Ordered accordingly. Parties to appear before learned Additional Chief Judicial Magistrate, Kasauli, District Solan, H.P. on **26th June, 2019**.

11. With aforesaid observations, the petition, so also pending application(s), if any, stands disposed of.

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

Mohinder Kumar .....Petitioner
Versus
Sita Devi .....Respondent

CMPMO No. 236 of 2018
Reserved on 07.05.2019
Decided on: 14.06.2019

Code of Civil Procedure, 1908-Order XXVI Rule 9- Appointment of Commissioner– Justification – Held, plaintiff claiming right of passage through staircase as well as land of defendant– No boundary dispute exists interse parties. It is for plaintiff to prove right of passage through land/staircase in possession of defendant– No purpose would be served by getting the land demarcated– Trial court justified in dismissing plaintiff's application seeking demarcation of land through local commissioner– Petition dismissed.(Para 6)

For the petitioner: Mr. Vaibhav Tanwar, Advocate.
For the respondent: Mr. Rohit Sharma and Mr. Anuj Gupta, Advocates.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India, has been maintained by the petitioner/defendant (hereinafter to be called as "the defendant"), against the order dated 04.05.2018, passed by learned Civil Judge (Jr. Div.), Court No. 6, Shimla, H.P., whereby an application under Order 26, Rule 9 CPC, filed by the defendant for appointment of a Local Commissioner has been dismissed.

2. Briefly stating facts giving rise to the present petition are that the respondent-plaintiff (hereinafter to be called as "the plaintiff") filed a Suit for permanent prohibitory injunction and for mandatory injunction, wherein the plaintiff has claimed the right of passage through the stairs which passes through defendant's land and garden, comprised in Khasra No. 296 and then joins the main road, situated at Bhagwati Nagar, Tehsil and District Shimla. The plaintiff has claimed the passage from the said stairs to the main road, which has been constructed by the defendant through Khasra No. 296 on the basis that the stairs have been constructed on the common land, as no partition has taken place amongst the co-sharers. It has been further averred that there was no common path ever constructed on common land, nor it was ever a passage shown in the revenue papers. In April, 2013, the defendant carried out private demarcation of his land, comprised in Khasra No. 296, in which the plaintiff was also associated being a necessary party. In said demarcation, the report was submitted by the revenue officials on 06.01.2017, wherein it has been stated that the stairs in question have been constructed by the defendant on Khasra No. 296. Feeling aggrieved by the said demarcation report, the defendant filed an

appeal before Sub Divisional Magistrate (Rural), Shimla, who set aside the order dated 06.01.2014, passed by Assistant Collector 1st Grade, Shimla, on the ground that the instructions given by the Financial Commissioner, under Section 107 of the H.P. Land Revenue Act, i.e. Guidelines of demarcation are not followed by the lower revenue authority. As per the defendant, present boundary dispute can only be decided through the revenue agency by demarcating the plot, building and stairs in question, as such, a Local Commissioner is required to be appointed. Hence the present application.

3. In reply to the application, the plaintiff has taken preliminary objection qua maintainability. On merits, it has been averred that the land in question is still unpartitioned amongst the co-sharers and there is no boundary dispute. It has been further averred that at the time when the plot was purchased by the plaintiff there existed a common path from the main road to the plots, comprised in Khata/Khatauni No. 74/106, Khasra No. 512, situated at Muhal Vihar, Pargana Jajhot, Tehsil and District Shimla, H.P. The plaintiff used the said path to only access the plot and has been using the same since the purchase of plot by her. The land over which the defendant has constructed his house, has been assigned Khasra No. 296 and the land on which the plaintiff constructed her house was assigned Khasra No. 297, the common passage which existed on the spot in old Khasra No. 512, after the settlement operation is now lead to Khasra No. 297. The defendant after filing of the present suit entered into an agreement with the plaintiff, wherein existence of old common path and construction of stairs over the said common paths has been admitted by the defendant. Lastly, it has been averred that prejudice shall be caused to the plaintiff, if the present application is allowed and dismissal of the application has been prayed.

4. Learned Court below vide order dated 04.05.2018, dismissed the application, so filed by the defendant, hence the present petition.

5. Learned counsel for the petitioner has argued that the order of the learned Court below without appreciating the fact that a Local Commissioner was required to be appointed to tell exact location of the land where the stairs are constructed, dismissed the application filed by the petitioner/defendant. So, the order of the learned Court below be set aside and a Local Commissioner be appointed. On the other hand, learned counsel for the respondent has argued that the order passed by learned Court below is just reasoned and needs no interference and the land was common land, upon which no partition has taken place and the path is kept common.

6. From the record it is clear that as the defendant was obstructing the passage, suit was filed by the plaintiff. The plaintiff is claiming the right of the staircase and path as easementary right, so present dispute cannot be said to be a boundary dispute. It is for the plaintiff to prove that there exist any path or passage over the suit land and she was using it for ingress and egress since long and the right has accrued to her as easementary right, vide sale deed dated 14.07.1992. So, in the given facts and circumstances of the case, no purpose would be served by getting the demarcation of the land as the plaintiff has not disputed that both the disputed Khasra numbers are in the possession of the defendant or there is any encroachment etc., which the defendant and the plaintiff want to prove. Accordingly, This Court finds that present dispute is with respect to the obstruction of the passage only and the Court is not to create evidence for the party to prove its case.

7. So, the order passed by the learned Court below needs no interference, as the land is still joint and only dispute is with respect to using of the passage which is joint and there is no boundary dispute. Consequently the present petition sans merit, deserves dismissal and is accordingly dismissed. Pending application(s), if any, also stands

dismissed. No order as to costs. Parties to appear before the learned Court below on **15th July, 2019**.

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

Kalyan Singh .....Appellant
Versus
Kartar Singh .....Respondent

RSA No. 226 of 2016
Reserved on: 22.05.2019
Decided on: 20.06.2019

Indian Easements Act, 1882- Section 13 – Right of passage by way of necessity for cultivation etc.– Held, on facts, lands came to parties through their mother – Land of plaintiff can be cultivated only if he has access through defendant's land – Defendant's land is a servient tenement vis-a-vis land of plaintiff – Right of passage for cultivation includes right to carry tractor also but for cultivation purposes – Passage closed by defendant by erecting gate – Decree of mandatory injunction for removal of obstruction in the said passage as well as for damages as passed by trial court restored. (Paras 14 to 17)

For the appellant: Sh. Kalyan Singh in person.
For the respondent : Mr. K.D. Sood, Sr. Advocate with Mr. Shubham Sood, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present regular second appeal has been maintained by the appellant, who was the plaintiff before the learned trial Court (hereinafter to be called as "the plaintiff"), laying challenge to the judgment and decree, dated 03.02.2016, passed by learned Additional District Judge, Hamirpur, H.P., in Civil Appeal No. 139/12 RBT 88/13, 72/14, whereby the judgment and decree, dated 17.05.2012, passed by learned Civil Judge (Sr. Div.), Nadaun, District Hamirpur, H.P, in Civil Suit No. 254/2002 was set aside.

2. Briefly, the facts, which are necessary for determination and adjudication of the present appeal are that the plaintiff filed a suit for declaration, mandatory injunction, as well as recovery of Rs. 10,000/- qua land comprised in Khata No. 9, Khatauni No. 20, Khasras No. 96/1, 154/1, 167, 179, 184/1, 205, 205/1 and 208, measuring 1-97-11 hectares, situated in Village Jangal-Khor, Mouza Jalari, Tehsil Nadaun, District Hamirpur, H.P. as per Misal Hakiat Bandobast Jadid Sani 1994-95 (hereinafter to be called as "suit land No. 1"). As per the plaintiff, the defendant-respondent is owner in possession of land comprised in Khata No. 10, Khatauni No. 21, Khasra Kita 7, measuring 1-97-93 hectares and Khata No. 4 min, Khatauni No. 11 min, Khasras No. 106 and 181, measuring 0-08-16 hectares situated in village Jangal-Khor, Mouza Jalari, Tehsil Nadaun, District Hamirpur, H.P. as per Misal Hakiat Bandobast Jadid Sani 1994-95 (hereinafter to be called as "suit land No. 2"). Earlier, the land comprised in Khatas No. 9 and 10 was exclusively owned and possessed by the mother of the parties, Smt. Malook Dei and somewhere in the year 1995,

she gifted the said land to the plaintiff and the defendant. However, prior to 1995 Smt. Malook Dei alongwith other villagers approached the authorities concerned for construction of road from village Jajoli to village Jangal-Khor upto her house. The authorities on acceding to the request, carried out survey of the road upto old house of Smt. Malook Dei, which was approved by Engineer-in-Chief vide letter dated 17.04.1994 for a length of 1.250 kms, touching the old house of Smt Malook Dei. In September, 1994 PWD, B & R Sub Division Dhaneta deployed bulldozer and the road was carved out upto complete length through present Khasras No. 73 and 70 partly and Khasras No. 106, 181 and 105. At that time, Khasra No. 105 was owned by Smt. Malook Dei and Khasras No. 106 and 181 by Panjab Singh and Bimla Devi, whereas Khasra No. 70 by both of them alongwith one Krishni Devi. At that time, no objection was raised to the proposed construction. However, during the year 1997 when PWD B & R started soling work from point 0.000 to 1.051 km, the defendant obstructed the same from point 1.051 km to 1.250 km. Thereafter, the concerned department carried out work upto 0.975 Km, because beyond same it was obstructed by the defendant, who beyond point 0.975 Ks to 1.051 Km himself laid concrete, as he had become owner of Khasras No. 105, 106 and 181. He also fenced the common boundary line of Khasras No. 105 and 184/1 by completely blocking ingress and outgress of the plaintiff to the land and for his house situated over suit land No. 1. Owing to said acts of the defendant, the plaintiff has been deprived of cultivation of his land, which is rendered barren. According to plaintiff, as per custom, he has a right to take tractor for the purpose of agriculture and the purposes subservient to the agriculture. Thus, the plaintiff suffered a loss to the tune of Rs. 10,000/- and is suffering it continuously. Hence, the present suit.

3. In written statement, preliminary objection qua maintainability, limitation, estoppel and valuation were taken. On merits, it has been averred that mother of the parties gifted her property in their favour by way of separate and individual Khasra numbers and they are in possession of the same. The road was constructed in place where there was Gair Mumkin passage. Beyond that, there was exclusive land of the defendant and he himself has constructed the passage and mettled the same for his personal use. He has also put up grills and boundary walls. The construction of the passage and its use is for the last 10-15 years and during this period, no right was ever exercised by the plaintiff over the same. The plaintiff is having separate passage and is carrying his bullocks and tractor through the land of other villagers. There is no passage through the land of the defendant in a manner, as claimed by the plaintiff, nor any construction of road or soling was done by the department, as alleged. The gate has been erected by the defendant on the boundary of his land and the plaintiff has no right to access the road, as suit land No. 2 is exclusive property of the defendant. The easementary rights claimed by the plaintiff were also denied in the written statement.

4. By filing replication, the contents of the plaint were reasserted. On the pleadings of the parties, the learned trial Court on 01.06.2004 framed the following issues for determination and adjudication:

> ***"1. Whether the plaintiff has acquired easementary right by way of necessity to use the road/path existing on the land of the defendant, as alleged? OPP***
>
> ***2. Whether the plaintiff is entitled for the relief of mandatory injunction, as alleged? OPP***
>
> ***3. Whether the plaintiff is entitled to recover Rs. 10,000/- as damages and the cost of the suit, as alleged? OPP***
>
> ***4. Whether the suit is within time? OPD***

> ***5. Whether the suit is not maintainable, as alleged? OPD***
>
> ***6. Whether the plaintiff is estopped from filing the suit by his act and conduct, as alleged? OPD***
>
> ***7. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD***
>
> ***8. Relief."***

5. After deciding issues No. 1 to 4 in affirmative and issues No. 5 to 7 in negative, the suit of the plaintiff was decreed. Subsequently, the defendant maintained an appeal before the learned first Appellate Court, which was allowed and the judgment and decree of learned trial Court was set aside. Hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

> ***"1. Whether the learned Appellate Court has not appreciated the document Ext. PW-3/G Shrayat (Wajeb-al-arz) to its true perspective?***
>
> ***2. Whether the learned Court below has not misread and misappreciated the evidence and the judgment and decree passed by the learned Appellate Court is perverse?***
>
> ***3. Whether the other documents are not appreciated by the learned Appellate Court to its true perspective and the judgment and decree is perverse?***

6. Sh. Kalyan Singh, appellant, has argued that the judgment and decree passed by learned lower Appellate Court is based upon surmises and conjectures and the learned lower Appellate Court has failed to take into consideration the evidence and not appreciated it in an appropriate manner. He has further argued that when it has come on record that the road was constructed by PWD, which is blocked by the respondent by putting the gate, there is no other conclusion other than that the respondent has blocked the path and thus the judgment and decree passed by learned lower Appellate Court deserves to be set aside.

7. On the other hand, Mr. K.D. Sood, learned Senior Counsel appearing on behalf of the respondent has vehemently argued that the judgment and decree passed by learned lower Appellate Court is in accordance with law. He has further argued that there is alternative path to the house of the appellant and by way of present proceedings, he only wants to use the land of the respondent, as a road. He argued that the land is never used as a road at any time and it is the appellant who is making out a new case to grab the land of the respondent. In support of his contentions, learned Senior Counsel has referred to the evidence led by the parties and argued that as there is no substantial question of law involved in the present appeal, the appeal deserves dismissal.

8. In rebuttal appellant, Sh. Kalyan Singh has argued that the respondent, who is his real younger brother has blocked the road and the evidence on record shows that the road/path which was constructed by PWD is there and in these circumstances, the judgment and decree passed by learned lower Appellate Court is based upon complete mis-appreciation of evidence and the same deserves to be set aside by re-appreciating the evidence correctly.

9. In order to appreciate the rival contentions of the parties, I have gone through the record carefully.

10. To prove its case, the plaintiff, Kalyan Singh has submitted his examination-in-chief upon affidavit, wherein he testified about his claim to take the tractor for the purpose of agriculture, which is obstructed by the defendant. He further testified that due to putting of gate by the defendant, about 19 kanals of his land is lying uncultivated. He also testified about the statement of custom enabling him to take tractor for the purpose of cultivation and purposes subservient to agriculture. In cross-examination, he admitted that before gate is put by the defendant, there is 2 ½ feet wide path, again stated 4-6 feet wide path. He admitted that the aforesaid path leads to his abadi, as well as to the fields, however he denied that he takes tractor also through that path, as if the path is merely 2 ½ feet wide, tractor cannot be taken.

11. **PW-2**, Manish Kumar, Assistant Engineer, HP PWD, Sub-Division Dhanera, Hamirpur, in his cross-examination has deposed that the road up to point 1,051 kilometers has not been acquired by his Department and he is also not aware of the Khasras number through which the said road would be passing. However, he testified that from National Highway to Village Jangal-Khor upto 1,051 kms the road is constructed on the Government expenses.

12. **PW-3**, Ashok Kumar, Patwari, has proved the revenue record. **PW-4**, Chameli Devi, has admitted in her cross-examination about a path, but she denied that this path is 6 feet wide and claimed the same to be 3 feet wide. **PW-5**, Urmila Devi, also supported the case of the plaintiff, but regarding the path going towards the house of the plaintiff and other before the gate, she stated it to be incorrect that it is 5-6 feet wide and claimed the same to be 3 feet wide.

13. On the other hand, defendant Kartar Singh, while appearing in the witness box as **DW-2** has deposed that HP PWD had constructed a link road to village Jangal-Khor from Nadaun-Hamirpur road through Gair Mumkin Gohar and also made the same pucca. He on leaving 15-20 feet path as katcha has constructed the same up to his house. He erected gate at his boundary and inside the same and he has made the path pucca by laying concrete and cement. In order to protect his land, he has fenced the same. He denied the claim of the plaintiff that the road was constructed by HP PWD upto the old house of Malook Dei, which was end point of survey as 1.250 kilometers. He also denied the fact of taking tractor by the plaintiff through the disputed path. He deposed that from the road constructed by HP PWD, a pucca path of 5-6 feet wide, passes towards the house of the plaintiff, Chameli Devi and Rasil Singh and one pucca path is also going separately to the Harijan locality. **DW-1**, Balwant Singh and **DW-3**, Dharam Singh, have also supported the version of DW-2, Kartar Singh on material aspects.

14. From the evidence which has come on record it is clear that the land was gifted to the parties by their mother, which shows that the land was one tenement and both plaintiff and defendant has acquired the land from the one owner, i.e. their mother. The land now a days is required to be cultivated by tractor and the land owned by the plaintiff requires passage for tractor through the land of the defendant. Meaning thereby that the land of the plaintiff is dominant and land of the defendant is servient and in these circumstances the dominant heritage has a right through the servient heritage, because whosoever enjoys dominant heritage, for the effective enjoyment of the dominant heritage has easementary right to enjoy servient heritage, when both are part of one estate. Consequently, this Court finds that the findings recorded by learned trial Court are in accordance with law and after appreciating the evidence which has come on record, including Ext. PW-3/G Shrayat (Wajeb-al-arz) correctly and also the plaintiff has right by way of easement of necessity as provided under Section 13 of the Indian Easements Act. The statement of PW-2 also shows that the road was constructed by PWD upto the place where

the gate is erected. Beyond the gate, the whole land was belonging to the mother of the parties and after she gifted the land, the land was given to the plaintiff and defendant by the mother of the plaintiff, which was earlier part of the one estate.

15. Further, the gate was constructed later on when the land was partitioned. Meaning thereby that earlier there was no hindrance, so, can the defendant create hindrance for the smooth passage of the tractor?, "the answer is no". The version of the defendant that if the tractor is taken by the plaintiff, the mainds would be damaged cannot be favored, because a deliberate damage would not be done by the plaintiff and denial to take the tractor through the land of the defendant would lead to turning a big chunk of land of the plaintiff barren, as now a days ploughing for cultivation through bullocks is not commercially available. Further the customary right of the plaintiff to take the tractor through the land of the defendant, as claimed, has been proved. It has also been proved that even beyond the gate fixed by the defendant the soling was done by PWD. PW-2 in his statement has testified that from National Highway to Village Jangal-Khor, the road is constructed on the Government expenses upto the gate now raised by the defendant. Consequently, the plaintiff has a customary right of easement to use the road and path from the suit land for the purpose of cultivation and other purposes subservient to agriculture. So, the defendant is required to remove the obstruction and to allow the plaintiff to exercise the customary right of easement to take and bring back the tractor from his land.

16. In the given facts and circumstances of the case, this Court finds that the judgment passed by learned lower Appellate Court is perverse, as learned Court has failed to appreciate the document, Ext. PW-3/G Shrayat (Wajeb-al-arz) correctly and to its true perspective and has come to the conclusion, which is not at all possible, so substantial question of law No. 1 is answered accordingly. As far as substantial questions of law No.2 and 3 are concerned, learned lower Appellate Court has misread and misappreciated the evidence, as well as the documents which has come on record and findings arrived at by learned Court are thus perverse and not sustainable in the eyes of law, so substantial questions of law No. 2 and 3 are answered accordingly.

17. Consequently, for the reasons as discussed hereinabove, the present appeal is allowed and the judgment and decree, passed by the learned lower Appellate Court is set aside and judgment and decree passed by learned trial Court is affirmed. However, in the peculiar facts and circumstances of the case, parties are left to bear their own costs, as they are real brothers.

18. The appeal, so also pending application(s), if any, stand(s) disposed of accordingly.

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

Bhupesh Janartha .....Petitioner

Versus

Ranveer Singh and another .....Respondents

CMPMO No. 412 of 2018
Reserved on 20.06.2019
Decided on: 26.06.2019

Employees Compensation Act, 1923– Sections 4 & 22– Injury during course of employment– Claim application– Limitation– Held, it is statutory duty of employer to immediately calculate compensation and pay to employee for injuries suffered by latter during course of his employment – If there is any delay, employer has to pay the penalty also– Injury to workman during course of employment not in dispute– When employer though initially agreeing to pay was delaying payment of compensation on one pretext or other, employee has a continuing cause of action to file claim– Application cannot be said to be barred by limitation - At any rate delay if any, is not attributable to employee and can be condoned. (Para 7)

For the petitioner: Ms. Seema K. Guleria, Advocate.
For the respondents: Mr. Parveen Kumar, Advocate, vice Mr. Jai Dev Thakur, Advocate, for respondent No. 1.
Mr. Imran Khan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India, has been maintained by petitioner, against the order dated 16.08.2018, passed by learned Commissioner, under the Employee's Compensation Act, Rampur Bushahr, District Shimla, H.P., wherein application under Section 10 of the Employee's Compensation Act (hereinafter to be called as "the Act"), with a prayer to file application under Section 22 of the Act, after the statutory period, has been allowed.

2 Briefly stating facts giving rise to the present petition are that respondent No. 1 filed an application under Section 22 of the Act, claiming compensation for suffering injury in his right hand middle finger, during the course of employment under the petitioner and respondent No. 2, as a Dryer Operator. As per the petitioner, the said application was time barred and deserves to be dismissed, as the petitioner did not disclose sufficient grounds for condonation of delay and moreover the lacuna was being tried to be filled up, however, learned Commissioner without granting an opportunity to the contesting parties to prove their objections allowed the said application.

3. The application filed by the applicant was resisted and contested by respondent No. 1 by filing reply, wherein preliminary objection qua maintainability has been taken. On merits, it has been averred that the delay cannot be condoned and the lacuna by moving the application cannot be filled up at belated stage. Lastly, a prayer for dismissal of the application has been made.

4 Learned Court below vide impugned order dated 16.08.2018, allowed the application, so filed by the applicant, hence the present petition.

5 Learned counsel for the petitioner has argued that the learned Court below has failed to take into consideration the fact that claim petition was time barred and the order of the learned Court below is illegal. On the other hand, learned counsel for respondent No. 1 has argued that it was for the petitioner to make the payment of amount due and permissible instantaneously and the petitioner cannot take the plea that claim is time barred. Learned counsel for respondent No. 2 has argued that it is for the petitioner to pay compensation, as respondent No. 1 was employee of the petitioner.

6 The case of respondent No. 1 is that he was working as Dryer Operator with respondents No. 1 and 2, being regular employee and on 23.07.2014, at about 11:00 a.m., when he was working near the rotary machine, his right hand middle finger was stuck inside the moving machine, resultantly, the middle finger of his right hand got amputated. After the said accident respondent No. 1 asked the Manager of milk plant to report the matter to the police, but he assured him that they will compensate him later on, when he will join his duties. However, thereafter respondent No. 1 kept on asking the respondents about compensation, but, the respondents on one pretext or another delayed the matter by giving false assurance to him, as such, respondent No. 1 could not file the claim petition earlier.

7 It is settled proposition of law that it is for the employer to immediately calculate the compensation and pay it to the employee and if there is any delay, employer is to make the payment of penalty also, but in the instant case strangely enough the employer is denying the payment of compensation and earlier he was assuring respondent No. 1 that the payment will be released with respect to the compensation. Admittedly, the injury and incapacity by way of loss of one finger is not in dispute. In these circumstances, this Court finds no infirmity with the order passed by learned Court below holding that the just claim of the petitioner cannot be denied and barred on the flimsy grounds and technical reasons. When the employer-petitioner was assuring employee-respondent No. 1 that he will make payment and on this pretext delaying the matter, there is continuing cause of action.In these circumstance also the delay is not attributable to the employee and the employer-petitioner cannot take any benefit out of this and delay, if at all, has occurred, is required to be condoned. Even otherwise, the order passed by learned Court below is just reasoned and there is no occasion to interfere after invoking extraordinary powers vested in this Court under Article 227 of the Constitution of India.

8 Taking into consideration the overall aspects of the case and the discussion made hereinabove, the present petition is dismissed with costs of Rs. 5,000/-. The petitioner-employer is directed to make payment of costs within four weeks from today to employee-respondent No. 1.

9 With these observations, the petition, so also pending miscellaneous application(s), if any, stands disposed of. Parties to appear before the learned Court below on **25th July, 2019**.

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

Sardar Harjit Singh Kochhar …..Applicant/Plaintiff
Versus
Sardar Manjit Singh Kochhar …..Non-applicant/Defendant

OMP No. 247 of 2019 in
Civil Suit No. 24 of 2018
Decided on: 27.06.2019

Code of Civil Procedure, 1908- Order XXIII Rule 3- Compromise of suit- Parties real brothers- They settled dispute between them and mutually partitioned suit property by metes and bounds- Compromise arrived at between them placed on record and made part of decree– Suit disposed of as compromised.(Para 2)

For the applicant/plaintiff: Ms. Poonam Gehlot and Mr. Abhimanyu Rathour, Advocates.
For the non-applicant/defendants: Mr. Y. P. Sood, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral)

OMP No. 247 of 2019

The parties in the present case are real brothers and they have settled the dispute between them and have mutually partitioned the suit property by metes and bounds. The ultimate goal is to make the parties to live in peace. This Court is happy that the parties have settled their dispute and now both the brothers will have cordial and good relations.

2. The compromise arrived at between the parties is placed on record by way of present application under Order 23, Rule 3, read with Section 151 of the Code of Civil Procedure. The same is perused and taken on record. As the matter stands compromised, the present suit is disposed of as per the compromise and terms contained in the application. The present application, as well as site plan enclosed alongwith the application shall form part of the decree to be drawn with respect to the recording of final partition done by the parties. The suit, so also pending application(s), if any, stands disposed of accordingly.

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

Gian Chand ….Petitioner.
Versus
Harish Kumar …Respondent.

Cr. MMO No.223 of 2019.
Reserved on : 21.6.2019
Decided on: 1st July, 2019.

Negotiable Instruments Act, 1881 – Section 138- Dishonour of cheque **–** Complaint - Trial Court convicting and sentencing accused for dishonour of cheque – Judgment upheld by court of session – Revision against - Parties compromising matter during revision – In view of compromise interse parties, petition allowed – Leave to compound offence granted – Conviction and sentence set aside.(Para 5)

For the petitioner Mr. G.R. Palsra, Advocate.
For the respondent Mr. Bodh Raj Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition has been filed against the judgment passed by the learned Sessions Judge, Mandi, District Mandi, dated 1.9.2016, in Cr. Appeal No. 12 of 2016, whereby the appeal filed by the petitioner against the judgment of conviction and sentence passed by the learned Additional Chief Judicial Magistrate, Court No.1, Mandi, District Mandi, dated 18.2.2016, in Case No. 14 of 2012, under Section 138 of the Negotiable Instruments Act, vide which, petitioner-accused was convicted and sentenced to undergo simple imprisonment for a period of six months and to pay compensation to the tune of Rs.50,000/- (rupees fifty thousand only) to the complainant, has been dismissed and the judgment and sentence passed by the learned Additional Chief Judicial Magistrate, Court No.1, Mandi, District Mandi, dated 18.2.2016, has been upheld.

2. Briefly stating facts giving rise to the present petition are that in the 1st week of August, 2012, the petitioner-accused borrowed Rs.50,000/- from the complainant to discharge his liability towards the complainant, the accused gave a post dated cheque bearing No.697837, dated 1.9.2012, amounting to Rs.50,000/- of Indian Bank, Mandi, to be encashed out of his bank Account No.916443761. On 25.9.2012, the respondent-complainant presented the said cheque to the banker of the accused, but the same was dishonoured for "*Insufficient Funds*" in the account of accused and was returned back to the complainant. Thereafter, the complainant issued a legal notice, dated 9.10.2012 to the accused through registered post through his counsel, but the accused neither responded to the said notice nor paid the cheque amount to the complainant. While giving the cheque in question to the complainant, the accused was fully aware and in the knowledge that he was not having sufficient funds in his bank account for encashment of the said cheque nor he had made any arrangement for encashment of the cheque and thereby the accused defrauded, deceived and cheated the complainant. Consequently, the complainant filed a complaint against the accused for the offence punishable under Section 138 of the Negotiable Instruments Act.

3. Learned counsel appearing for the petitioner-accused has argued that as the amount in question has been paid to the complainant and the complainant has compromised the matter with the petitioner-accused, vide compromise deed, placed on the file, the offence be compounded and the petitioner be acquitted of the offence, he was convicted.

4. On the other hand, learned counsel appearing for the respondent-complainant has argued that as the amount in question has been received by his client and he has entered into a compromise with the petitioner-accused, he may be permitted to withdraw the present complaint, in view of the compromise and the judgment/order of conviction and sentence be set aside.

5. After hearing the learned counsel for the parties and going though the records, including compromise deed, this Court finds that as the amount in question has been received by the complainant and he does not want the accused to get convicted, it would be in the interest of justice, if the parties are permitted to get the matter settled in light of the compromise arrived at *inter se* them. So, taking into consideration the overall aspects of the case, the complainant is permitted to withdraw the complaint and the judgment/order of conviction and sentence passed by the learned Courts below are hereby set aside and the petitioner-accused is acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act.

6. Accordingly, the petition is disposed of in the aforesaid terms, so also the pending application(s), if any.

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

State of Himachal Pradesh …….Appellant.
Versus
Kuldeep Chand ……Respondent.

Cr. Appeal No.304 of 2009.
Decided on : 1st July, 2019.

Indian Penal Code, 1860 - Sections 279, 337 and 338 - Rash and Negligent driving – Proof of– Trial court acquitting accused of rash driving– Appeal against– Held, prosecution story being that accused hit his vehicle against victim's legs, when he (victim) was crossing road – Complainant not stating that offending vehicle was in high speed – Alleged eye witnesses to occurrence in fact, were not present on spot at time of occurrence of accident – In absence of proof of rash and negligent driving, no presumption can be drawn against accused– Appeal dismissed– Acquittal upheld. (Paras 7 & 8)

Cases referred:
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
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. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocate Generals.
For the respondent Mr. Vinod Gupta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of accused in a case under Sections 279, 337 and 338 of the Indian Penal Code, passed by the learned Judicial Magistrate 1st Class, Nalagarh, District Solan (H.P) dated 12.11.2008, in Criminal Case No.63/2 of 2004.

2. Briefly stating facts giving rise to the present appeal are that on 5.12.2003, Police of Police Station, Nalagarh, received a telephonic message from Civil Hospital, Nalagarh, that two injured have been brought in the hospital with the alleged history of roadside accident. HC Sunil Kumar, has recorded the statement of complainant, under Section 154 of the Code of Criminal Procedure, in which, he has stated that he is working as a worker in 'Laxmi Brick Kiln' Baglehan alongwith his wife. According to him, at about 3:00 p.m, he had sent his son Ankit to purchase '*biri bundle*' from the nearby shop, when he was coming back after purchasing the aforesaid articles and when he was crossing the road, Maruti van came from Nalagarh side in a rash and negligent manner so as to endanger human life and personal safety of others struck against the legs of child. Thereafter, the injured child was lifted in the same vehicle bearing registration No.HP-01-3116 for medical treatment to Civil Hospital, Nalgarh. This accident has taken place due to the rash and negligent act on the part of the accused. On the basis of aforesaid statement, HC Sunil

Kumar, sent *rukka* through Constable Ram Pyara to Police Station, Nalagarh. The matter was reported to the police, on the basis of which, FIR Ex.PW5/B was registered. Statement of the witnesses was also recorded and site plan was prepared. Thereafter, codal formalities were completed and *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as eleven witnesses. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he has denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. Learned Additional Advocate General has argued that the prosecution has proved the guilt of accused beyond the shadow of reasonable doubt, but the learned Court below on the basis of surmises and conjectures has acquitted the accused and the present is a fit case, where the accused is liable to be convicted after setting aside the judgment of acquittal.

5. On the other hand, learned counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubt and there is no occasion to interfere with the well reasoned judgment passed by the learned trial Court.

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

7. In order to prove its case, the prosecution has examined PW-1, father of the injured, Pratap Singh. He has deposed that he has sent his son to purchase '*biri bundle*' from the nearby shop of 'brick kiln' and when his son was coming back, then, a vehicle came from the Nalagarh side and crushed the foot of his son. He has nowhere stated that the Maruti van was in high speed. PW-2 Chanan Singh, has also supported the same and similar version given by PW-1. In his cross-examination, he has admitted that at the time of occurrence, he was sitting in his office and someone has come from Ranjeet Singh's shop to disclose that the accident has taken place. Thereafter, he went to the spot and the father of the injured, Pratap Singh, was also called. Meaning thereby, at the time of occurrence, neither PW-1 Pratap Singh nor PW-2 Chanan Singh, was present there and they are only the hearsay witness. He has also denied that the injured was crossing the road in a running condition. He has further denied that the occurrence has taken place due to the rash and negligent act on the part of injured. PW-3, Kushal Kumar, owner of the vehicle has proved the certificate Ex.PW3/A, which was issued by him with regard to the employment of the accused. PW-4, Rajinder Singh, proved the mechanical report Ex.PW4/A. PW-6, Jagdish Chand, prepared the spot map Ex.PW6/A and recorded the statement of witnesses as per their version. PW-8, Jagdish Ram, prepared the *challan* after completion of the investigation. PW-11, ASI Harjeet Singh, has taken into possession the vehicle alongwith its documents and medico legal case summary from PGI, Chandigarh.

8. In the present case, it is admitted fact that injured Ankit is not cited as prosecution witness. His age in the Medico Legal Certificate is mentioned as five years and he was sent by his father to purchase '*biri bundle'* all alone after crossing the road. In these circumstances, it is clear that the father of the injured himself was negligent by sending his child to purchase 'biri bundle' after crossing the National Highway. PW-2, Charan Singh, the matter was initially reported to him by a person from the shop of shopkeeper Ranjeet Singh. Meaning thereby, the alleged eye witnesses of the occurrence were not present at the time of occurrence. It is admitted fact that the injured was aged about five years and he was

all alone allowed to cross the road to purchase a '*biri bundle'*. There is nothing on record with respect to the rash and negligent act on the part of the driver of the vehicle in the absence of any evidence to that effect, it is difficult to convict a person, as no conviction can be based upon the presumption of surmises and conjectures. In these circumstances, it cannot be said that the accident was caused due to rash and negligent driving of the accused. So, this Court finds that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt.

9. 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.

10. 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.

11. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal :

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***(2) The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
>
> ***(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***
>
> ***(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.***
>
> ***(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."***

12. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt. There is no illegality and infirmity in the findings, so recorded by the learned trial Court.

13. Accordingly, in view of the observations and analysis, made hereinabove, there is no merit in the appeal and the same is dismissed. Record of the learned trial Court be sent back forthwith.

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

Durgi Devi …..Petitioner

Versus

State of H.P. and another …..Respondents

Cr. MMO No. 483 of 2017
Reserved on: 27.06.2019
Decided on: 04.07.2019

Code of Criminal Procedure, 1973- Section 133- Public nuisance, what is? Whether private disputes can be brought before Executive Magistrate? Complainant praying for removal of branches of mango tree belonging to respondent on ground that said tree may fall at any time and cause damage to complainant's house– Executive Magistrate dropping proceedings on ground that it is a private dispute and provisions of Section 133 of Code are not attracted– Sessions Judge allowing revision and directing owner of tree to cut branches which were extending towards complainant's house– Petition against- Held, no evidence on record that tree had become dangerous– Simply to give relief to complainant to enable her to raise second storey of her house after cutting extended branches of tree, is not intendment of Section 133 of code– It is not a case of public nuisance– Petition allowed– Order of Sessions Judge set aside and of Executive Magistrate restored. (Para 7)

For the petitioner: Ms. Manjula Kumari, Advocate.
For the respondents: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Addl. AGs with Ms. Svaneel Jaswal, Dy. AG, for respondent No. 1.
Mr. Surinder Saklani, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure, read with Article 227 of the Constitution of India, has been maintained by the petitioner against the order dated 05.09.2017, passed by learned Sessions Judge, Hamirpur, H.P., in Cr. Revision No. 16 of 2014, whereby order dated 26.06.2014, passed by learned Sub-Divisional Magistrate, Bhoranj, District Hamirpur, H.P., in case No. 14/11, has been set aside and complaint under Section 133(1)(d) of the Code of Criminal Procedure (hereinafter to be called as "the Code") filed by respondent No. 2/complainant (hereinafter to be called as "the complainant") has been allowed.

2. Briefly stating the facts, giving rise to the present petition are that on 16.03.2010, complainant filed a complaint against the present petitioner under Section 133(1) (d) of the Code, wherein it has been alleged that there is one mango tree of the petitioner and house of the complainant is located under the branches of the said tree and the tree may be fall at any time and may cause damage to the house of the complainant. So, the complainant prayed for removal of the nuisance. Consequently, the matter was sent to S.H.O., Police Station Bhoranj and report was called. On the report, learned trial Magistrate has taken cognizance and issued notice under Section 133 of the Code to the petitioner. In reply to the said notice, the petitioner totally denied the fact of apprehension of public nuisance and it has been averred that the tree will not cause any damage to the house of the complainant, as the house is 20 feet away from the house of the complainant. It has been further averred that the complainant constructed the house below the branches of the tree and now he wants to construct second storey. Lastly, dismissal of the notice was prayed.

3. The learned trial Magistrate after recording the statements of the witnesses, dropped the proceedings against the petitioner on the ground that it is a private dispute between the parties and provisions of Section 133 of the Code are not attracted at all. Feeling aggrieved, the complainant filed a revision petition against the said order and learned Sessions Judge, Hamirpur, set aside the order passed by learned trial Magistrate and directed the petitioner to cut the branches of mango tree, which are extending towards the house of the complainant within 30 days. Hence the present petition.

4. In order to prove his case, the complainant has examined Sh. Harman Singh, **CW-1**, Sh. Surjeet Singh, **CW-II**, Sh. Niranjan Ram, **CW-III** and Sh. Bidhi Chand, **CW-IV.** All these witnesses admitted that there is a mango tree on the spot and its one branch is over the house of the complainant and stated that due to branch of mango tree, the complainant is unable to construct the second storey of his house.

5. On the other hand, respondent (petitioner herein), while appearing in the witness box as RW-1, has deposed that the complainant has constructed his house four years ago, whereas mango tree is 50 years old. He further deposed that there is no danger from this mango tree and if it happens in future, she would be responsible and ready for compensation.

6. Section 133 (1) (a) and (d) of the Code provides as under:

> ***"133. Conditional order for removal of nuisance.-(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-***
>
> ***(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or***
>
> ……… ………. ……….
>
> ***(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or***

……………….. ……….”

7. From the evidence which has come on record, coupled with the provisions of law as contained under Section 133 of the Code, if the tree becomes dangerous, it can be asked to be removed by exercising the power under Section 133 of the Code. In the instant case, there is no evidence that the tree has become dangerous. The only factum that the complainant has constructed his house near the mango tree and a branch of tree is there near the lintel wall of the house of the complainant, is not a proof that the branch or tree is dangerous to the house or persons living there. The dispute is only with respect to the fact that the complainant wanted to raise second storey after cutting the branch of the tree. This is simply a civil dispute and the order passed by learned Magistrate is in accordance with law. The learned lower Appellate Court has misread the provisions of Section 133 of the Code by concluding that the tree has become dangerous, without there being any evidence to that effect. Simply to give relief to the complainant by permitting him to cut branches in order to raise second storey of the house is no way the intend of Section 133 of the Code.

8. So, in view of the above discussion, this Court finds that the order passed by learned Sessions Judge, Hamirpur, H.P., is without appreciating the law correctly and to its true perspective in the facts and circumstances of the present case. Consequently, the order passed by learned Sessions Judge, Hamirpur, H.P., is set aside and the order passed by Sub-Divisional Magistrate, Bhoranj, District Hamirpur, H.P., is upheld.

9. With these observations, the petition, so also pending application(s), if any, stands disposed of.

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

Ming Chung Dorjee …..Petitioner
Versus
State of H.P. and another …..Respondents

Cr. MMO No. 331 of 2019
Reserved on: 28.06.2019
Decided on: 04.07.2019

Code of Criminal Procedure, 1973 (Code)- Sections 320 & 482– Inherent powers– Exercise of- Quashing of FIR pursuant to compromise interse parties– Held, for securing ends of justice if quashing of FIR becomes necessary, it may be quashed but such power must be exercised with utmost care and caution– FIR registered for offence under Section 188 of Indian Penal Code for violating temporary injunction restraining petitioner from raising construction ordered to be quashed pursuant to compromise between parties in mediation proceedings- Power conferred by section 482 is not circumscribed by provisions of Section 320 of Code.(Paras 2, 6 & 7)

Cases referred:

B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58
Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others vs.State of Gujarat and another, (2017) 9 SCC 641

Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667

For the petitioner: Mr. Umesh Kanwar, Advocate.

For the respondents: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Addl. AGs with Ms. Svaneel Jaswal, Dy. AG, for respondent No. 1.
Mr. R.L. Chaudhary and Mr. H.R. Sidhu, Advocates, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as “the Code”), has been maintained by the petitioner for quashing of F.I.R No. 182/16, dated 01.07.2016, under Section 188 of the Indian Penal Code, registered at Police Station Balh, District Mandi, H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned trial Court.

2. Briefly stating the facts, giving rise to the present petition are that the petitioner had filed RSA No. 204/2013 against the judgments passed by learned Courts below before this Court and this Court vide order dated 03.03.2016, passed interim order restraining respondent No. 2 from raising construction and changing the nature of the suit land. However, despite interim order, respondent No. 2 demolished the Khokhas existing on the suit land. Accordingly, this Court vide order dated 14.03.2016 directed the police authorities to ensure the compliance of order dated 03.03.2016. The police authorities in supervision of S.I., Incharge Rewalsar, visited the spot and directed respondent No. 2 to stop construction. Respondent No. 2 again violated the orders by putting tin/PVC sheets in order to conceal further construction. On 21.06.2016, the petitioner made a complaint to the police authorities, wherein it has been alleged that respondent No. 2 is not a law abiding citizen and has taken the law in his own hand and is still continuing with the illegal construction, consequently, F.I.R No. 182/16, dated 01.07.2016, came to be registered against the petitioner. The petitioner has also proceeded against respondent No. 2 under Order 39, Rule 2A of CPC before this Court. During the proceedings in the said application, the matter was ordered to be listed before the learned Mediator to see whether the matter can be compromised and due to sincere efforts made by learned Mediator, now the parties have entered into a compromise **(Annexure P-2)** and in order to maintain their relation cordial, they 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-2)**, no purpose will be served by keeping the proceedings alive, hence the FIR, alongwith consequent proceedings, arising out of the same, pending before the learned trial Court may be quashed and set aside.

4. Learned counsel appearing on behalf of respondent No. 2 has argued that the present petition may be allowed, in view of the compromise arrived at between the parties.

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

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

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

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

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

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

then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

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

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

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

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

[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the

complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

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

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

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High

> **Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.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. Similarly, Hon'ble Supreme Court in **Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others***vs.***State of Gujarat and another, (2017) 9 Supreme Court Cases 641,** wherein it has been held as under :

> **"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:**
>
> **16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;**
>
> **16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.**
>
> **16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;**
>
> **16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;**
>
> **16.5 The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;**
>
> **16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;**
>
> **16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;**
>
> **16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an**

essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9 In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

Even if, the trial is allowed to be continued, as the parties have compromised the matter, there are bleak chances of conviction to secure the ends of justice.

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice would be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise **(Annexure P-2)**, placed on record.

11. Accordingly, looking into all attending facts and circumstances, this Court finds that present is a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code and, therefore, the present petition is allowed and F.I.R No. 182/16, dated 01.07.2016, under Section 188 of the Indian Penal Code, registered at Police Station Balh, District Mandi, H.P., is ordered to be quashed. Since F.I.R No. 182/16, dated 01.07.2016, under the aforesaid Section has been quashed, consequent proceedings, arising out of the said F.I.R., pending before the learned trial Court are thereby rendered infructuous.

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

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

Satish Kumar and another .....Petitioners
Versus
State of H.P. and another .....Respondents

Cr. MMO No. 267 of 2019
Reserved on: 26.06.2019
Decided on: 04.07.2019

Code of Criminal Procedure, 1973- Sections 320 & 482– Inherent powers– Exercise of- Quashing of FIR pursuant to compromise inter se parties – Held, for securing ends of justice if quashing of FIR becomes necessary, it may be quashed but such power must be exercised with utmost care and caution– FIR registered for offences of criminal intimidation and hurt ordered to be quashed pursuant to compromise between parties- Power conferred by Section 482 is not circumscribed by provisions of Section 320 of Code.(Paras 2, 6 & 7)

Cases referred:
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another,(2013) 4 SCC 58
Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others vs. State of Gujarat and another, (2017) 9 SCC 641
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667

For the petitioners: Mr. Dheeraj K. Vashisht, Advocate.
For the respondents: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Addl. AGs with Ms. Svaneel Jaswal, Dy. AG, for respondent No. 1.
Mr. Prashant Sharma, Advocate, for respondent No. 2.
Parties are present.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code"), has been maintained by the petitioners for quashing of F.I.R No. 27/17, dated 28.04.2017, under Sections 324, 323, 504, 506 and 34 of the Indian Penal Code, registered at Police Station Chintpurni, District Una, H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned trial Court.

2. Briefly stating the facts, giving rise to the present petition are that on 27.04.2017, some controversy took place between respondent No. 2 and petitioner No. 1 and petitioner No. 1 started hurling abuses to respondent No. 2. In the meantime, son of petitioner No. 1 came to the spot and pushed respondent No. 2, due to which, she fell down and sustained internal injuries on her person, as such, an F.I.R No. 27/17, dated 28.04.2017, came to be registered against the petitioners. However, now the parties have entered into a compromise **(Annexure P-3)** and in order to maintain their relation cordial, they do not want to pursue the case against each other. Hence the present petition.

3. Learned counsel for the petitioners has argued that as the parties have compromised the matter, vide Compromise Deed **(Annexure P-3)**, no purpose will be served by keeping the proceedings alive, hence the FIR, alongwith consequent proceedings, arising out of the same, pending before the learned trial Court may be quashed and set aside.

4. Learned counsel appearing on behalf of respondent No. 2 has argued that the present petition may be allowed, in view of the compromise arrived at between the parties.

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

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

[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.

[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomesnecessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.

[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

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

[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in

the complaint and none of the witnesses have alleged any role of both the appellants.

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

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

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

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

[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable

offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

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

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

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.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. Similarly, Hon'ble Supreme Court in **Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others*vs.*State of Gujarat and another, (2017) 9 Supreme Court Cases 641,** wherein it has been held as under :

> **"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:**
>
> **16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;**
>
> **16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.**
>
> **16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;**
>
> **16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;**
>
> **16.5 The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;**
>
> **16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;**
>
> **16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;**
>
> **16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;**
>
> **16.9 In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a**

> **conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and**
>
> **16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.**

Even if, the trial is allowed to be continued, as the parties have compromised the matter, there are bleak chances of conviction to secure the ends of justice.

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice would be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise **(Annexure P-3)**, placed on record.

11. Accordingly, looking into all attending facts and circumstances, this Court finds that present is a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code and, therefore, the present petition is allowed and F.I.R No. 27/17, dated 28.04.2017, under Sections 323, 324, 504, 506 and 34 of the Indian Penal Code, registered at Police Station Chintpurni, District Una, H.P., is ordered to be quashed. Since F.I.R No. 27/17, dated 28.04.2017, under the aforesaid Sections has been quashed, consequent proceedings, arising out of the said F.I.R., pending before the learned trial Court are thereby rendered infructuous.

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

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

Om Prakash Sharma …Appellant/Plaintiff

Versus

H.P. Tourism Development Corporation …Respondent/Defendant.

OSA No. 4001 of 2013.
Judgment reserved on: 24.06.2019.
Date of Decision: 05.07.2019.

Indian Contract Act, 1872 – Section 73 – 'Debt' - Meaning – Held, debt would include any liability to pay for a breach of a contract and since the liability is pecuniary it would take the character of a debt- Amount payable by department to a contractor in terms of a building contract for work executed by him will amount to 'debt'. (Paras 18 & 25)

Indian Contract Act, 1872 – Section 73 – Payment towards escalation of cost – Held, no evidence on record that contractor had accepted the full and final amount without any objection or protest – He is entitled for amount towards escalation of cost of construction material etc. (Para 33)

Limitation Act, 1963 – Section 19 –Extension of period of limitation – Held, Section 19 of Act will be applicable to a suit filed by contractor for recovery of amount regarding work executed by him under a building contract- Payment in writingmade by the Government in his favour will extend the period of limitation. (Paras 28 to 30)

Cases referred:

Asian Techs Limited vs. Union of India and others, (2009) 10 SCC 354

Chairman and MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors, (2004) 2 SCC 663

CIT vs. Dr.Sham Lal Narula, AIR 1963 Punj 411

DPP vs. Turner, 1973 3 All England Reporter, 124

Dr.Sham Lal Narula vs. CIT, AIR 1964 SC 1878

Jullundur Improvement Trust vs. Kuldip Singh, 1984 AIR (Punjab) 185

Kesoram Industries and Cotton Mills Ltd. vs. Commissioner of Wealth-Tax (Central), Calcutta, (1966) 69 ITR 767

Paras Nath vs. Kishan Lal, AIR 1965 All 189

R.L. Kalathia and Company vs. State of Gujarat, (2011) 2 SCC 400

Rajendra Shankar Shukla and others vs. State of Chhattisgarh and others, (2015) 10 SCC 400

Ram Lal Jain vs. Central Bank of India, AIR 1961 Punj. 340

Riches versus Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL)

Secretary, Irrigation Department, Government of Orissa and others vs. G.C.Roy, (1992) 1 SCC 508

South Eastern Coalfields Ltd. vs. State of M.P. and others. (2003) 8 SCC 648

Urban Improvement Trust, Bikaner vs. Mohan Lal. (2010) 1 SCC 512

For the Appellant : Mr. J.S. Bhogal, Senior Advocate with
Mr. Tarunjit Singh Bhogal, Advocate.

For the Respondent : Mr. G.D. Verma, Senior Advocate, with
Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The plaintiff is the appellant, who aggrieved by the judgment and decree passed by learned Single Judge on 10.01.2013 in Civil Suit No. 22 of 2004 whereby the suit filed by him came to be dismissed, has filed the instant Original Side Appeal.

2. The plaintiff filed a suit for recovery of a sum of Rs. 22,00,000/- along with interest at the rate of 18% per annum from the date of filing of the suit till its realization on the allegation that he was a Class 'A' Contractor and was awarded the construction work of Yatri Niwas (Phase-II) Dharamshala. A formal agreement with respect to the same was executed between the parties. The plaintiff executed the said work well within time and to the satisfaction of the defendant and the final bill of the plaintiff was released only on 21.5.2001. The plaintiff had also raised a claim for escalation under Clause 10 CC of the agreement but the same was not released to him alongwith the final bill. Even though the same was prepared by the Assistant Engineer, HPTDC, Dharamshala in consultation with the plaintiff and thereafter forwarded to the Superintending Engineer vide letter dated

20.10.1999 for an amount of Rs.21,32,119/-. The same was checked by the office of Superintending Engineer for an amount of Rs.18,79,871/-. It was averred that in terms of the agreement the final authority to decide the amount of compensation payable under Clause 10 CC was the Superintending Engineer, but the amount was illegally detained by the defendant even after the same had been approved by the competent authority for payment to the plaintiff.

3. It was further averred that besides the aforesaid amount, a sum of Rs.1,00,000/-has also been detained by the defendant on account of the security and, therefore, the plaintiff is also entitled for release of the same since the work had been satisfactorily completed. It was lastly averred that despite oral requests made on several occasions by the plaintiff to the defendant for release of the amount the same was wrongly withheld, the plaintiff is entitled to interest at the current commercial rate of 18% per annum from the date when the amounts became due till its realization. The plaintiff claimed the following amounts:

a. Amount of Escalation as passed underclause 10 CC	: Rs.18,79,871/-
b. Security	: Rs. 1,00,000/-
c. Costs of notice.	: Rs. 1,100/-
d. Interest @ 18% from 18.5.2001	: Rs. 10,69,130/-
Total:	**Rs.30,50,101/-**

However, the plaintiff categorically gave up a part of his claim for pre-suit interest and restricted his claim to Rs.22,00,000/- as is evident from para 10 of the plaint.

4. The defendant contested the suit by filing written statement wherein preliminary objections were raised to the effect that the plaintiff had not submitted any claim or bill for escalation under Clause 10 CC etc. of the agreement for which he has inter alia claimed the payment in the present suit, as such, the suit was not maintainable and deserves to be dismissed. The other objection raised by the defendant was with regard to the maintainability of the suit in view of the arbitration clause contained in the agreement entered into between the parties. Lastly, an objection was raised that since the plaintiff had accepted the full and final payment without any objection or reservation long ago on 7.1.2000, therefore, he cannot agitate or dispute the matter at this belated stage and the suit was barred by limitation and was not maintainable.

On merits, the preliminary objections so raised were elaborated, yet it was further averred that the plaintiff was required to complete the work within one year i.e. before 2.12.1997. However, the same was delayed considerably by the plaintiff and was completed only on 15.4.1999. After acceptance of measurements by the plaintiff and completion of required formalities, the full and final payment was made to the plaintiff on 7.1.2000 which was accepted by him without any reservation or objection.

5. As regards the escalation bill, it was averred that the Assistant Engineer, Dharamshala vide his letter dated 20.10.1999 had only assessed the tentative and provisional liability which was further verified by the Superintending Engineer of the Corporation and, therefore, the plaintiff cannot claim any payment on the basis of the said assessment of liability. As regards the security amount of Rs.1,00,000/-, it was averred that this amount of refundable security to the plaintiff had been detained by the defendant as the plaintiff despite repeated requests had not furnished the proof of clearance of his liabilities towards the deposit of CPF with the competent authority in respect of the employees engaged by him for the work executed by him for the defendant. The plaintiff having failed to furnish the CPF clearance certificate from the competent authority was not

entitled to the security amount till such payment was cleared. The defendant accordingly prayed for dismissal of the suit.

6. The replication to the written statement was filed by the plaintiff wherein the averments made in the plaint were reiterated and reaffirmed, while those in the written statement were denied. As regards the preliminary objection No.1, it was averred that the bill for the price escalation was duly prepared by the staff of the defendant as per the practice in the office of the defendant and the counter-signatures of the contractors are obtained thereupon at the time of making the payment.

7. As regards the preliminary objection No.2, it was averred that since the work was completed and the final payment for the same was made to the plaintiff on 21.5.2001 when the price escalation was also admissible but was not paid, therefore, the arbitration clause would not come into operation and the same would otherwise come into operation only when there is no dispute relating to the price escalation as the bill for the same had been checked in the office of the Superintending Engineer of the defendant.

8. Insofar as the preliminary objections No.3 and 4 relating to the suit being time barred, it was averred that the final payment was accepted by the plaintiff on 7.1.2000 and, therefore, the suit was well within the period of limitation. As observed, the other allegations in the written statement on merits were denied and corresponding averments made in the plaint were reiterated.

9. On the pleadings of the parties, the following issues came to be framed on 4.3.2005:

1. *Whether the plaintiff is entitled to the suit amount as alleged? OPP*
2. *Whether the plaintiff is entitled for future interest at the rate of 18% per annum? OPP*
3. *Whether the suit is not maintainable in view of the arbitration agreement between the parties? OPD*
4. *Whether the plaintiff cannot claim the suit amount as he has accepted the full and final payment from the defendant without any protest? OPD.*
5. *Whether the suit is within the period of limitation? OPP*
6. *Whether the plaintiff did not make any claim under Clause 10 CC of the agreement between the parties as well, if so, its effect? OPD*
7. *Relief.*

10. After recording the evidence and evaluating the same, the suit filed by the plaintiff came to be dismissed by the learned Single Judge on 10.01.2013, constraining the plaintiff to file the instant appeal.

11. The issues No. 1, 2 and 5 were answered against the plaintiff, whereas, issue No.3 was answered against the defendant, while issues No. 4 and 6 were answered in favour of the defendant.

12. It is vehemently argued by Mr. J.S. Bhogal, learned Senior Advocate assisted by Mr. T.S. Bhogal, Advocate that the learned Single Judge erred in dismissing the suit, that too, on the ground of limitation by simply relying upon Article 18 of the Limitation Act without considering the provisions of Section 19 thereof under which a fresh period would start from the date when payment on account of the work was made. It is further urged that the learned Single Judge erred while deciding issues No. 1, 2, 4 and 6 by holding that the plaintiff did not make the representation for enhanced payment for escalation and by further

concluding that he has accepted the payment of the final bill without any objection. It is lastly argued by learned counsel for the appellant that the learned Single Judge has given undue weightage to the fact that the Managing Director of the defendant did not approve the bill, but at the same time, has failed to appreciate the fact that on account of the failure of the officers of the defendant to approve and make the payment of escalation bills and the security that initially the notice was issued and subsequently the suit was instituted against the defendant.

13. On the other hand, Mr. G.D. Verma, learned Senior Counsel assisted by Mr. B.C.Verma, Advocate would argue that since the plaintiff had received the payment without any objection or protest, therefore, he is estopped from filing the suit and would otherwise claim that the suit being time barred has been rightly dismissed by learned Single Judge.

14. We have heard learned counsel for the parties and have gone through the records of the case and would now proceed to examine the issue-wise findings in the same order as has been considered by the learned Single Judge.

ISSUE NO.5:

15. Noticeably, the point of law for consideration in the instant appeal is: whether a suit for money for remuneration for work done would amount to a suit for enforcement of debt and consequently payment in writing would extend the period of limitation under Section 19 of the Limitation Act.

16. Article 18 of the Limitation Act, which has been relied upon by learned Single Judge reads as under:

18.	*For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.*	*Period of Limitation is three years.*	*When the work is done.*

17. Section 19 of the Limitation Act deals with the effect of payment and reads thus:

> *"**Effect of payment on account of debt or of interest on legacy.**- Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duty authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made :*
>
> *Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.*
>
> *Explanation. – For the purposes of this section,-*
>
> *(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment.*
>
> *(b) "debt" does not include money payable under a decree or order of a court."*

18. Noticeably, Section 19 deals with a debt and, therefore we would have to fall back on the meaning of debt in the context of Section 73 of the Indian Contract Act. The question was considered in detail by a Full Bench of Punjab and Haryana High Court in ***Ram Lal Jain vs. Central Bank of India, AIR 1961 Punj. 340*** and it was held that debt

would include any liability to pay for a breach of a contract and since the liability is pecuniary it would take the character of a debt.

19. The Allahabad High Court in ***Paras Nath vs. Kishan Lal AIR 1965 All 189*** held that "debt" comes into existence in the cases of accrued rent not paid to the landlord and the pecuniary liability quantified or capable of quantification will come in the definition of debt.

20. **Earl Jowitt** in his definition of English law has defined debt as follows:

> *"a sum of money due from one person to another, a debt exits when a certain sum of money is owing from one person to another."*

21. In ***DPP vs. Turner 1973 3 All England Reporter, 124***, it was held a debt is a sum that one person is bound to pay to another. It was further held that debt normally has one or other of two meanings it can mean an obligation to pay money or it can mean a sum of money owed.

22. In ***Kesoram Industries and Cotton Mills Ltd. vs. Commissioner of Wealth-Tax (Central), Calcutta, (1966) 69 ITR 767,*** the Hon'ble Supreme Court after discussing various decisions, has observed at pages 786 and 787, as under:

> *"a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligationdebitum in praesenti, solvendum in futuro.*
>
> *A debt involves an obligation incurred by the debtor and the liability to pay a sum of money in present or future. The liability must, however, be to pay a sum of money, i.e., to pay an amount which is determined or determinable in the light of factors existing on the date when the nature of the liability is to be ascertained."*

23. It was further held by the Hon'ble Supreme Court in para 32 as under:

> *"32. To summarize: A debt is a present obligation to pay an ascertainable sum of money, whether the amount is payable in praesenti or in futuro; debitum in praesenti, solvendum in futuro. But a sum payable upon a contingency does not become a debt until the said contingency has happened….."*

24. Black's Law Dictionary defines 'debt' as under:

1. Liability on a claim; a specific sum of money due by agreement or otherwise.
2. The aggregate of all existing claims against a person, entity, or state.
3. A non-monetary thing that one person owes another, such as goods or services.

25. From the aforesaid exposition of law, we are of the considered view that the money which is sought to be recovered by the plaintiff for the work done must be held to be a liability to pay an amount as per the contract and, therefore, a debt. Section 19 is comprehensive to include every situation where the financial liability is ascertained.

26. Adverting to the impugned judgment, it would be noticed that the learned Single Judge took note of the limitation as prescribed under Article 18 without considering Section 19 of the Limitation Act and held the suit to be time barred. While reaching at such a conclusion, it relied upon the judgment of Punjab and Haryana High Court in ***Jullundur***

Improvement Trust vs. Kuldip Singh 1984 AIR (Punjab) 185 where the Court held that the starting point of limitation for an agreement for construction of work would be three years from the time when the work was completed. It further held that receipt of payment therefor was irrelevant.

27. However, it would be noticed that there was no specific consideration of the effect of Section 19 in the said judgment and, therefore, the same could not have been applied.

28. This fact has been duly noted by another learned Single Judge of the Punjab and Haryana High Court in SAO No. 81 of 2011 (O&M), decided on 13.12.2013 in case titled ***Unitech Ltd. vs. M/s Prem Builders India and others,*** wherein the point of law for consideration like in the instant case was whether a suit for money for remuneration for work done amounts to a suit for enforcement of debt and consequently payment in writing will extend the period of limitation under Section 19 of the Limitation Act.

29. While answering the question in affirmative, the earlier judgment of that Court in ***Ram Lal Jain's*** case (supra) was distinguished in the following manner:

> *"6. The counsel for the petitioner brings to me a judgment of this Court in **Jullundur Improvement Trust vs. Kuldip Singh 1984 AIR (Punjab) 185** where the court was holding that the starting point of limitation for an agreement for construction of work would be three years from the time when the work was completed. The Court was holding that receipt of payment thereof was irrelevant. There was no specific consideration of the effect of Section 19 in the said judgment and I will not therefore find any reason to apply the said judgment."*

And it was thereafter held:

> *"7. The money which is sought to be recovered by the plaintiff for the work done must be taken as a liability to pay an amount as per the contract and therefore a debt. Section 19 is comprehensive to include every situation where the financial liability is ascertained. To persist with the second appeal against the order is frivolous. I find it to be an excuse not to pay the amount due under the contract. The second appeal against the order of the court below is dismissed with exemplary costs of Rs.3,500/- Counsel's fee Rs.5,000/-"*

30. We see no reason to take a different view from the one taken by the learned Single Judge of Punjab and Haryana High Court in ***Unitech Ltd.*** (supra). Consequently, the findings on issue No.5 as recorded by learned Single Judge, are liable to be set-aside. Ordered accordingly.

ISSUE NO. 3:

31. Issue No.3 has already been decided by the learned Single Judge against the defendant and admittedly the said findings have attained finality as the defendant has not chosen to file separate appeal or cross-objections questioning the same.

ISSUES NO. 4 & 6:

32. Now, adverting to the findings rendered on issue No.6; the onus to prove this issue was upon the defendant, who in order to prove its case examined Pyara Singh Thakur as DW-1, who stated that even though the work was required to be executed within one year, however, the plaintiff took three years for its completion. He further stated that the

plaintiff did not make any representation for enhanced payment on account of costs escalation. However, in his cross-examination, he admitted that on reporting of execution of a work, the Junior Engineer concerned used to measure the work done on the spot and enter the same in the measurement book and thereafter, prepare the final bill. He also admitted that the signature of the contractor used to be obtained in token of his acknowledgement with respect to correct measurement of the work. He further admitted that the defendant did not submit any bill either on his pad or letter head or in any bill form and rather it was the Junior Engineer, who prepared one bill for the work and another for escalation in the costs of material and wages of labours. The witness also admitted that the bill was sent to the head office. It has come on record that it was the Managing Director of the defendant, who failed to take a decision on the bill by neither rejecting it nor accepting the same. In such circumstances, it could not be said that the plaintiff had not made any claim under Section 10 CC of the agreement and the contrary findings recorded by learned Single Judge on this issue is therefore, liable to be set-aside. Ordered accordingly.

33. Adverting to issue No.4, it would be noticed that there is nothing on record to even remotely suggest that the plaintiff had accepted the full and final amount without any objection or protest, so as to dis-entitle him to claim a sum of Rs. 18,79,871/- on account of escalation.

34. In the present case the defendant is H.P. Tourism Development Corporation, which is a public authority. It does not lie to the public authority like the defendant raising such plea to deprive a just claim of the plaintiff, though the suit is within time depriving just claim of the plaintiff.

35. We make it clear that even though a public authority is not prohibited from raising such a plea and the Court is otherwise duty bound to decide such plea when raised, but such a plea should not ordinarily be taken up by a Government or a public authority, unless of course the claim of the plaintiff is not well founded and by reason of delay in filing a suit, the evidence for the purpose of resisting such a claim has become un-available.

36. In ***Urban Improvement Trust, Bikaner vs. Mohan Lal (2010) 1 SCC 512***, it was observed that it is a matter of concern that such frivolous and unjust litigations by Governments and statutory authorities are on the increase. It was further observed that statutory authorities which existed for to discharge statutory functions in public interest should be responsible litigants and cannot raise frivolous and unjust objections nor act in a callous and high-handed manner. It would be apposite to refer to the relevant observations, which reads thus:

> ***"5. It is a matter of concern that such frivolous and unjust litigation by governments and statutory authorities are on the increase. Statutory Authorities exist to discharge statutory functions in public interest. They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a callous and highhanded manner. They can not behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment. They are expected to show remorse or regret when their officers act negligently or in an overbearing manner. When glaring wrong acts by their officers is brought to their notice, for which there is no explanation or excuse, the least that is expected is restitution/restoration to the extent possible with appropriate***

compensation. Their harsh attitude in regard to genuine grievances of the public and their indulgence in unwarranted litigation requires to be corrected.

6. This Court has repeatedly expressed the view that the governments and statutory authorities should be model or ideal litigants and should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice. We may refer to some of the decisions in this behalf.

7. *In Dilbagh Rai Jarry vs. Union of India* ***[1974 (3) SCC 554] where the Hon'ble Supreme Court extracted with approval, the following statement (from an earlier decision of the Kerala High Court (P.P. Abubacker vs. Union of India, AIR 1972 Ker 103, AIR pp. 107-08, para 5)]:(SCC p.562, para 25)***

> ***"25.......'5. ....."The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The lay-out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf. I am not indulging in any judicial homily but only echoing the dynamic national policy on State litigation evolved at a Conference of Law Ministers of India way back in 1957.' "***

8. *In Madras Port Trust v. Hymanshu International****, (1979) 4 SCC 176 the Hon'ble Supreme Court held: (SCC p. 177, para 2):***

"2. .... It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable...."

9. In a three Judge Bench judgment of *Bhag Singh & Ors. v. Union Territory of Chandigarh* ***through LAC, Chandigarh [(1985) 3 SCC 737]: the Hon'ble Supreme Court held: (SCC p. 741, para 3)***

"3... The State Government must do what is fair and just to the citizen and should not, as far as possible, except in cases where tax or revenue is received or recovered without protest or where the State Government would otherwise be irretrievably be prejudiced, take up a technical plea to defeat the legitimate and just claim of the citizen."

10. Unwarranted litigation by governments and statutory authorities basically stem from the two general baseless assumptions by their officers. They are:

(i) All claims against the government/statutory authorities should be viewed as illegal and should be resisted and fought up to the highest court of the land.

(ii) If taking a decision on an issue could be avoided, then it is prudent not to decide the issue and let the aggrieved party approach the Court and secures a decision.

The reluctance to take decisions, or tendency to challenge all orders against them, is not the policy of the governments or statutory authorities, but is attributable to some officers who are responsible for taking decisions and/or officers in charge of litigation. Their reluctance arises from an instinctive tendency to protect themselves against any future accusations of wrong decision making, or worse, of improper motives for any decision making. Unless their insecurity and fear is addressed, officers will continue to pass on the responsibility of decision making to courts and Tribunals."

37. Similar reiteration of law can be found in a fairly recent judgment of the Hon'ble Supreme Court in ***Rajendra Shankar Shukla and others vs. State of Chhattisgarh and others (2015) 10 SCC 400***, wherein again while referring to the earlier decision in ***Hymanshu's*** case (supra)*, the Hon'ble Supreme Court held in para 32 as under:*

"32. Further, this Court has frowned upon the practice of the Government to raise technical pleas to defeat the rights of the citizens in Madras Port Trust vs. Hymanshu International (1979) 4 SCC 176, wherein it was opined that it is about time that governments and public authorities adopt the practice of not

relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Para 2 from the said case reads thus :- (SCC p.177)

> ***"2. We do not think that this is a fit case where we should proceed to determine whether the claim of the respondent was barred by Section 110 of the Madras Port Trust Act (2 of 1905). The plea of limitation based on this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well-founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the. purpose of resisting such a claim has become unavailable. Here, it js obvious that the claim of the respondent was a just claim supported as it was by the recommendation of the Assistant Collector of Customs and hence in the exercise of our discretion under*** *Article 136* ***of the Constitution, we do not see any reason why we should proceed to hear this appeal and adjudicate upon the plea of the appellant based on Section 110 of the Madras Port Trust Act (2 of 1905)."***

38. The learned Single Judge held that the plaintiff was not entitled to the suit amount as he had accepted the full and final payment from the defendant without any protest. However, such findings are not supported by the material placed on record.

39. Even otherwise mere acceptance of the amount would not debar the plaintiff to make further claims as was held by the Hon'ble Supreme Court in ***R.L. Kalathia and Company vs. State of Gujarat (2011) 2 SCC 400***, wherein it was observed as under:

> *"9. On going through the entire materials including the oral and documentary evidence led in by both the parties and the judgment and decree of the trial Judge, we are unable to accept the only reasoning of the High Court in non-suiting the plaintiff. It is true that when the final bill was submitted, the plaintiff had accepted the amount as mentioned in the final bill but "under protest". It is also the specific claim of the plaintiff that on the direction of the Department, it had performed additional work and hence entitled for additional amount/damages as per the terms of agreement. Merely because the plaintiff had accepted the final bill, it cannot be deprived of its*

right to claim damages if it had incurred additional amount and is able to prove the same by acceptable materials."

40. It was further observed that merely because the plaintiff had accepted the final bill, he cannot be deprived of his right to claim damages if he had incurred additional amount and is able to prove the same by acceptable materials.

41. Earlier to that the Hon'ble Supreme Court in ***Chairman and MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663*** and ***Asian Techs Limited vs. Union of India and others (2009) 10 SCC 354*** considered that the Public Sector undertaking and Financial Institutions always have an upper hand and they would not ordinarily release the money unless a "No Demand Certificate" is signed and further held that each case, therefore, is required to be considered on its own merits. The Hon'ble Supreme Court applied legal *maxim necessitas non habet legem* which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.

42 In ***R.L. Kalathia's*** case (supra) the legal position was summed up as under:

(I) Merely because the contractor has issued "no-dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground if issuance of "no-dues-certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "no-dues certificate".

Accordingly, these issues are decided against the respondent/defendant.

ISSUES NO. 1 & 2:

43. It would be noticed that the basis for deciding these issues against the plaintiff were that the findings recorded qua issues No.4 and 6 and admittedly no further reasons were given for deciding these issues against the plaintiff. Now issues No.4 and 6 stand decided against the defendant, obviously then, both these issues have to be answered in favour of the plaintiff. Apart from that, save and except, the claim of refund of Rs.1,00,000/- as security, which in fact, has been withheld only for CPF clearance certificate, which in our considered view cannot be termed to be unjustified, the suit of the plaintiff must be decreed. Issues No.1 and 2 are accordingly decided in favour of the plaintiff.

44. Now, adverting to the question regarding the entitlement of the plaintiff towards the interest, it would be noticed that save and except the legal notice, no other document has been placed on record by the plaintiff. Even the agreement for award of the work of contract in favour of the plaintiff has not been placed on record so as to enable this Court to come to the conclusion as to whether there was a clause in the said agreement regarding the payment of interest. In the notice issued by the plaintiff, he has claimed 18% interest, whereas while appearing as PW-1 the interest @ 24% has been claimed.

45. Be that as it may, once this Court has come to the conclusion that the plaintiff has been deprived of use of money, because of lapse or fault of the defendant, to which he is entitled to, then he would have a right to be compensated for such deprivation which may be called interest, compensation or damages etc.

46. A Constitution Bench of the Hon'ble Supreme Court in ***Secretary, Irrigation Department, Government of Orissa and others*** *versus* ***G.C.Roy (1992) 1 SCC 508***,held that:-

> *"43…(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages……. ."*

47. Black's Law Dictionary (7th Edition) defines 'interest' inter alia as:

> *"3. The compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use of [the] borrowed money."*

48. According to Stroud's Judicial Dictionary of Words And Phrases (5th Edition) interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money.

49. The essence of interest in the opinion of Lord Wright, in ***Riches*** *versus* ***Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL)*** (AC at p.400: All ER at p.472-E-F) is that:-

> *'…..it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation'; the money due to the creditor was not paid, or, in other words, 'was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute'.*

50. At this stage, it may be relevant to note that the following observations made by a Division Bench of the High Court of Punjab in ***CIT*** *versus* ***Dr.Sham Lal Narula AIR 1963 Punj 411*** on the concept of 'interest' were duly approved by the Hon'ble Supreme Court in ***Dr.Sham Lal Narula*** *versus* ***CIT, AIR 1964 SC 1878*** and it was held as under:-

> *"8. The words "interest" and "compensation" are sometimes used interchangeably and on other occasions they have distinct connotation. "Interest" in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, "interest" is understood to mean the amount which one has contracted to pay for use of borrowed money……*
>
> *In whatever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties,*

or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

51. In ***South Eastern Coalfields Ltd. Vs. State of M.P. and others (2003) 8 SCC 648,*** it was held that interest is also payable in equity in certain circumstances. It was further observed that rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement. Applicability of the rule to avoid interest in equity is attracted when the existence of a state of circumstances is established which justify the exercise of such equitable jurisdiction and such circumstances can be many. It is apt to reproduce paragraphs 21, 24, 26 and 28 of the judgment, which reads thus:-

"21. Interest is also payable in equity in certain circumstances, me rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (See: Chitty on Contracts, Addition 1999, Vol. II, Part 38-248, at page 712). Interest in equity has been held to be payable on a market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.

24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid. The justification for award of interest stands fortified by the weighty factor that the Coalfields themselves are obliged to pay interest to the State on such amount. It will be a travesty of justice to hold that though the Coalfields must pay the amount of interest to the State but the consumers/purchasers in whose hands the money was actually withheld be exonerated from liability to pay the interest.

Liability of the consumers/purchasers to pay interest to the Coalfields:

(b) for the period for which the restraint order passed by the Court remained in operation.

26. In our opinion, the principle of restitution takes care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution or decree or order or the court or in direct consequence of a decree or order (See : Zafar Khan and Ors. v. Board of Revenue, U.P., and Ors., . In law, the term 'restitution' is used in three senses; (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, p.1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

"Often, the result in either meaning of the term would be the same. ..... Unjust impoverishment as well as unjust enrichment is a

> *ground for restitution. If the defendant is guilty of a non-tortuous misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."*

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 of the C.P.C. speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with ail expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing, wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise corned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the set of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to

or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced, we are, therefore, or the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

52. Judged in light of the aforesaid exposition of law, we are of the considered view that the ends of justice would be subserved in case the plaintiff is awarded interest at the rate of 6% per annum from the date of filing of the suit i.e. on 19.5.2004 till the date of its realisation. Ordered accordingly.

53. In view of the issue-wise findings recorded above, the appeal is allowed. The judgment and decree passed by the learned Single Judge is set-aside. However, even though the plaintiff is held entitled to the entire amount of Rs.18,79,871/-,but as regards the security amount of Rs.1,00,000/- the same shall be refunded to him only in the event of his submitting CPF clearance certificate. In addition thereto, the plaintiff is held entitled to interest at the rate of 6% per annum from the date of filing of the suit i.e. on 19.5.2004 till its realisation. Pending application, if any, also stands disposed of. Decree-sheet be prepared accordingly.

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

Anil Kumar Jamwal …..Appellant.
Versus
Smt. Reena Devi …..Respondent.

FAO (HMA) No.: 05 2019
Decided on: 04.07.2019

Hindu Marriage Act, 1955- Section 13 (1)(i-a) (i-b)- Divorce on grounds of cruelty and desertion – Proof- District Judge dismissing petition of husband seeking divorce on grounds of cruelty and desertion – Appeal against –Held - Evidence revealing that wife still residing in house of her in-laws alongwith minor children – They being maintained only by father in-law of wife - Husband not residing with his parents as he was disowned by them – He also performed ring ceremony with another lady despite already being married – He is interested in marrying some other lady and divorce petition filed by him to achieve that end – No evidence of cruelty or desertion by wife on record – Appeal dismissed – Decree upheld.(Paras 17 & 18)

For the appellant:	Mr. L.S. Mehta, Advocate.
For the respondent:	Mr. Varun Chandel, Advocate.
	Parties are present in person.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this appeal, the appellant has challenged the judgment dated 24.10.2018, passed by the Court of learned District Judge, Bilaspur, H.P. in HMA Petition No. 18/3 of 2017, titled as *Shri Anil Kumar Jamwal Vs. Smt. Reena Devi,* vide which, a petition filed under Section 13 of the Hindu Marriage Act, 1955 by the appellant for dissolution of marriage by way of decree of divorce, has been dismissed.

2. Brief facts necessary for the adjudication of the appeal are that appellant-petitioner (husband){hereinafter referred to as 'the petitioner'} filed a petition for dissolution of marriage under Section 13 of the Hindu Marriage Act, 1955 on the ground that his marriage was solemnized with the respondent-Reena Devi as per Hindu Rites on 15.01.2005. They lived peacefully in their village for some time after the marriage and out of the said wedlock, two children were born. After the birth of children, the behaviour of the respondent changed towards the appellant and she started abusing, maltreating and misbehaving with the petitioner. On numerous occasions, respondent left the house of the petitioner without any prior permission. On number of occasions, petitioner brought her back from the house of in-laws. He was also maltreated by the parents and brothers of the respondent, who threatened him with dire consequences and also dissuaded him from visiting the house of in-laws. According to the petitioner, on one occasion, the matter was got amicably settled between the parties with the help of nears and dears and respondent came back to her matrimonial house, however, after few days, she again started misbehaving and quarreling with the petitioner. According to the petitioner, there was no physical/biological relation between him and the respondent after the birth of their children. Respondent had caused mental as also physical cruelty to the petitioner. During the years 2005 to 2007, petitioner was posted at Jalandhar and w.e.f. 2007 to 2008, he remained posted at Baddi and since then, he was doing a private job at Shimla. Somewhere in the year 2009-2010, on the request of the petitioner, respondent remained with him at Shimla for about 10-15 days, but thereafter she deserted him in the month of January, 2010 and went to her parents house. It was also the case of the petitioner that in the year 2007, his parents had disowned him. His case was that respondent was hand-in-glove with his parents in getting him dis-owned from the property of his parents. His children were also residing with their grandparents. Petitioner was not even being permitted to visit his own house. As the parties were residing separately since last four years as from the date when the petition was filed and there were no chances of re-conciliation between the parties, the petitioner filed a petition praying for dissolution of marriage by way of decree of divorce.

3. The petition was resisted by the respondent, *inter alia,* on the ground that it was the petitioner who has failed to maintain the respondent and their children, who were minor and school going. According to the respondent, petitioner had never spent even a single penny towards the education of the children. The factum of ill-treatment of the petitioner at the behest of respondent was emphatically denied. All other allegations levelled in the petition by the petitioner against the respondent were also denied. It was denied that respondent used to leave the matrimonial house without the prior permission of petitioner to go to her parental house. It was also denied that the parents or brothers of the respondent misbehaved with the petitioner or that he was threatened by them, as alleged. As per the

respondent, while in Jalandhar, petitioner got entangled with some other girl. He came back at the insistence of his parents and other relatives. Petitioner while in Shimla, was living a life of adultery. It was only on account of his misdeeds that his parents had disowned him and in fact were supporting their daughter-in-law (respondent) and their grandchildren. It was denied that after the birth of the children, there was no physical/biological relation between the parties. As per the respondent, there was physical relation between them even in the month of February, 2015 when the petitioner visited his home. It was also the case of the respondent that petitioner constantly used to visit his parental house. It was denied by the respondent that parties were residing separately for the last four years and according to the respondent, it was the petitioner who was ill-treating and misbehaving with the respondent.

4. On the basis of pleadings of the parties, learned Court below has framed the following issues:

> *"1. Whether the petitioner is entitled for divorce on the grounds of cruelty? OPP.*
>
> *2. Whether the petitioner is entitled to decree on the ground of desertion? OPP.*
>
> *3. Whether the petition is not maintainable? OPR.*
>
> *4. Whether the petitioner has concealed the material facts from the Court as alleged. If so, its effect? OPR.*
>
> *5. Whether the petitioner has no cause of action to file the present petition? OPR.*
>
> *6. Whether this Court has no jurisdiction to hear and decide the matter? OPR.*
>
> *7. Relief."*

5. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned Trial Court on the issues so framed:

"Issue No. 1:	No.
Issue No. 2:	No.
Issue No. 3:	No.
Issue No. 4:	No.
Issue No. 5:	No.
Issue No. 6:	No.
Relief:	Petition is dismissed with costs per operative part of the judgment."

6. While dismissing the petition filed by the appellant, learned Court below held that it was not proved on record that the petitioner was treated with cruelty and desertion by the respondent, whereas it had come on record that respondent was residing with her in-laws alongwith children. Learned Court held that there was no convincing ground to infer that the respondent was in the habit of leaving her in-laws' house without intimation and permission nor there was any convincing ground to infer that the respondent had misbehaved with petitioner or ill-treated him. Learned Court also held that it had come on record that the petitioner had been disowned by his parents in the year 2007 and despite this, he was visiting the house of his father. Learned Court held that the petitioner had

failed to lead any convincing evidence that respondent acted in a manner, which amounted to cruelty and desertion. It held that petitioner had failed to provide due care to his wife as also children and the allegation of cruelty and desertion against the respondent were not legally proved. On these grounds, learned Court below dismissed the petition.

7. Feeling aggrieved, the appellant/petitioner has filed the present appeal.

8. I have heard learned counsel for the parties and have also gone through the judgment passed by the learned Court below.

9. To prove his case, petitioner examined five witnesses. His father Gian Singh entered the witness box as PW-1 and stated that respondent (wife) was residing with him and he was also looking after his grandchildren, who were residing with him. This witness also stated that petitioner, who was his son, was not residing with him for the last two years and nine months. He also stated that he had disowned the petitioner from his property by issuing a public notice in this regard.

10. Mother of the petitioner-Pyaro Devi entered the witness box as PW-2 and she also deposed in the Court that the petitioner was not residing in his parental house and that neither her son nor daughter-in-law were under their command. She further stated that the respondent as also her grandchildren were being maintained by them and were residing with them. She also stated that the petitioner who is her son was disowned by them as he had got himself engaged to a girl at Jalandhar in the year 2007 and now his son wanted to marry with some other girl in Shimla.

11. PW-3 Sh. Piar Singh, Pradhan, Gram Panchayat Kotlu Brahmna has stated in the Court that at the instance of the father of the petitioner, a meeting of the Panchayat was convened with regard to the maintenance of the respondent, however, no meeting was actually held as the petitioner did not turn up before the Panchayat.

12. One Shri Sandeep Kumar, who entered the witness box as PW-4 feigned his ignorance about having any knowledge with regard to the dispute between the parties. He also showed his ignorance to the fact that the petitioner wanted to marry some other girl and therefore, the petitioner had filed the petition for divorce.

13. Petitioner himself entered the witness box as PW-5 and he stated in the Court about the cruelty being meted out to him by the respondent, who was a quarrelsome and abusive lady. He stated in the Court that the respondent used to leave the house of the petitioner and go to her parents house without his consent and since 2010, he was having no physical relations with his wife.

14. Respondent examined Shri Bharat Bhushan as RW-1 and Sh. Bal Chand as RW-2 and both these witnesses deposed that after her marriage, the respondent had resided in her matrimonial house. He had never abused the petitioner. These witnesses deposed that it was the petitioner who was interested in marrying some other girl at Jalandhar and had also performed ring ceremony with another girl despite his being married to the respondent. Shri Ramesh Chand and Mustaq Mohammad entered into the witness box as RW-3 and RW-5. RW-3 Ramesh Chand, who was Pradhan of Gram Panchayat Bhatoli-Kalan stated that in the year 2016, father of respondent had brought into his notice the fact that his daughter was being ill-treated in her in-laws' house and when he met the parents of the petitioner, he was told that the petitioner was neither residing with them nor he was listening to their directions, whereas the respondent was living with them.

15. RW-5 Mustaq Mohammad also stated in the Court that petitioner was interested in marrying some other girl and this was the reason as to why he had filed the divorce petition.

16. Respondent entered the witness box as RW-4 and she stated in the Court that she alongwith her children were residing in the house of her in-laws. She had never left her matrimonial house, as alleged by the petitioner. She further stated that petitioner had in fact committed fraud by getting engaged to another girl at Jalandhar and thereafter, they had shifted to Shimla. She stated that now at Shimla, the petitioner was again interested in marrying another girl and for this reason, he had filed the divorce petition.

17. From the above discussion, certain facts which clearly emerge, are that whereas the respondent is residing with her in-laws with her two minor children, the petitioner is not living with his parents. Petitioner while in Jalandhar had performed a ring ceremony with another girl, despite the fact that he was already married to the respondent. While at Shimla, he was now interested in marrying another girl and for the said purpose, he had initiated divorce proceedings against the respondent. The above noted facts are strengthened by the statements of the parents of the petitioner himself, who entered the witness box as his witnesses. Both these witnesses have deposed that petitioner was not residing with them, he was not listening to them, respondent was residing with them, father-in-law of the respondent was maintaining the respondent as also her two minor children and the petitioner was disowned by the parents, because he had performed a ring ceremony with some other girl at Jalandhar. The petition for divorce was filed by the husband on the ground of cruelty. Onus was upon him to have had proved the ingredients of cruelty, which he miserably failed to prove. This is exactly what has been held by the learned Court below also. Learned Court below by way of a well reasoned judgment has dismissed the petition filed by the petitioner. Learned Court has discussed the entire evidence on record, as also the relevant case law in detail. The findings so returned by the learned Trial Court are duly borne out from the records of the case and this Court concurs with the findings so returned, because in my considered view also, the petitioner has not been able to prove that respondent has subjected him to cruelty, as alleged in the divorce petition. On the contrary, there is merit in the contention of learned counsel for the respondent that the divorce petition was filed by the petitioner so that he could marry some other girl.

18. During the course of arguments, learned counsel for the appellant could not point out any infirmity or perversity with the findings returned by the learned Trial Court with reference to the record of the case. Thus, in this view of the matter, as in my considered view, learned Court below has rightly held that the petitioner had not been able to make out any case of cruelty against the respondent, there is no infirmity with the judgment passed by the learned Trial Court, vide which it has dismissed the petition filed by the appellant herein for grant of divorce. Therefore, this appeal being devoid of any merit is dismissed. Pending miscellaneous applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

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

Cr. Appeal No. 517 of 2016

Judgment reserved on: 10.6.2019
Date of Decision: July 5, 2019

Indian Penal Code, 1860- Section 376 **-** Rape– DNA examination, when becomes necessary– Trial court convicting accused of raping victim– Appeal against– On facts, held victim, a married lady left matrimonial house of her own without informing her husband (complainant)– During investigation, victim telling Police that accused took her away and had coitus with her without her consent– Semen found and collected by medical officer during her medical checkup not sent for DNA examination– Incriminatory material does not connect accused with certainty with commission of said offence– Appeal allowed– Conviction set aside– Accused acquitted.(Paras 22 & 23)

Cases referred:
Dilip & another vs. State of M.P., 2001 (9) SCC 452
Narender Kumar vs. State (NCT of Delhi), 2012(7) SCC 171

Amicus Curiae	:	Mr. Shrawan Dogra, Senior Advocate as Amicus Curiae with Mr. Karan Singh Kanwar, Advocate.
For the appellant	:	Mr. Amrinder Singh Rana, Advocate, as Legal Aid Counsel, for the appellant.
For the respondent	:	Ms. Divya Sood, Deputy Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The present appeal has been filed by convict Om Prakash, under Section 374 of the Code of Criminal Procedure, assailing the judgment dated 22.6.2016, passed by the Additional Sessions Judge, Hamirpur, H.P., in Sessions Trial No. 19 of 2014, whereby he has been convicted for having committed an offence punishable under Section 376 of the Indian Penal Code, and sentenced to undergo rigorous imprisonment for a period of seven years and pay a fine of INR 20,000/-, and in case of default of payment to fine to further undergo simple imprisonment for three months. The trial Court further ordered that out of the amount of fine so imposed upon the convict, an amount of INR 15,000/- be paid to the victim as compensation, on its realization. The period for which, the convict already remained in custody, was also set off by giving him the benefit of Section 428 CrPC.

2. The gist of the facts apposite to arrive at a just conclusion, are as follows:

(a) One Rajesh Kumar (who appeared during the trial as PW-1), made a written complaint to the SHO Police Station Talai, Distt. Bilaspur, H.P. on 17th March 2014. He informed the police that his wife has left her matrimonial home without informing him (She is the victim and her name is being withheld because of Section 288-A CrPC, and starting now she would be referred to as the 'victim').

(b) He further stated that around 7-8 months before, he had entered into a love marriage with the victim, which was registered in the Court of Ghumarwin, Bilaspur, HP. The couple was living happily at his house. On 15-03-2014, the victim left home by saying that she was going to Jhandutta, for filling a form (Kaushal Grant Form). After that, in the evening, when he

reached home, then his mother told him that the victim has gone to Jhandutta. Thereupon he made a telephonic call to her on Mobile Number No. 82619-79926 but could not contact her. He suspected that somebody might have lured her and taken her away.

(c) On this information, the Investigating Officer found a prima facie case under Section 366 of IPC to have been made out and, hence, he registered FIR No. 22/2014 (Ext. PW-15/A), at Police Station- Talai, District-Bilaspur, HP, on 17.03.2014.

(d) After that, the police swung into action and tried to find out the whereabouts of the missing lady. During such inquiry, SHO Hem Raj (PW-18), received telephonic information from Pradhan Savita Devi of Gram Panchayat, Patta (PW-8) that a girl has been brought to his house by Om Prakash (Convict). On receiving such information, he incorporated entry No. 12(A) in the daily station diary on 24.04.2014 at 8:15 hours. During the trial, this daily diary entry was tendered in evidence as Ext. PW-15/B.

(e) After that, Inspector Hem Raj (PW-18) visited the house of Pradhan Smt. Savita Devi (PW-8) and gave protection to the victim. The father of the victim Sh. Kali Ram (PW-9) also reached the house of Pradhan Savita Devi (PW-8).

(f) At that place, the victim made a statement to Lady Constable Anjana Kumari (PW-17) which she recorded under Section 154 of CrPC. (Ext. PW-7/A), vide entry incorporated in the daily diary (Ext. PW-15/C), at 7.05 p.m.

3. The victim (PW-7) in her statement under Section 154 CrPC. (Ext. PW-7/A) mentioned her age as 18 years and stated to be the wife of one Rajesh Sharma (PW-1) stated as follows:

(a) On 15.3.2014, out of her free will, she left her matrimonial home and went to the house of one Mukesh Kumar resident of Village Patta, Tehsil Bhoranj, Distt. Hamirpur (Not examined during trial).

(b) From that date, she had been residing in the house of Mukesh Kumar. In the evening of 23.4.2014, when she was present in his home, then Om Prakash (convict), whose house is in the vicinity, came along with Dhani Ram, father of Mukesh Kumar, to his house. He asked her to accompany him to his home because he apprehended that the police might raid the premises. After that Shakuntala Devi (PW-11), mother of Mukesh Kumar also told the same thing. Shakuntala Devi (PW-11) further assured the victim that Om Prakash (convict) is known to them, and it would be safe to go with him. She stated that, that is why she agreed to accompany to the house of Om Prakash (convict) and went along with him.

(c) On reaching the house of Om Prakash (convict), she asked him to provide drinking water to her. After drinking water, she ran away from his house and reached the house of Mukesh Kumar. She further stated that she did so because while accompanying Om Prakash to his home, on the way he had molested her.

(d) On reaching back to the home of Mukesh Kumar, she told the father of Mukesh Kumar that his friend is not a good man and that she will not go to his house. On this, the father of Mukesh Kumar told her to sleep there itself in his home. After about ten minutes, Om Prakash (convict) again visited the house of Mukesh Kumar and forcibly dragged her to his house.

(e) She further stated that in the house of Om Prakash (convict) he gave her milk to drink and he consumed liquor. Then he asked the victim to provide the phone number of her father and he made her speak with him. Her father told her that he would visit the next morning and take her back.

(f) The victim further stated that during the night, Om Prakash (convict) indulged in forcible coitus with her without her consent.

(g) On the next morning, at about 4.00 a.m., Om Prakash (convict) received a phone call on his mobile, and then he told the caller that he has entrapped one female pigeon (*kabootari*) and that he has to sell her.

(h) For whole night Om Prakash (convict) slept in the same room with her, and in the morning Om Prakash on his own brought her to the house of Pradhan of Gram Panchayat, Patta (PW-8). There, on the arrival of the police, she got her statement recorded.

(i) Consequently, the police found an offence punishable under Section 376 of the Indian Penal Code, prima facie, to have been made out and registered F.I.R. No.64/2014, dated 24.4.2014 (Ext. PW-13/C) against the accused at Police Station Bhoranj, Distt. Hamirpur, H.P.

4. The Police of Police Station, Talai, did not further investigate the previous FIR No. 22/2014 (Ext.PW-15/A), dated 17.03.2014 and it stood merged with the new FIR No.64/2014 (Ext. PW-13/C), registered against the accused at Police Station Bhoranj, Distt. Hamirpur, H.P., on 24.4.2014.

5. On the next date i.e., 25.4.2014, the Investigating Officer produced the victim in the Court at Hamirpur, where the Judicial Magistrate recorded her statement under Section 164 CrPC. (Ext. PW-7/C). In the said statement, the victim reiterated some facts but made some additions and omissions from FIR (Ext. PW-13/C). In her statement (Ext. PW-7/C), the victim stated as follows:

(a) On 15.3.2014, she left the house of her in-laws, without telling them, and went to the home of Shakuntala Devi (PW-11) where her son Mukesh and son-in-law Vipin Sharma were also present. There was one other person who had a vehicle, but she could not remember his name.

(b) She stated that Shakuntala Devi (PW-11) declared and accepted her as her daughter-in-law in front of the entire village and she started living there in her house for about one and half month.

(c) After that father of Mukesh Kumar and his friend Om Prakash came there to take her away.

(d) She stated that when the police came to the village, Patta and Shakuntala Devi (PW-11) made her climb the roof of the house. Along with them were her son Parkash and daughter Nisha Sharma. Then the police raided the premises.

(e) After that, Shakuntala Devi (PW-11) asked her to jump from the roof, and the moment she jumped, she fell on her left side and received injuries on her foot and arm. She stated that Nisha then helped her and took her to reach near the bamboo grove. With great difficulty, she reached Patta, where Vipin Sharma also entered the house at 7.30 p.m. and gave her medicine. After that at around 9 – 9.30 p.m., father of Mukesh, Shakuntala Devi and Om Prakash (convict) reached at her house at Patta. At that time, Shakuntala Devi came towards the kitchen, and Om Prakash (convict) and

father of Mukesh went to a different room. Then Om Prakash went to the kitchen, and he lifted her and took her to another room. Om Prakash told her that he has three daughters, and she is like them. After that, Om Prakash took her to his house.

(f) On the way to his home, Om Prakash (convict) expressed his gratitude to the fate that she met him. He asked her why she fell into the trap of these people (actual word withheld because the said word is offensive, under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act. Om Prakash told her that he would get her married to some other person. After that, she reached the house, Om Prakash.

(g) On reaching the house of Om Prakash, she demanded water to drink and then returned to her home. On entering the house of Mukesh Kumar, she told his father not to send her there.

(h) After half an hour, Om Prakash (convict) visited the house of Mukesh Kumar and gave her beatings with kicks and fist blow. However, he did not say anything to Mukesh or his family members. After that, the convict again took her to his home, and on the way to his home started molesting her.

(i) On reaching his home, Om Prakash (convict) asked his wife to bring milk for the victim, and he kept a glass for taking drinks. After grabbing drinks, the convict asked her to make a phone call to her father. The victim further stated that then Om Prakash spoke with her father and asked him that has his daughter gone missing. He also told the father of the victim to take her back at 4.00 a.m. After that, the victim told her father to rescue her. After this, he disconnected the phone call and committed rape upon her, against her will and consent. He kept on committing rape with her for half an hour.

(j) In the morning, Om Prakash (convict) brought her to the house of Pradhan, and she apprised the Pradhan of the entire incident.

6. The Investigating Officer ASI Jai Chand (PW-19) arrested accused Om Prakash on 24.4.2014 at 11.30 p.m., and daily diary entry to that effect was made vide Ext. PW19/D.

7. Before the recording of the statement of the victim under Section 164 CrPC, she was medically examined by Dr. Sapna Dhiman (PW-4) at CHC Bhoranj, Distt. Hamirpur. During the trial, Dr. Sapna Dhiman (PW-4) tendered in evidence MLC of the victim (Ext. PW-4/B). The examining Doctor took samples of thick whitish fluid from the posterior fornix and vaginal walls. She further opined that the possibility of sexual intercourse could not be ruled out. During the investigation, the police also took into possession one mattress lying on the bed from the house of accused Om Prakash on which he had raped the victim.

8. Subsequently, the Investigating Officer sent this sample to the Regional Forensic Science Laboratory, Mandi on 27.4.2014. Vide report dated 28.4.2014, Ext. PW-19/P, the Laboratory vide notified detection of human blood of group 'O,' on blood sample as well as on the salwar of the victim. The Laboratory also discovered semen on the salwar as well as on the mattress, seized during the investigation. FSL also detected human blood of group 'B' on the blood sample of Om Prakash (convict). The other findings of the Regional Forensic Science Laboratory are not material to conclude the present case.

9. During the investigation, the Investigation Officer also got the medico-legal examination of Om Prakash (convict) conducted and the MLC rendered in evidence as Ext. PW-5/B; seized one mobile phone of Lava KKT-341 Black from Om Prakash on 24.4.2014

vide Ext. PW-8/A; prepared site plan Ext. PW-19/A, recorded statements of the witnesses under Section 161 CrPC; and also took the call details of the mobile phone No. 98826-08231 of Om Prakash vide Ext. PW-19/Q to 19/T.

10. The Investigating Officer also procured the birth certificate (Ext. PW-3/B) of the victim according to which she was born on 16.8.1995. Therefore, the fact of the victim, above 18 years of age is undisputed.

11. On this evidence, the SHO filed a report under Section 173 CrPC, in the Court of Sessions Judge, Hamirpur. In compliance with the provisions of Section 207 CrPC., the Trial Court provided the complete copies of challan (Police report) to the accused/convict. The trial Court as per the mandate of Sections 211 and 214 Cr.P.C. framed charges against the accused/convict for the commission of an offence under Section 376 I.P.C. vide order dated 9.12.2014, to which he did not plead guilty and claimed trial.

12. It is pertinent to mention here that the charge stated the age of the victim as 18 years.

13. During trial, prosecution though examined all the material witnesses. However, it did not examine (i) Mukesh Kumar with whom she was staying; (ii) Dhani Ram (father of Mukesh Kumar), who had allegedly sent her to the house of Om Prakash (convict); (iii) Nisha who had climbed with her on the roof as mentioned in statement under Section 164 CrPC. (Ext. PW-7/C); and (iv) Vipan Sharma who had provided first aid to her.

14. Accused could not afford to engage a lawyer at his expenses. Hence, the Trial Court provided him with the services of a lawyer, at the costs of the State. After the completion of the prosecution evidence, the learned Sessions Judge put the incriminating circumstances appearing against the accused to him as per the requirement of Section 313 Cr.P.C. The accused has taken a specific plea in answer to question No. 65 in his statement under Section 313 Cr.PC in the following terms:

> "Q.65. Why the witnesses have deposed against you?
>
> Ans. When Dhani Ram and Shakuntla left (victim) with me, then I rang up father of (victim). Due to this reason he got annoyed and deposed against me falsely."

15. The accused was allowed to lead defence evidence which he did not avail, and consequently, the trial Court closed the evidence. The accused also did not file any oral arguments or memo of arguments as contemplated under Section 314 CrPC.

16. After hearing the arguments, the learned Sessions Judge accepted the prosecution evidence and convicted the accused for the charged offence and sentenced as aforesaid. Hence the present appeal.

17. The accused/convict could not engage any private lawyer and requested the H.P. State Legal Services Authority to provide a lawyer at State expenses. Accordingly, Mr. Amrinder Singh Rana, Advocate, was appointed as a Legal Aid Counsel to file the appeal in this Court, under Section 374 CrPC, against the judgment of conviction.

18. On 10.6.2019, during the final hearing of the matter, this Court found it appropriate to seek the assistance of some Senior Advocate on the proposition of law and passed the following order:

> "During the course of arguments, this Court is of the considered opinion that on the proposition of law that when the accused does not specifically take

> the plea of consent either in cross examination or in his statement under Section 313 Cr.P.C. and then without affording an opportunity to the prosecutrix, can she be fastened with her conduct of any sexual intercourse as a willing and consenting party."

19. The Court found it appropriate to request Sh. Shrawan Dogra, learned Senior Advocate, who is the former Advocate General of the State of Himachal Pradesh, to assist the Court as an *Amicus* and also requested Sh. Karan Singh Kanwar, Advocate to assist him in this proposition. After that the learned counsel for the parties were heard at length and Sh. Shrawan Dogra, learned Senior Counsel assisted by Sh. Karan Singh Kanwar, Advocate, also rendered valuable assistance by explaining the proposition of law to the full satisfaction of the Court.

20. After careful reading of the entire evidence, application of law and judicial precedents, my reasoning is as follows:-

21. During the trial, the victim appeared as PW-7. Undisputedly, at the time of the alleged occurrence, she was a major, well above eighteen years of age and a married lady. Her testimony, on oath, leads to the following material facts, some of which on the face of it are credible, some needs corroboration and some are contradicted by other evidence.

(a) The victim testified that she was married to Rajesh Kumar (PW-1) in August 2013. It was a love marriage. Until 15.3.2014, she was staying with her husband in her matrimonial home. This fact finds mention from the statements of her husband, Rajesh Kumar (PW-1) and father Kali Ram (PW-9).

(b) It appears that the victim was known to Mukesh Kumar (not examined in Court), his mother Shakuntala Devi (PW-11), Nisha and Seema (both not tested in Court). On 15.3.2014, the victim went to the house of Mukesh Kumar, without informing her husband or any member of his family. In her cross-examination, she admitted that she had gone with Mukesh Kumar to his house.

(c) When Rajesh Kumar (PW-1), husband of the victim realized that she is missing, then he informed the police, which registered FIR No. 22/2014 (Ext. PW-15/A), at Police Station- Talai, District- Bilaspur, H.P. on 17.03.2014, under Section 366 of the Indian Penal Code.

(d) Rajesh Kumar (PW-1) in his testimony, stated that he had tried to contact his wife (victim) on her mobile number 82619-79926. Even the victim does not deny that she was having a mobile phone with her when she left her matrimonial home.

(e) On receipt of information about the missing of a young lady, the police swung into action. SI – Hem Raj (PW-18) took over the investigation. During the investigation, police based on the tower location zeroed her location to village Patta. HC – Rajesh Kumar (PW-15), who was also part of this investigating team, inquired from one Dinesh Kumar (PW-2) of village Patta, who informed him that the missing girl was present in the house of Savita Minhas (PW-8), Pradhan of Village Patta. HC-Rajesh Kumar (PW-15) further testified in his examination-in-chief that Dinesh Kumar mentioned above, also told him that Om Prakash (accused) had brought the victim to the house of Savita (PW-8).

(f) The Pradhan Savita Minhas (PW-8) testified that at around 7 a.m. of 24.4.2014, accused Om Prakash brought one girl to her house, and she identified such girl to be the victim. When she made an inquiry from the victim then apart from other details, she also told her that during the previous night, the accused made the victim speak to her father on the phone.

(g) Savita Minhas (PW-8) in her cross-examination stated that the victim was staying in the house of Mukesh Kumar for the last 1 ½ months.

(h) She further stated that accused resides in his house with his wife and three daughters and the eldest of whom was a student of Class X.

(i) When the police visited the house of Savita Minhas (PW-8) and rescued the victim, they communicated about the tracing of the victim to her husband who was the informant of the FIR No. 22/14 (Ext. PW-15/A).

(j) When the police party headed by SI Hem Raj (PW-18) was trying to trace the victim, then they contacted Dinesh Kumar (PW-2) of village Patta. This Dinesh Kumar testified that on 23.4.2014, SHO Police Station, Shahtalai, approached and told him that from the tower location of the phone of the victim she is likely to be present in and around village Patta. He further testified that after that he, along with the police, visited the house of Dhani Ram, father of Mukesh Kumar, where only his wife and children were found present. The SHO inquired from them about the missing girl; however, the police could not trace her in the said house. In his cross-examination, Dinesh Kumar (PW-2) stated that when the police had visited the home of Dhani Ram then around fifteen villagers were present there and the said villagers told the police that the victim had run away from the house of Dhani Ram.

(k) Dinesh Kumar (PW-2) in his cross-examination stated that three other homes surround the house of accused Om Prakash.

(l) In the house of Pradhan Savita Minhas (PW-8), the victim gave information to the police that on the intervening night of 23rd and 24th April 2019 accused had committed rape upon her. On receiving such information, the police team thought it appropriate that FIR is registered at Police Station Bhoranj, Hamirpur and accordingly they called ASI Jai Chand (PW-19) from the said police station. Consequently, they recorded, FIR No.64/2014, dated 24.4.2014 (Ext. PW-13/C), against the accused at Police Station Bhorang, Distt. Hamirpur, H.P. under Section 376 of the Indian Penal Code. Police also transferred the earlier FIR (Ext. PW-15/A) to Police Station Bhoranj.

22. After the registration of the FIR, the police got the victim medically examined at CHC Bhoranj, Distt. Hamirpur, from Dr. Sapna Dhiman.

(a) Dr. Sapna Dhiman, Medical Officer, CHC Bhoranj, examined the victim on 24.4.2014 and recorded her observations and opinion in MLC (Ext. PW-4/B). During the trial, the said Doctor appeared as PW-4 and has proved the MLC and her medical observations. Before the examination, she inquired from the victim and was narrated the history of sexual assault and beaten by shoes.

(b) On examination of the victim, she noticed the following injuries. Four small sized abrasions/scratch marks on the left forearm and elbow; one abrasion of size 1cm X 2 cm on the left forearm; a small-sized scratch on the

right forearm; a bruise of size 2cm X 3 cm on the left knee with swelling of left foot; and three small size scratch marks on the neck.

(c) The Doctor noticed that the hymen of the victim was not intact (nulliparous). On examination, per speculum, the Doctor noticed thick whitish colored fluid in posterior fornix and also took the swab. The Doctor did not found any injury on any portion of her vagina, labia majora, labia minora, clitoris, and fornix.

(d) Regarding injuries, the examining Doctor observed that bruises of size 2cm X 3 cm on the left knee with swelling of the left foot were possible due to falling while running. The Doctor further stated in her cross-examination that the injuries mentioned at Sr. No. 1, 2, and 4 are not possible on account of fall while running.

(e) The Investigating Officer sent the swab to the laboratory for analysis.

(f) The Investigating Officer tendered in evidence, the report of Regional Forensic Science Laboratory, Mandi as Ext. PW-19/P. Because of the provisions of Section 297 CrPC, the statement is per se admissible. The laboratory detected human semen on salwar of the victim. Apart from that, the laboratory also identified human blood on bra and salwar of the victim and human blood group 'O' on the blood sample of the victim. The laboratory also detected semen and blood group 'B' on the mattresses as well as blood group 'B' on the blood sample of Om Prakash (accused).

(g) The convict, Om Prakash was proved to be a married person, and the presence of semen on the mattress is not conclusive that this semen is not because of his cohabiting with his wife.

(h) Surprisingly the Investigating officer did not seek DNA examination of the semen collected from the swab of the victim and her clothes. Since the laboratory could not detect any semen, from the vaginal swabs collected from the posterior fornix, as such, no conclusive finding can be given that she had any coitus with the convict. Regarding the presence of human semen on the salwar of the victim, in the absence of DNA examination, it cannot be said with certainty that the semen connects with convict Om Prakash.

(i) Furthermore, it has also come in evidence that the victim was staying in the house of Mukesh Kumar for the last 1 ½ months. The Investigating Officer was well aware of this fact. Therefore, to ensure that the semen found on her bra and salwar was that of the accused alone and none else, it was only possible by getting it examined through DNA test.

(j) In *Krishan Kumar Malik v. State of Haryana*, 2011 (7) SCC 130, Supreme Court holds,

> "44. Now, after the incorporation of Section 53-A in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Criminal

> Procedure Code prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences."

(k) According to the victim, convict forced himself upon her during the night. The victim was a married lady hence, must have experienced sexual intercourse. She would have sufficient information about the fallouts of sex. She did not say that the rapist had used any condoms or that he did not ejaculate inside her vaginal canal. On the next day at 3.45 p.m., around 16 – 17 hours or so, the doctor medically examined her and collected swabs. Despite, such a short interval, the laboratory could not detect any semen. Given this scientific evidence, simply because the laboratory found semen on her salwar, it is not sufficient to fasten or connect the said salwar with the accused and none else.

(l) The victim did not attribute to the convict, the three small scratch marks on the neck as well as any of the injuries received by her, at the time of the sexual assault. Her case is that she had received all these injuries when she had jumped from the roof of the house of Shakuntala Devi. To the contrary, while giving the history to the Doctor, she further stated that the convict had beaten her with shoes, in the home of Shakuntala Devi. Therefore, the prosecution failed to prove that she received these injuries at the time of the sexual assault by the convict.

23. Regarding missing of the victim from the house, her husband, Rajesh Kumar (PW-1) had informed the father of the victim Kali Ram (PW-9). Kali Ram corroborates this fact. He testified during the trial that on 23.4.2014, he spoke on the phone with convict Om Prakash, who told him that his daughter is with him. Om Prakash further said to him that he must take his daughter back by 4.00 a.m.; otherwise he will not be responsible for her. Kali Ram further testified that after that Om Prakash made him speak with the victim, who requested him to take her back. Next day, he also reached the house of Pradhan of village Patta where he found his daughter to be present.

24. Shakuntala Devi (PW-11), the mother of Mukesh Kumar, contradicted the victim by stating that she had visited their house on her own. She further testified that the victim told them that she had left her husband's home after getting fed up from the beatings administered by him upon her. After that, the victim sought their permission to stay in their house, and such, they give their consent. On the face of it, this statement is not at all credible, and she is trying to save her son and her involvement. The victim certainly had a place to go, to her father in case she was fed up with the behavior and cruelty of her husband. The version of the victim appears to be more probable that she had left her husband's home on her own free will and had accompanied Mukesh son of Shakuntala Devi to his house also on her free will and her accord. Shakuntala Devi further stated that on 23.4.2014 police from police station Shah Talai visited her home. Police took away Mukesh Kumar on the charges of abducting the victim. This part of the statement has not been rebutted by the prosecution, and the Public Prosecutor did not seek the permission of the Court to declare this witness as a hostile witness. It means that the case of the prosecution is also the same. It is pertinent to mention that Shakuntala Devi (PW-11) did not reveal the

whereabouts of the victim to the police. She stated that in the night accused Om Prakash visited her house, and as per her the accused told them that he would take the victim to his own home and after that would drop her at, the house of her parents. On this assurance, they sent the victim with the accused. She further stated that after some time, the victim returned to their home and told them that she is afraid of the accused and refused to accompany him. During the night at around 11.00 p.m., accused again visited their house and after giving threats to them took the victim with him. Shakuntala Devi in her cross-examination admitted that during that time the victim was staying in their home, she was free to move around where ever she wanted. She further revealed that the victim on her own had gone with accused Om Prakash. Shakuntala Devi also in her cross-examination stated that there are lots of houses near the house of accused Om Prakash and further pointed out that around 20 – 25 people reside there.

25. Ramesh Chand (PW-14) was examined by the prosecution to prove the occupation of the accused. He stated that the accused is doing menial work of serving water in the marriages. He said that on 24.4.2014 he had called the accused Om Prakash and asked him whether he would like to work in a wedding on which Om Prakash declined. This witness did not support the prosecution case and was declared hostile. When a leading question was put to him by the Public Prosecutor under Section 138 of the Indian Evidence Act, 1872, he stated that the convict/accused told him on the phone that he has lured one female (kabootari) and that he wants to sell her. Now prosecution did not lead any evidence that why would accused disclose this intention to Ramesh Chand.

26. In Hanuman Govind Nargundkar v State of M.P., AIR 1952 SC 343, Supreme Court observed that It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all.

27. It is difficult to believe this admission. What advantage the accused would derive by conveying this information to him. It is not the case of the prosecution that Ramesh Chand (PW-14) was dealing with the trafficking of women. The prosecution also did not lead any evidence to prove what kind of relationship accused was sharing with this witness. It shall be highly unsafe to rely upon the extra-judicial confession and that too by way of leading questions put by the Public Prosecutor. Therefore, it shall be highly insecure to place any reliance on such a weak type of evidence.

28. The victim testified that on 24.4.2014, during day time, the police from Police Station Shahtalai visited village Patta, where she was staying. She further stated that Mukesh Kumar, his mother Shakuntala Devi (PW-11) and other members of the family, made her hide in the upper floor of the house. Nisha, who is the sister of Mukesh Kumar, pushed her from the balcony of the house. Because of this push, she fell and received injuries in her left leg and due to which she found it difficult to walk. In cross-examination, the victim stated that Nisha gagged her mouth. It is unbelievable. Even it is not possible to forcibly make someone hide. She was also aware that the police is trying to search for her. In her cross-examination, she stated that before that she was made to conceal in the houses of different people. It is shocking that when the police had come to rescue her then instead of cooperating with the police, she sided with Mukesh and his family members and successfully concealed herself from the police. There is no allegation that Shakuntala, Mukesh, and Nisha, made her hide forcibly. There is also no allegation that when she was made to conceal, they gagged her mouth and tied her feet and arms. Her not seeking help from the police lends assurance of the fact that she was willing to stay in the house of Mukesh. In the light of this analysis, the answer given by the accused in his statement under Section 313 Cr.P.C. assumes great significance. The plea of the accused is that it was

he who had informed the father of the victim on the phone, and because of which Mukesh and his family members were extremely annoyed with him. This conduct of Om Prakash lends corroboration from the proved fact that it was the convict Om Prakash who had taken her to the house of Pradhan Savita Minhas (PW-8). Had the accused raped the victim, then there was no occasion for him to himself take her to the home of the Pradhan. Had the accused intended to rape her, then he would not have made her speak to her father on the phone. Both these facts stand proved during the trial, and it dents the credibility of the prosecutrix to the hilt.

29. The irrationality in the conduct of the victim is writ large. She was trying to conceal herself from the police. She never wanted to go back either to her husband or her father. Therefore, the possibility cannot be ruled out that to show her annoyance with accused Om Prakash she leveled allegation of rape against him. She would have discerned the presence of police, and in turn, she had the determination to keep on staying in the home of Mukesh Kumar.

30. The victim testified that, after she had fallen from the balcony, she was given first aid by Anu Sharma, who was the son-in-law of Shakuntala Devi. She further stated that Dhani Ram and Shakuntala Devi also reached there and told that Police had taken their son Mukesh Kumar along with them. They requested her to go to Shahtalai and make a statement to save Mukesh Kumar. However, she refused to do so and asked her to take her back to their parental home. Now, this action again impeaches the credibility of the prosecutrix as well as of the Investigation team. The prosecution did not associate said Mukesh Kumar as a witness. This statement also reveals that Police had also used its usual tactics of putting pressure. Prosecutrix resisted leaving the house of Mukesh Kumar to such an extent that she did not care that Police had taken Mukesh Kumar to the police station. So finally, when the convict Om Prakash brought her to the house of Pradhan (PW-8), she had all the reasons for getting angry with him. It is quite possible that intending to take revenge; she falsely implicated the accused Om Prakash. The victim testified that around 9.30 p.m., convict Om Prakash visited the house of Mukesh Kumar. Impliedly by that time, the police had left the village. She says that after that, Dhani Ram asked her to accompany Om Prakash to his house. Understandably, the police might come again during the night so to keep her safe they sent her with Om Prakash. The conduct of the victim is suspicious when she says that when she was going to the house of Om Prakash, he had molested her on the way. After that, she returned to the home of Mukesh Kumar. Consequently, she says that the convict came there again, dragged her from her braid, and gave her kick blows and took her to his house. This conduct is highly doubtful. It has come in the evidence that at least three houses are surrounding the home of Om Prakash and 15 to 20 people who live nearby his house. As per the victim, Convict Om Prakash had beaten her in the presence of family members of Mukesh Kumar. She said that she had accompanied Om Prakash to his house.

31. According to the victim (PW-7), in the house of Om Prakash, his wife and daughters were there. She says that when the accused was trying to do coitus with her when she told her that she is like his daughter on which he replied that he did not care of his daughters. The prosecution did not dispute the presence of the daughters of Om Prakash, in the house at that very time. Now there is a wife and three daughters, one of whom is in Class-X and must have been sixteen years old at that time. There is no evidence of how many rooms are there in the house of the accused. There is no evidence that even if there were more than one room in the house, whether the voice was audible from one place to another. It assumes significance because Ramesh Chand (PW-14) with whom accused was working testified that he is working to offer water during marriages. Accused was an

unskilled worker. This Court shall not hesitate to take Judicial notice of the financial status of the convict. The Trial Court, as well as this Court, provided him legal aid counsel to him. Therefore, his house cannot be said to be expansive from where noise would not be audible from one room to another. It is challenging to believe that a person would rape a young girl in his own house and when his wife and daughters are present there.

32. Moreover, the victim was aware of the presence of these persons. Neither did she seek their help to rescue her, nor did she raise any cries. In cross-examination, she admits that there was no weapon with the accused. She also admits that none gagged her mouth nor anyone intimidated her. She did not make any effort to resist sexual advances and rape. She was a matriculate and was a grown-up married lady. She would certainly know what coitus means. In case such a thing would happen, she was expected to offer some resistance. It impeaches her credibility.

33. In *Dilip & another vs. State of M.P.*, 2001 (9) SCC 452, Supreme Court observed,

> "14. The age of the prosecutrix was around 16 years, may be a little more. The fact remains that she was not just a child who would have surrendered herself to a forced sexual assault without offering any resistance whatsoever. Without going into testing truthfulness of the explanation offered by the prosecutrix that because of being over-awed by the two accused persons she was not able to resist, the fact remains that the 'probabilities factor' operates against the prosecutrix. The gang rape is alleged to have been committed at about 2 p.m., in her own house situated in a populated village by the side of the main road where people were moving on account of Holi festival. The prosecutrix did raise hue and cry to the extent she could and yet none was attracted to the place of the incident. The prosecutrix is said to have sustained injuries, also bleeded from her private parts staining her body as also the clothes which she was wearing. This part of the story, is not only not corroborated by the medical evidence, is rather belied thereby. The presence of blood-stains is not confirmed by forensic science laboratory or by the doctors who examined the prosecutrix. Her own maternal aunt to whom the story of sexual assault has been narrated by the prosecutrix gives a version which does not tally with the version of the prosecutrix as given in the court. The learned Counsel for the State relied on Section 114A of Evidence Act, 1872 which provides that in a trial on a charge under Section 376(2)(g) of Indian Penal Code on the prosecutrix stating that she was not a consenting party, the Court shall presume absence of consent of the woman alleged to have been raped. Suffice it to observe that we should not be misunderstood as recording a finding that the prosecutrix was a willing party to sexual intercourse by the accused persons. The court is finding it difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault as alleged was committed on her in view of the fact that her narration of the incident becomes basically infirm on account of being contradicted by the statement of her own aunt and medical evidence and the report of forensic science laboratory. The defence has given suggestion in cross-examination for false implication of the accused persons which however have not gone beyond being suggestions merely. It is not necessary for us to dwell upon further to find out the probability of truth contained in the suggestions because we are not satisfied generally of the correctness of story as told by

the prosecutrix. We find it difficult to hold the prosecutrix in the case as one on whose testimony an implicit reliance can be placed."

34. Another significant pointer of the credibility of the victim is that in her cross-examination, she stated that police were searching for her desperately, but every time Mukesh Kumar and his family members would make her conceal at different places. As far as five to seven times, she was made to hide in the houses of different people.

35. In the absence of credible testimony of the prosecution, it shall be hazardous to assume that rape had taken place simply because the victim says so. She stands contradicted on almost every aspect. Like the manner, she was made to hide at five to seven locations, and she also appears to have concealed in the house of the accused. It is quite possible that she would have visited the home of the accused to hide there, like five to seven times on earlier occasions. But she was offended when he made her speak to her father and brought her to the house of the Pradhan. Accused Om Prakash defeated her entire exercise of concealing from her husband and father. Therefore, intending to take revenge with the accused, she leveled allegations of rape against him.

36. Ld. Amicus Mr. Shravan Dogra, Sr. Advocate ably assisted by Mr. Karan Singh Kanwar, Advocate, rightly contended that it may not be prudent to attribute every act of coitus as consent, in the absence of cross-examination on this score. To substantiate his point, he has placed reliance upon *Narender Kumar v. State (NCT of Delhi)*, 2012(7) SCC 171, which holds as follows:

> "28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.
>
> 29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: *Tukaram & Anr. v. The State of Maharashtra,* AIR 1979 Supreme Court 185; and *Uday v. State of Karnataka,* AIR 2003 Supreme Court 1639*)*.
>
> 30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story

projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected."

37. Therefore, appreciation of the evidence and application of law cited herein above takes this Court to only one conclusion that the possibility of the accused being innocent cannot be ruled out. The prosecution has failed to prove its case beyond reasonable doubts.

38. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 22.6.2016/23.6.2016, passed by the Additional Sessions Judge, Hamirpur, H.P., in Sessions Trial No. 19 of 2014, is set aside and the accused is acquitted of the charged offence.

39. The Appellant Om Prakash be set at liberty forthwith, if not required in any other case. Amount of fine, if deposited by the appellant, be refunded to him. Release warrants be prepared accordingly.

40. Once the Courts have found the inmates not guilty, then, simply because of noncompliance of Section 437A CrPC, to the effect that sureties are not available, the liberty of an individual cannot be curtailed. Such curtailment on the face of it is, in total violation of Article 21 & 22 of the Constitution of India.

41. The Jail Superintendent and all concerned officers of the jail are directed to release the inmate on the very same date when she/he receives release warrants from this Court. To comply with the provisions of Section 437A of CrPC, he shall only wait until Sunset or when he realizes that the inmate in question is unable to arrange sureties. The concerned officer(s) shall not wait for the sureties beyond the time of closure of the prison. If on the day, the release warrants are received, and sureties are available, then bonds from such sureties may be taken. However, if the sureties are not available, then concerned jail official(s) shall release the inmate on furnishing personal bonds for INR 10,000/- (Rupees ten thousand only), and it shall deem compliance of the provisions of Section 437A Cr.P.C.

The appeal stands allowed in the terms mentioned above. All pending applications, if any, are also closed.

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

Shri Ram Rattan ....Petitioner.
Versus
Smt. Kamli Devi and others ....Respondents.

CMPMO No.: 525 of 2017
Date of Decision: 05.07.2019

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of local commissioner– Stage– Held– When there is a boundary dispute between parties, appointment of local commissioner for demarcation of land will facilitate the court in arriving at just decision of the case- Plaintiff filing suit for possession of part of suit land – Dismissal of application for demarcation of land simply because suit is at stage of final arguments not justified, when no demarcation was carried by revenue authorities on his application– Petition allowed–

Application for appointment of local commissioner for demarcation of land allowed. (Paras 12, 13 & 14)

Case referred:
Liaquat Ali vs. Amir Mohammad and others, Latest HLJ 2016 (HP) 831

For the petitioner: Mr. Janesh Gupta, Advocate.
For the respondents: Mr. Dalip K. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has assailed order dated 12.05.2017, passed by the Court of learned Civil Judge (Junior Division), Court No. II, Solan in CMA No. 227/6 of 2016 in Civil Suit No. 108/1 of 2010, vide which, an application filed by the petitioner, who is the plaintiff before the learned Trial Court for appointment of a Local Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure has been dismissed.

2. Brief facts necessary for the adjudication of the petition are that petitioner herein has filed a suit for possession of part of the suit land on the basis of title and also for a decree of permanent prohibitory as also mandatory injunction against the defendants, *inter alia*, on the ground that the defendants have encroached upon the portion of the suit land, which is owned by the plaintiff.

3. Record demonstrates that during the pendency of the suit, an application was filed under Order XXVI Rule 9 of the Code by the plaintiff for demarcation of the suit land, however, the same was dismissed by the learned Trial Court vide order dated 28.02.2015 (Annexure P-6) by *inter alia* holding that as the parties were yet to lead their evidence and alleged dispute as averred by the plaintiff was at the stage of pleadings only, the application was not maintainable at that stage.

4. It is also borne out from the record as per the averments made in the pleadings submitted on behalf of the petitioner/plaintiff that for the purpose of demarcation of the land in dispute, he approached the Revenue Authorities, however, despite this, no action was taken by the Revenue Authorities to carry out the demarcation of the disputed land. In these circumstances, another application was filed by the present petitioner under Order XXVI Rule 9 of the Code, though at a slightly belated stage, i.e., after the respective parties had led their evidence and the matter was fixed for arguments. This application has been rejected by the learned Court below vide impugned order, i.e., order dated 12.05.2017 by *inter alia* holding that as the matter was being listed for arguments since 21.07.2016 and the application was filed by the plaintiff on 23.09.2016, the Court must be vigilant and must see that the parties are not stalling the proceedings, otherwise, it would lead to travesty of justice.

5. Feeling aggrieved, the petitioner/plaintiff has filed the present petition.

6. Learned counsel for the petitioner has argued that the impugned order is *prima facie* perverse, as learned Court below has erred in not appreciating that it was a fit case wherein the Court should have had exercised its jurisdiction as vested under the provisions of Order XXVI Rule 9 of the Code, because the dispute between the parties being a boundary dispute and the petitioner already having filed application before the Revenue

Authorities for demarcation, had no option but to approach the Court under Order XXVI Rule 9 of the Code with the prayer for appointment of a Local Commissioner, when revenue staff was not carrying out demarcation. He also argued that the order passed by the learned Court below is otherwise also a cryptic order, because the provisions of Order XXVI Rule 9 of the Code *per se* do not contemplate a particular stage for filing such an application and it was incumbent upon the Court to have had passed a reasoned order within the ambit of provisions of Order XXVI Rule 9 of the Code if the application filed by the petitioner was not finding merit with it. According to learned counsel, the same could not have been dismissed simply on the ground that as the application has been filed at the stage of hearing of the parties, the same was filed to stall the proceedings. Learned counsel has further argued that the application filed under Order XXVI Rule 9 of the Code was a self speaking application. It contained all the averments as to why the application was filed at that stage and none of the reasons which were mentioned in the application have been touched and dealt with in the impugned order. In these circumstances, it has been prayed that the petition be allowed and the impugned order be set aside.

7. On the other hand, learned counsel for the respondents has argued that the order passed by the learned Court below cannot be said to be a perverse order, because learned Court below has rightly held that the application was filed just to stall the proceedings, as it is apparent from the record that the same was filed at the stage of hearing. He has further argued that because the petitioner, i.e., the plaintiff had alleged encroachment, therefore, onus was upon him to have had proved this fact and it is not for the Court to garner or gather evidence for the parties. He has also argued that in case one peruses the evidence which has come on record, from the same it is apparent that the plaintiff has not been able to prove his case and therefore, filing of the application is nothing but an attempt to fill up the lacunae. He further argued that in view of the fact that plaintiff had closed his evidence on 18.05.2015 by giving up one of the cited witnesses, who was a Revenue Officer, therefore also, rejection of the application by the learned Court below is justifiable in the facts of the case. Learned counsel has also relied upon the judgment of this Court in ***Liaquat Ali*** Vs. ***Amir Mohammad and others***, Latest HLJ 2016 (HP) 831.

8. I have heard learned counsel for the parties and have also gone through the impugned order as also other documents appended with the petition.

9. A perusal of the record demonstrates that the suit which has been filed by the petitioner/plaintiff is for possession of part of the suit land, on the basis of title and the allegation against the defendants therein is that they have encroached upon the suit land. It is also evident from the record that earlier an application was filed by the petitioner under Order XXVI Rule 9 of the Code with the prayer for appointment of a Local Commissioner to carry out the demarcation of the land, however, the same was rejected by the Court vide order dated 28.02.2015 on the ground that the same was premature. In these circumstances, what the Court now has to assess is as to whether the rejection of the subsequent application filed by the petitioner under Order XXVI Rule 9 of the Code in the facts of the case is justified or not?

10. It is not in dispute that the subsequent application was filed by the petitioner after both the parties had closed their evidence and the matter was being taken up by the learned Trial Court for arguments. The application which was subsequently filed by the petitioner is appended with the petition as Annexure P-11. A perusal of the averments made in the said application demonstrates that it was mentioned in the said application that applicant, i.e., the petitioner had moved an application for demarcation of the suit land, but no action was being taken by the Revenue Authorities on the same. It further stood mentioned in the application that the controversy between the parties pertained to a

boundary dispute and it would be in the interest of justice in case a Local Commissioner is appointed for demarcation of the suit land, as the applicant/petitioner had already approached the Revenue Authorities for the said purpose, who were not acting on his application and in these circumstances, only option left to him was to approach the Court by filing an application under Order XXVI Rule 9 of the Code

11. Reply filed to the said application demonstrates that the same was *inter alia* resisted on the ground that the applicant/petitioner had not supplied any particulars with regard to the application allegedly filed by him to the Revenue Authorities for getting the suit land demarcated and as earlier application filed for the same relief stood rejected by the learned Court, therefore, subsequent application also deserved rejection, as the application was being filed just to harass the respondents.

12. A perusal of the impugned order passed by the learned Trial Court demonstrates that there is no discussion made in the said order on merit with regard to the respective contentions taken therein by the parties concerned. Suffice it to say that except observing that the application stood filed by the petitioner/plaintiff at a belated stage and was an attempt to stall the proceedings, no other reasoning has been assigned by the learned Trial Court while rejecting the application. It has not dealt with the specific averments made by the petitioner/plaintiff before it that in view of the fact that the petitioner had already approached the Revenue Authorities for the purpose of demarcation of the land, who were not carrying out the required demarcation, the petitioner was not having any other option but to approach the Court for the purpose of getting the land demarcated by appointment of a Local Commissioner.

13. It is settled law that when there is a boundary dispute between the parties, then it is in the interest of justice in case a Local Commissioner is appointed to have the land demarcated, because the same facilitates the Court in arriving at a just conclusion in order to dispense justice between the parties. The judgment relied upon by the learned counsel for the respondents has no applicability in the facts of the said case, because it has not been held by the Co-ordinate Bench of this Court in the said judgment that even in a case where a party approaches the Revenue Authorities for the purpose of demarcation of the land and no action is taken by the Authorities therein, then also subsequent application filed under Order XXVI Rule 9 of the Code by the said party deserves rejection.

14. In my considered view, in the peculiar facts of the case, learned Trial Court rather than passing a mechanical order, ought to have gone into all the averments which stood mentioned by the petitioner/plaintiff in the application and ought to have allowed the same by ordering the appointment of a Local Commissioner for the purpose of demarcation of the suit land to find out as to whether there was any encroachment upon the same by the defendants, as alleged or not.

15. In view of the specific contention of learned counsel for the respondents that during the course of evidence led by the parties, the plaintiff has failed to demonstrate that there is any encroachment upon the suit land is concerned, in my considered view, the respondents should not shy away from the land being demarcated by way of appointment of a Local Commissioner, because if there is no encroachment upon the land by them, then it is in their interest that such a demarcation be carried out, to falsify the case of plaintiff.

16. Accordingly, in view of the observations made hereinabove, the impugned order dated 12.05.2017 is set aside and the application filed by the petitioner/plaintiff for demarcation of the suit land is allowed. Tehsildar, Solan is directed to demarcate the suit land in accordance with law within a period of four weeks from today, after giving prior

intimation to the parties concerned. Report thereof be taken on record by the learned Trial Court and thereafter, learned Trial Court may proceed with the matter in accordance with law. The expenses for carrying out the demarcation by the Revenue Authorities are assessed at Rs.5,000/-, which shall be deposited by the present petitioner with Tehsildar, Solan within a period of four weeks from today.

The petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Sh. Raj Kumar and another ….Petitioners.
Versus
Sh. Som Nath ….Respondent.

CMPMO No.: 353 of 2017
Date of Decision: 08.07.2019

Code of Civil Procedure, 1908- Order XXXIII Rules 1, 2 & 6– Leave to sue as indigent– Whether notice of such application to opposite party and Govt pleader necessary? Trial court permitting plaintiff to sue as an indigent without issuing notice to opposite party and Govt pleader– Petition against– Held, if court comes to conclusion that there is no reason to reject application of party seeking its leave to sue as an indigent, it must issue notice to other party for receiving such evidence– Court must follow procedure as contemplated under Rule 6– Allowing application without issuing notices to opposite party and Government pleader is illegal– Petition allowed– Order set aside– Matter remanded with direction to proceed further in accordance with law. (Para 10)

For the petitioners: Ms. Shalini Thakur, Advocate.
For the respondent: Mr. Amit Kumar Dhumal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has challenged order dated 5th May, 2017, passed by the Court of learned Civil Judge (Senior Division), Sirmaur District at Nahan in CMA No. 56-6 of 17 in Civil Suit Registration No. 56/2017 (Filing No. 137/2017), titled as *Sh. Som Nath Vs. Shri Raj Kumar and another*, whereby an application filed under Order XXXIII Rules 1 and 2 of the Code of Civil Procedure by the respondent herein for permission to file the suit for recovery as an indigent person, has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are that respondent herein filed an application alongwith plaint under the provisions of Order XXXIII Rules 1 and 2 of the Code of Civil Procedure praying for grant of permission to the applicant/plaintiff for filing the Civil Suit for recovery of an amount of Rs.5,00,000/- (rupees five lacs only) as damages/compensation against the petitioners herein.

3. Vide order dated 5th May, 2017, said application has been allowed by the learned Court below by passing the following order:

> *"….The Court fee has been exempted by order dated 13.12.2016 by the District Legal Services Authority. Hence, the application U/O 33 R. 1 & 2 stands deemed accepted.*
>
> *Heard. Let def. be summoned for 05/06/17."*

Said order stands assailed by the petitioners before this Court.

4. Learned counsel for the petitioners has argued that the impugned order is *per se* not sustainable in the eyes of law, as no opportunity was granted to the petitioners to contest the said application in terms of Rule 6 of Order XXXIII of the Code, as per which, it is mandatory for the learned Trial Court that in case it comes to the conclusion that there is no reason to reject the application on any of the grounds taken by the applicant therein, then notice has to be issued to the other party and the Government pleader for receiving such evidence, as the applicant may adduce in proof of his indigency and for hearing any evidence which may be adduced in disproof thereof. On these basis, learned counsel for the petitioners has argued that the impugned order is liable to be set aside.

5. On the other hand, learned counsel for the respondent has submitted that there is no perversity in the impugned order, because the order was passed by the learned Trial Court by placing reliance upon Eligibility Certificate issued by the District Legal Services Authority, declaring the present respondent to be a disabled person. On these basis, he has submitted that the petition has been filed just to prolong the suit filed by the respondent and the same be dismissed.

6. I have heard learned counsel for the parties and have also gone through the impugned order as well as other documents appended with the petition.

7. As per record, the application filed by the respondent herein under Order XXXIII Rules 1 and 2 of the Code was allowed by the learned Trial Court without any notice having been issued to the opposite party. This is a matter of record and this position has not been disputed by the learned counsel appearing for the respondent. In this view of the matter, what this Court has to adjudicate is as to whether the order which has been passed by the learned Court below without complying with the procedure, as contemplated under Rule 6 of Order XXXIII of the Code is sustainable in law or not?

8. Order XXXIII of the Code deals with suits by indigent persons. Rule 1 of Order XXXIII provides that suits may be instituted by indigent person subject to the provisions enumerated therein. Rule 1-A of the said Rule provides for the manner in which inquiry has to be conducted into the means of an indigent person.

9. Rule 6 of Order XXXIII reads as under:

> *"6. **Notice of day for receiving evidence of applicant's indigency**- Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his indigency, and for hearing any evidence which be adduced in disproof thereof."*

10. A perusal of the said Rule demonstrates that where Court comes to the conclusion that apparently there is no reason to reject the application filed under Rule 1 of Order XXXIII of the Code, then the Court has to fix a date with at least 10 days clear notice

to the opposite party and the Government pleader for receiving such evidence as the applicant may adduce in proof of his indigency and for hearing any evidence which may be adduced in disproof thereof.

11. Admittedly, in the present case, application which has been allowed by way of impugned order was filed under Order XXXIII Rules 1 and 2 of the Code. In these circumstances, in my considered view, once the Court came to the conclusion that there was no reason to reject the said application, then it ought to have followed the procedure as provided in Order XXXIII Rule 6 of the Code. In other words, such an application could not have been allowed by the learned Court below without issuing a clear notice to the opposite party as prescribed in Rule 6 of Order XXXIII of the Code.

12. At this stage, Mr. Amit Kumar Dhumal, learned counsel for the respondent points out that probably it was not necessary for the learned Court below to have followed this procedure, because it is not as if the respondent has been permitted to file the suit without payment of Court Fee on the ground that he was an indigent person, said concession was given to him on the ground that he is a physically disabled person and, thus, is entitled for the relief of non-payment of Court Fee in terms of the provisions of the Himachal Pradesh Legal Services Authority Act, 1987.

13. In my considered view, even if that is the case, then also, because the application was filed by the applicant under the provisions of Order XXXIII, the procedure as is mentioned in Rule 6 thereof, ought to have been followed. In other words, even if the concession given to the applicant/respondent was on the basis of the provisions of the Himachal Pradesh Legal Services Authority Act, 1987, then also it was incumbent upon the learned Trial Court to have heard the petitioners/defendants therein before passing any order.

14. In this view of the matter, this petition is allowed. Impugned order dated 5th May, 2017, passed by the Court of learned Civil Judge (Senior Division), Sirmaur District at Nahan in CMA No. 56-6 of 17 in Civil Suit Registration No. 56/2017 (Filing No. 137/2017), titled as *Sh. Som Nath Vs. Shri Raj Kumar and another* is set aside. Application filed by the respondent under Order XXXIII Rules 1 and 2 of the Code of Civil Procedure is revived with the direction that the said application shall be decided by the learned Trial Court afresh after following the procedure as prescribed in Rule 6 of Order XXXIII of the Code. The application be positively decided by the learned Trial Court after giving opportunity to put forth their respective case to the parties before it within a period of three months from today.

Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON’BLE MR. JUSTICE ANOOP CHITKARA, J.

Dr. Anil Kumar and another ..Petitioners.

Versus

Union of India and others ..Respondents.

CWP No.3011 of 2018.
Judgment reserved on: 04.07.2019
Decided on: 9 .7.2019

Constitution of India, 1950- Articles 14 & 16 - Notice inviting applications for appointment of medical officers on contractual basis issued by the Goverment – Challenge thereto– Justification– Petitioners- medical officers, already working with Ministry of Defence on contractual basis ,filing writ to challenge notice issued by union of India inviting applications for appointment of medical officers on contractual basis for 11 months - Also praying that petitioners should be allowed to continue on contractual basis – Held, petitioners were working on contractual basis only – Notice inviting applications did not in any manner affect terms and conditions of their contract – Prayer to allow them to continue is not based on any Rule– Petition lacks merits and is dismissed. (Paras 10 & 11)

For the petitioners: Mr. Nipun Sharma, Advocate.
For the respondents: Mr. Rajesh Kumar Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging a Notice inviting applications for the appointment of Medical Officers on contractual basis and also seeking a direction to the respondents to allow them to continue on contract basis as Medical Officers, two doctors have come up with the above writ petition.

2. Heard Mr. Nipun Sharma, learned counsel for the petitioners and Mr. Rajesh Kumar Sharma, learned Assistant Solicitor General of India, for the respondents.

3. The Government of India, Ministry of Defence issued a Policy in the year 2003 for the welfare of Ex-Servicemen. It was known as the "Ex-Servicemen Contributory Health Scheme". The Scheme was launched w.e.f. 1.4.2003, with a view to provide Medicare to Ex-Servicemen, pensioners and their dependents through a network of Polyclinics, Service Medical Facilities and Civil Empanelled/Govt. Hospitals spread across the country.

4. One of the broad features of this Scheme was to engage Medical Officers, who were themselves Ex-Servicemen, on contract basis. If adequate number of Ex-Servicemen medical personnel were not available, civilian medical professionals could be engaged on contract basis.

5. In accordance with the said Scheme, the first petitioner herein was appointed in the first instance, by the proceedings dated 10.5.2014 for a period of one year w.e.f. 16.5.2014 to 15.5.2015. Subsequently, he was again employed on contract basis by the proceedings dated 13.5.2015, for a period of one year from 18.5.2015 to 17.5.2016. By three subsequent proceedings dated 25.5.2016, 3.8.2017 and 18.4.2018, the petitioner was engaged on contract, during the period 25.5.2016 to 19.5.2017, 5.8.2017 to 21.4.2018 and 1.5.2018 to 30.3.2019.

6. Similarly, the second petitioner herein was appointed as a Medical Officer on contract basis by a letter dated 18.4.2018, for a period of 11 months w.e.f. 1.5.2018 up to 30.3.2019.

7. It is relevant to note that the petitioners are actually retired State Government servants. As on date, both the petitioners herein have crossed 65 years of age.

8. Even before the current contracts of appointment issued to the petitioners, were to expire on 30.3.2019, the respondents issued the impugned employment notice inviting applications from Medical professionals for appointment on contract basis for a period of 11 months. Though this employment notice did not, in any way, affect the terms and conditions of contract of the petitioners, the petitioners have come up with the above writ petition not only challenging the impugned notice but also seeking a direction to the respondents to continue them on contract basis.

9. There is no dispute about the fact that the petitioners are retired Government servants. Their age is also not in dispute. The fact that the first petitioner was engaged from time to time on contract and the fact that the second petitioner has been engaged on a contract only w.e.f. 1.5.2018, are all not denied. But the contention of the learned counsel for the petitioners is that the petitioners are entitled to continue in service up to the age of 68 years. Therefore, it is their case that they should be allowed to continue. Though in the relief column of the writ petition, the petitioners have not confined their claim to continue in service up to the age of 68 years, the learned counsel for the petitioners at least conceded before us that the petitioners will be entitled to continue only up to the age of 68 years.

10. But the claim of the petitioners appears to be baseless. At the outset, the petitioners have no right to challenge the impugned employment notice. There is no indication in the impugned employment notice that the contracts of appointment issued to the petitioners would get terminated. The Scheme floated by the Central Government envisaged the appointment of a large number of Medical personnel. Therefore, two persons cannot come to Court challenging the employment notice. Hence the first prayer sought by the writ petitioners is thoroughly misconceived.

11. The second relief claimed by the petitioners in the writ petition is to allow them to continue. The petitioners have not even indicated the date up to which they are entitled to continue. If the writ petition is to be allowed, the petitioners would become entitled to continue as long as they wish. Therefore, such a prayer cannot be entertained.

12. In any case, even their prayer for continuing them up to the age of 68 years cannot be allowed, since their claim is not based upon any Rules. Admittedly, they were appointed under a Scheme which contemplates appointments on contract basis. The first petitioner has been working on contract basis from 2014. There is not a single condition incorporated in the contract, which allows them to continue up to the age of 68 years. Therefore, the writ petition is completely devoid of merits, and hence it is dismissed alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

M/s Mystic Boat Cruise ..Petitioner.
Versus
State of HP and others ..Respondents.

CWP No. 818 of 2019.
Judgment reserved on 25.6.2019
Decided on: 9 .7.2019

Constitution of India, 1950 - Articles 14 & 226– Procedural fairness- Notice inviting tender for leasing out District Water Sports Centre, Taleru, District Chamba to intended lease holders issued – Challenge thereto- After participating in tender process, petitioner contending notice inviting tender as arbitrary on ground that on previous occasions only 'experienced agencies' were invited to tender but this time no such condition was stipulated and it was done to exclude him– Held, notice and terms and conditions contained in tender document did not speak about requirement of prior experience– If prescription of prior experience is necessarily to be a prerequisite for participating in tender, petitioner could have approached the Court earlier immediately after issuance of notice or after downloading of tender document– Petitioner participated in tender process by filing bid and awaited the outcome– A person who participated in entire tender process, subject to terms and conditions contained in tender document, is estopped from questioning its correctness. (Paras 11& 12)

Constitution of India, 1950–Article 14– Tender- Delay in finalizing the tender process, whether inference of lack of transparency can be drawn? Held, on facts, tenders though opened by authorities earlier but could not be finalized because of prevailing Model Code of Conduct on account of elections– Department finalized tenders after obtaining necessary permission from Election Commission of India– Plea of lack of transparency cannot accepted. (Para 13)

Constitution of India, 1950– Article 14– Procedural fairness- Tender process– Notice inviting tender dated 15.2.2019 issued for leasing out District Water Sports Centre, Taleru in Chamba– Corrigendum dated 11.3.2019 – Challenge thereto and court's interference- Notice document providing that lessee would not prohibit other registered private operators/boat owners using jettis in premises of sports centre– Corrigendum deleting this stipulation and thereby prohibiting use of premises by private operators– Petitioner, a registered private operator and who participated in tender process, challenging corrigendum on ground that it prohibited registered private operators to use premises of Water Sports Complex– Petitioner submitting that corrigendum will infringe his rights as registered private operator– Held, petitioner can not don two roles, one as of bidder and another that of private operator– He could have either challenged corrigendum as private operator without participating in tender or he could have assailed tender only as a person who participated in tender- Deletion of condition through corrigendum was with intention to benefit the highest bidder– If petitioner had become highest bidder, corrigendum would have gone to his assistance– Act of petitioner in waiting for result of tender to challenge corrigendum cannot be accepted. (Para 18)

For the petitioner:	Mr. Rajiv Jiwan, Sr. Advocate with Mr. Janesh Mahajan, Advocate.
For the respondents:	Mr. Ashok Sharma, Advocate General with Mr. Ranjan Sharma, Mr. Ashwani Sharma and Ms. Ritta Goswami, Additional Advocates General, for respondents No. 1 to 3/State.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging a Notice Inviting Tenders dated 15.2.2019, and a corrigendum dated 11.3.2019, the petitioner, who is into the business of carrying on Water Sports Activities, has come up with the above writ petition.

2. Heard Mr. Rajiv Jiwan, learned Senior Advocate, for the petitioner and Mr. Ashok Sharma, learned Advocate General for the respondents.

3. By a communication dated 26.11.2018, the Government of Himachal Pradesh accorded approval to the District Tourism Development Officer, Chamba, for leasing out the Water Sports Centre at Taleru in Chamba District by inviting fresh tenders for a period of three years "on existing terms and conditions".

4. Pursuant to the approval so granted, the third respondent herein issued a Notice on 15.2.2019 inviting tenders for the operation, maintenance and the management of the Government property and equipment at Water Sports Centre, including Jetty at Taleru in Chamba District, for a period of three years on contract. The notice stipulated that the tender form/documents will be available on-line w.e.f. 25.2.2019 and that the tenders will be opened on 23.3.2019. The bidders were required by the said notice to pay tender cost of Rs.1000/- (one thousand) and also to deposit an earnest money of Rs.1,00,000/- (rupees one lac), by way of a demand draft/bankers cheque from any of the Nationalized/Commercial Bank in favour of "Chamba District Water Sports and Allied Activities Society". The reserve price for the bid was fixed at Rs. 50,00,000/- (rupees fifty lacs) for the three years contract period.

5. The Notice Inviting Tenders was accompanied by a Tender Schedule. The Schedule reads as under:-

"*Tendering Schedule:-*

Date & Time of on-line publication:	*25.02.2019 06.00PM*
Period of downloading of en-tender	*26.02.2019 (10 AM) to 23.03.2019 up to 11.00 AM*
Date & Time for Pre-bid meeting:	*06.03.2019 at 11.30 AM*
Place of Pre Bid Meeting	*Office of Additional Deputy Commissioner Chamba*
Last date and time for submission /uploading of e-tender along with cost of tender document, Earnest Money Deposit:	*23.03.2019 & up to 11.00AM*
Date & Time for opening of Eligibility Bid:	*23.03.2019 at 11.30 AM Office of Additional Deputy Commissioner Chamba*
Cost of the tender document	*Rs.1000/-*
Earnest Money Deposit (EMD)	*Rs.1,00,000/- (one lakh)*
1. Bidder shall ensure that the cost of tender document, Earnest Money Deposit are deposited in the office of DTDO Chamba (on any working day from 10.00 AM to 5PM) on and before 23.03.2019 (time 11.30 AM) and receipt is taken. Scanned copy of proof of Depositing EMD and tender cost is to be uploaded on HP e-tender portal. *2. If the date fixed for the opening of tender is declared a holiday, the tender shall be opened on the next working day at the same time as fixed for the original date for this*	

purpose."

6. Before the date intended for the opening of the eligibility bid, a corrigendum was issued on 11.3.2019 to the Notice Inviting Tenders. By this Corrigendum, condition No. 19 found at page No. 14 of the Tender Document, was deleted. The deleted condition No. 19 reads as follows:

> *"19.The Contractor shall not prohibit in any manner the registered private operators/Boat owners using the jetties installed in the premises of the water sports Centre."*

7. Thereafter, the bids were opened on 23.3.2019 as per tendering schedule stipulated in the Notice Inviting Tenders. But further processing was kept on hold, as the Model Code of Conduct imposed by the Election Commission of India had come into force by then. However, the Election Commission of India accorded permission on 10.4.2019 to complete the tender process. Accordingly, the technical evaluation was done on 11.4.2019. After such evaluation, the petitioner, who was one of the bidders, has come up with the above writ petition challenging the Notice Inviting Tenders dated 15.2.2019 and also challenging the corrigendum issued on 11.3.2019.

8. The challenge to the Notice Inviting Tenders and the entire tendering process is on the following grounds:-

(i) That when the approval granted by the Government of Himachal Pradesh by a communication dated 26.11.2018, was for leasing out the Water Sports Complex "on existing terms and conditions", the third respondent ought not to have deleted the condition relating to prior experience in carrying out Water Sports Activities;

(ii) That though the bids were opened on 23.3.2019, the evaluation was up-loaded in the website only on 11.4.2019, showing thereby that there was no transparency in the process;

(iii) That a person by name "Udey Singh" who did not upload the correct documents, was declared as qualified though he was not;

(iv) The deletion of condition No. 19 through a corrigendum dated 11.3.2019 was done with the *malafide* intention of throwing out the petitioner; and

(v) That the whole process was completely vitiated by arbitrariness.

9. We have carefully considered the submissions made by the learned Senior Counsel for the petitioner and the learned Advocate General.

10. It is true that by a letter dated 26.11.2018, the Government of Himachal Pradesh granted approval to the third respondent to lease out the Water Sports Complex, by inviting fresh tenders for a period of three years "on existing terms and conditions". It is also true that on earlier occasions, tenders were invited only from "Experienced Agencies". Nevertheless, the impugned Notice Annexure P-2 dated 15.2.2019 and the terms and conditions contained in the tender document did not speak about prior experience.

11. But if public interest demanded the prescription of prior experience as a pre-requisite for participating in the tender, the petitioner, in all fairness, could have approached this Court immediately after issue of impugned Notice dated 15.2.2019 or at least immediately after down-loading the tender document. The petitioner did not do so. On

the contrary the petitioner participated in the tender process, by filing his bid and awaiting the outcome when the tenders were opened on 23.3.2019. As a person who participated in the entire tender process, subject to the terms and conditions contained in the tender document, the petitioner is estopped from questioning the correctness of the tender document.

12. The case on hand is not a Public Interest Litigation. The petitioner has come up primarily because he could not succeed in the tender. Therefore, the first contention that the non-prescription of prior experience as a pre-requisite, vitiated the tender, does not lie in the mouth of the petitioner to be raised.

13. The second ground of attack to the tender process is that though the tenders were opened on 23.3.2019, they were not finalized till 11.4.2019, showing thereby that there was no transparency in the process. But the respondents have filed a reply-affidavit pointing out that the Model Code of Conduct imposed by the Election Commission of India was in force at that time and that by a letter dated 22.3.2019, permission was sought from the Election Commission of India. The respondents have also brought on record, the letter of the Election Commission of India dated 10.4.2019 permitting the third respondent to proceed with and finalize the process. In the light of this, the contention that the delay in finalization of the tender was a pointer to the lack of transparency, cannot be accepted.

14. The third ground of attack to the tender process is that a person by name Udey Singh who was not qualified due to the uploading of wrong documents, was shown as qualified. But this contention loses its force, in view of the fact that Mr. Udey Singh has not come out as a successful bidder. Therefore, the declaration on 23.3.2019 that he was qualified, is hardly of any significance today.

15. The fourth ground of attack revolves around the deletion of condition No. 19 from the tender document, by way of a corrigendum dated 11.3.2019. We have already extracted condition No. 19 that was deleted by the corrigendum.

16. It may be of interest to note that the petitioner is a private player organizing various water sports activities, including boating in the lake in question.

17. Until the advent of the impugned tender process, a person who bagged the contract for operating the water sports complex was not entitled to prohibit other registered private operators from using the jetties in the Sports Complex. Since condition No. 19 now stands deleted from the impugned tender, through a corrigendum dated 11.3.2019, the petitioner apprehends that his rights as a private operator will get infringed. But we are of the considered view that the petitioner cannot assail the impugned tender on the basis of a collateral damage that he may suffer. The primary grievance with which the petitioner has come up with the above writ petition is that he could not become a successful bidder. If he had become the successful bidder, he would have taken advantage of this corrigendum to prevent private operators other than himself from using the jetties.

18. It is not open to the petitioner to await the outcome of the tender process and then come up with a challenge to the corrigendum issued on 11.3.2019. The petitioner cannot don two roles, one as that of a bidder and another as that of a private operator. The petitioner could have either assailed the corrigendum as a private operator, without participating in the tender or he could have assailed the tender only as a person, who participated in the tender. The reason as to why he cannot attack the tender process in two *avtaars* is this. The deletion of condition No. 19 was to the benefit of the highest bidder. If the petitioner had become the highest bidder, the corrigendum would have gone to his assistance. Therefore, the act of the petitioner in waiting for the result of the tender, to

challenge the corrigendum, cannot be accepted. For the very same reason the fourth ground of attack should also fail.

19. According to the learned Advocate General appearing for the respondents, the third respondent has already awarded the contract by a letter dated 16.4.2019 to the successful bidder. The above writ petition was filed only on 16.4.2019. Moreover, the amount quoted by the petitioner was Rs.71,01,959/- (rupees seventy one lacs one thousand nine hundred fifty nine only). This is in contrast to the amount quoted by the highest bidder of Rs.1,51,09,000/- (rupees one crore fifty one lacs and nine thousand only). Therefore, apart from the fact that all the grounds of challenge to the impugned process are devoid of merits, the huge difference in the rate quoted by the petitioner and the rate quoted by the successful bidder would also dissuade us from interfering with the tender process.

20. Inviting our attention to the xerox copies of two demand drafts, one for rupees one thousand and another for rupees one lac drawn by the successful bidder towards payment of the cost of the tender and earnest money respectively, it was contended by Mr. Rajiv Jiwan, learned Senior Counsel appearing for the petitioner that the successful bidder ought to have been disqualified as the demand drafts were not drawn in favour of the appropriate Authority. In the impugned Notice Inviting Tender dated 15.2.2019, the tender cost and the earnest money were directed to be deposited by way of demand draft/bankers cheque in favour of “Chamba District Water Sports and Allied Activities Society”. But the demand drafts which bear the name of “Shri Maa Bhawani Transport Company”, who is the successful bidder, show that they were drawn in favour of “Deputy Commissioner-cum-Chairman Water,Sports Activities Society Chamba”. Therefore, it is contended that the successful bidder never even complied with the essential condition for the acceptance of his bid.

21. But unfortunately, the xerox copies of the demand drafts relied upon by the learned Senior Counsel for the petitioner were filed as Annexure P-10 only along with the rejoinder. Therefore, the respondents did not have an opportunity to meet these allegations. We cannot allow the pleadings in a writ petition of this nature to be enlarged in scope over a period of time.

22. In any case, keeping aside the technicalities for a moment, if we take a look at the Note File produced by the learned Advocate General, it is seen that several bidders were granted some reprieve from the strict adherence to the prescriptions contained in the tender document. The following are some of the instances:

(i) A bidder by name Udey Singh mentioned the demand draft number wrongly while up-loading the information. The same was condoned; and.

(ii) Four bidders, including the petitioner herein failed to mention the date and place in the pre- qualification bids in proforma I and II. But this was also condoned by the Committee on the ground that they were trivial clerical errors.

23. Therefore, it is clear that the petitioner himself was the beneficiary of a small reprieve granted by the Evaluation Committee and hence, he cannot complain about the successful bidder’s failure (if at all it is true) to take the demand drafts describing the name of drawee accurately.

24. Thus, in fine, we find that the grounds of challenge to the impugned tender process are without substance. Therefore, the writ petition is dismissed. There will be no order as to costs. Pending applications, if any also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR.JUSTICE DHARAM CHAND CHAUDHARY, J.

M/s. Shivalik Fibres (P) Ltd. and others …Petitioners
Versus
The Authorized Officer, Punjab National Bank and others …Respondents

CWP No. 1368 of 2019
Reserved on: 25.06.2019
Decided on: 09.07.2019

Securitization and Reconciliation of Financial Assets and Enforcement of Security Interest Act, 2002 – Section 18 (1) - Second proviso – Requirement of deposit of 50% of amount due for filing appeal – Applicability and computation of amount – Whether amount recovered by bank by way of auction of secured asset can be computed, when auction is challenged by debtors? – Held, second proviso to Sub- section (1) of Section 18 of Act imposes an obligation upon person filing appeal to make pre-deposit – A person filing appeal cannot take advantage of amount paid by other parties, except under certain circumstances – Where borrowers themselves are appellants they cannot claim benefit of money recovered through an auction, which itself had become subject matter of challenge – A borrower who assails an auction conducted under Act as null and void cannot take advantage of amount recovered by bank through such an auction – If in opinion of borrower an auction is invalid it would not confer any benefits upon any of parties including secured creditors and auction purchasers- To show the sale proceeds of very auction that is assailed in an appeal as money recovered by the Bank would tantamount to proverbial act of eating cake even while retaining it. (Para 16)

Cases referred:
Indian Bank vs. Blue Jaggers Estates Limited and others, (2010) 8 SCC 129
Mardia Chemicals Ltd. and others vs. Union of India and others, (2004) 4 SCC 311
Srishti Arogyadham Pvt. Ltd. vs. Punjab National Bank, W.P. (C) No. 12299 of 2018

For the petitioners: Mr. Ajay Sharma, Senior Advocate, with Mr. Sushant Vir Singh, Advocate.
For the respondents: None.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging an order passed by Debts Recovery Appellate Tribunal, New Delhi (hereinafter referred to as 'the Appellate Tribunal') directing them to make a pre-deposit of 50% of the debt recoverable from them, the borrowers as well as guarantors have come up with the above writ petition.

2. Heard Mr. Ajay Sharma, learned Senior Counsel appearing for the petitioners.

3. Assailing the measures taken by the Authorized Officer of the respondent-Bank under Section 13 (4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act'), the petitioners herein filed an Appeal in SA No. 316 of 2016 on the file of the Debts Recovery Tribunal-I, Chandigarh (hereinafter referred to as 'the Tribunal'). The appeal was dismissed by the Tribunal by an order dated 20th April, 2019.

4. Challenging the said order of the Tribunal, the petitioners filed a statutory Appeal before the Appellate Tribunal under Section 18 of the SARFAESI Act. The Appeal was accompanied by an Application in IA No. 457 of 2019 for waiver of the pre-deposit condition. In the said Application, it was contended by the petitioners that the Bank had already realized a sum of ₹ 6.75 crores by the auction sale of the mortgaged property and that since the total dues to the Bank were estimated only at ₹ 7,48,46,284/-, the requirement of pre-deposit condition stood satisfied. Reliance was placed by the petitioners in this regard on a judgment of the Delhi High Court in **Srishti Arogyadham Pvt. Ltd. versus Punjab National Bank {W.P. (C) No. 12299 of 2018}.**

5. However, by an order dated 31st May, 2019, the Appellate Tribunal rejected the prayer for waiver of pre-deposit condition and directed the petitioners to make payment of 50% of the amount due. It is against the said order that the petitioners have come up with the above writ petition.

6. The one and only issue that arises for our consideration in this writ petition is as to whether the sale proceeds of an auction sale conducted by the Authorized Officer of the Bank are liable to be adjusted as against the requirement of pre-deposit stipulated statutorily in the second proviso to sub-Section (1) of Section 18 of the SARFAESI Act or not.

7. Section 18 of the SARFAESI Act reads as follows:

> ***18. Appeal to Appellate Tribunal.****—(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal alongwith such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:*
>
> *Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:*
>
> *Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:*
>
> *Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso.*
>
> *(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.*

8. The second proviso mandates that an Appellate Tribunal shall not entertain an appeal, unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. A discretion is conferred upon the Appellate

Tribunal by the third proviso to sub-Section (1) of Section 18 of the SARFAESI Act, to reduce the amount of pre-deposit to not less than 25%.

9. The language of the second proviso to sub-Section (1) of Section 18 of the SARFAESI Act is unambiguous and it is mandatory. The second proviso to sub-Section (1) of Section 18 of the SARFAESI Act does not provide room for any controversy with regard to the quantum of amount to be deposited. The amount to be deposited is 50% and this 50% should be of either the amount of debt as claimed by the secured creditors or of the amount of debt as determined by the Debts Recovery Tribunal.

10. In **Srishti Arogyadham's case,** the Delhi High Court interpreted the second proviso tosub-Section (1) of Section 18 of the SARFAESI Act to the effect that once the Bank had realized some portion of the debt through the auction sale of a secured asset, the first eventuality contemplated by the second proviso to sub-Section (1) of Section 18 of the SARFAESI Act that there must be a debt due, will not stand satisfied. Therefore, the Delhi High Court came to be conclusion that an appellant before the Debts Recovery Appellate Tribunal cannot be called upon to make a pre-deposit of 50% of the amount that was due before the auction sale. Paragraphs 16 to 18 of the judgment of the Delhi High Court in **Srishti Arogyadham's case** read as follows:

> *"16. On a perusal of the second proviso to Section 18, it is clear that the same pre-supposes two eventualities; (i) that debt is due from the petitioner as claimed by the respondent No. 1 Bank or; (ii) debt has been determined by the Debt Recovery Tribunal, and the same is liable to be paid/recovered on the date when the appeal is entertained by the DRAT. In either of the eventualities 50% of the amount of debt need to be made as pre-deposit. We may state here that the Supreme Court in* ***Narayan Chandra Ghosh v. UCO Bank and Others reported as (2011) 4 SCC 548,*** *has inter alia held that the requirement of pre-deposit is a mandatory provision and need to be complied with. There cannot be any dispute on the said proposition and the same is binding upon this Court. In the said case, the argument of the petitioner therein was, that the debt has not been determined by the DRT. The Supreme Court rejected the plea by holding, if the debt has not been determined by the DRT, the borrower is liable to pay 50% of the debt due from him as claimed by the secured creditors. The facts being at variance, as there is no amount due from the borrower i.e. petitioner herein when more than due amount has already been realized by the Bank the judgment has no applicability.*
>
> *17. It is a conceded case of the respondents that none of the eventualities exist as the amount due to the Bank has been recovered. The application has been opposed by the respondents and decided by the DRAT primarily on an apprehension that since, the petitioner has challenged the auction, the same may be set aside. In other words, the sale remains in a nebulous stage and the sale will achieve finality/confirmed only when the legal proceedings come to an end.*
>
> *18. Surely such an apprehension as noted above, cannot govern the interpretation of Section 18 of the SARFAESI Act, 2002. The Section is clear and contemplates a situation stated in the earlier paragraph and the same has to be interpreted in the manner it exist, by giving a plain meaning."*

11. But with great respect to the Delhi High Court, we are unable to persuade ourselves to accept the line of reasoning given by them. The reasons are manifold.

12. If we peep into the history of the SARFAESI Act, 2002, it could be seen that immediately after Act 54 of 2002 was notified in the Gazette, challenges were made to the constitutional validity of the same before various Courts. Finally, the Supreme Court upheld almost all provisions of the Act by its decision in **Mardia Chemicals Ltd. and others versus Union of India and others, (2004) 4 Supreme Court Cases 311.** The Supreme Court struck down sub-Section (2) of Section 17 of the SARFAESI Act as *ultra vires*, as it mandated the deposit of 75% of the amount claimed by the Bank, before the Debt Recovery Tribunal entertained an appeal under Section 17 of the SARFAESI Act. Though Section 17 of the SARFAESI Act used the expression “Appeal”, the Supreme Court held that it is in the nature of an original proceeding and that therefore, a condition for making a pre-deposit will be *ultra vires*.

13. After the decision of the Supreme Court in **Mardia Chemicals' case,** a series of amendments were made to the SARFAESI Act by Amendment Act 30 of 2004. It is through the said Amendment Act 30 of 2004 that the second and third provisos to sub-Section (1) of Section 18 of the SARFAESI Act were inserted. These two provisos came into effect on 11th November, 2004.

14. The Statement of Objects and Reasons to the Amendment Act 30 of 2004 would show that the Parliament in its wisdom not only stipulated the payment of 50% of the amount of debt as claimed by the secured creditor or as determined by the Debts Recovery Tribunal as a pre-deposit, but also conferred power upon the Tribunal through the third proviso to grant waiver of the pre-deposit up to a particular limit.

15. The very reason why the Appellate Tribunal is conferred the power by the third proviso to sub-Section (1) of Section 18 of the SARFAESI Act to reduce the amount, is to take note of certain contingencies, such as, the payment of money during the period when the matter was pending before the Debts Recovery Tribunal or after the disposal of the application by the Debts Recovery Tribunal but before an appeal was filed.

16. Primarily, the second proviso to sub-Section (1) of Section 18 of the SARFAESI Act imposes an obligation upon a person filing an appeal to make a pre-deposit. A person filing an appeal before the Appellate Tribunal cannot take advantage of the amount paid by other parties, except under certain circumstances. Say, for instance, the Bank was proceeding against the properties of a guarantor, after exhausting its remedies against the borrower and after recovering a portion of the debt due from the borrower. In cases of that nature, the very attempt of the Bank would only be to recover from the guarantor, the balance of the money due after appropriating the sale proceeds of the properties of the borrower. But in cases where the borrowers themselves are the appellants, they cannot claim the benefit of the money recovered through an auction, which itself had become the subject matter of challenge. A borrower who assails an auction conducted under the Act, as null and void, cannot take advantage of the amount recovered by the Bank through such an auction. If in the opinion of the borrower, an auction is invalid, it would not confer any benefit upon any of the parties, including the secured creditors and the auction purchaser. As a corollary, such an auction cannot confer a benefit upon the borrower. To put it differently, an auction, which, according to the borrower, cannot confer any benefit upon the auction purchaser or the secured creditor, on account of being a nullity, cannot confer a benefit upon the borrower either. To show the sale proceeds of the very auction that is assailed in an appeal, as a money recovered by the Bank, would tantamount to the proverbial act of eating the cake even while retaining it.

17. The issue can be looked at from another angle also. An illegality cannot confer any benefit upon anyone. If an auction, according to the borrower is illegal, he

cannot be heard to contend that the proceeds of such auction sale represent the amount of debt already recovered by the secured creditor.

18. Interestingly, Delhi High Court accepted the argument, as seen from paragraph 19 of its judgment that the condition of pre-deposit is intended to discourage frivolous litigation. Once the foundation for the condition contained in the second proviso to sub-Section (1) of Section 18 of the SARFAESI Act is accepted as valid and justified, there is no room for maneuvering or manipulating within the letter of the law.

19. As seen from paragraph 22 of the judgment of the Delhi High Court in **Srishti Arogyadham's case,** the Supreme Court already clinched the issue in **Indian Bank versus Blue Jaggers Estates Limited and others, (2010) 8 Supreme Court Cases 129.** But the Delhi High Court distinguished the said judgment on the ground that in the case before the Supreme Court, the sale had not been confirmed and that therefore, it was in a nebulous stage.

20. But with great respect, we do not think that such a distinction is plausible. No borrower accepts before the Appellate Tribunal that his right of redemption is already lost due to the confirmation of sale or the issue of a sale certificate and its registration. So long as it is contended by the borrower/guarantor that his right of redemption is not lost and he is entitled to have the sale certificate set aside by the Appellate Tribunal, the money recovered by the Bank through the auction, is not a money fully and finally recovered.

21. Therefore, we are of the considered view that the Appellate Tribunal was right in demanding from the petitioner, the payment of 50% of the amount as per the second proviso to sub-Section (1) of Section 18 of the SARFAESI Act. As a result, we see no merits in the writ petition. Hence, it is dismissed, so also the pending applications, if any.

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

Sanjeev Kumar ....Petitioner.

Versus

Satya Devi & another ....Respondents.

Cr. MMO No. 123 of 2019
Reserved on: 27.06.2019
Decided on: 09.07.2019

Code of Criminal Procedure, 1973-Section 125(1)(d)- Interim maintenance– Grant of– Quantum– Challenge thereto– Held- Magistrate granted, interim maintenance to mother at rate of Rs.4000/-p.m. (Rs. 2000/- p.m. from each son) purely on abstract and hypothetical grounds- Order interfered with– Maintenance allowance reduced to Rs. 1500/- p.m. from each son.(Para 9)

For the petitioner: Mr. Ashwani K. Sharma, Sr. Advocate, with Mr. Mayank Sharma, Advocate.

For respondent No. 1: Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner under Section 482 Cr.P.C. read with Article 227 of the Constitution of India against the judgment dated 20.09.2018, passed by learned Sessions Judge, Hamirpur, H.P., whereby the revision filed by the petitioner was dismissed and order dated 28.04.2015, passed by the learned Chief Judicial Magistrate, Hamirpur, H.P., in proceedings under Section 125(1)(d) Cr.P.C., i.e., application for grant of maintenance to respondent No. 1 at the rate of Rs. 4,000/- per month from the date of petition in the learned Trial Court, was affirmed.

2. The facts giving rise to the present petition can be encapsulated as under:

Respondent No. 1 herein, Smt. Satya Devi, was the petitioner before the learned Trial Court (hereinafter referred to as "the petitioner"). The petitioner maintained an application under Section 125(1)(d) Cr.P.C. before the learned Trial Court seeking grant of maintenance allowance from her two sons, i.e., Shri Sanjeev Kumar, petitioner herein (hereinafter referred to as respondent No. 1) and Shri Punit Kumar (hereinafter referred to as respondent No. 2). As per the petitioner, after the death of her husband, she inherited property and she brought up her children, married and settled them. She averred that respondent No. 1 fraudulently executed a sale deed in his favour and respondent No. 2 also purchased land comprised in khasras No. 1285 and 1309 and he did not pay even a single penny to the petitioner. The petitioner had been deprived of her property and now she is unable to maintain herself. The petitioner made a prayer before the learned Trial Court for grant of Rs. 10,000/- and Rs. 5,000/- per month from respondents No. 1 and 2, respectively, as interim maintenance allowance. Respondent No. 1 (petitioner herein) contested the claim of the petitioner and contended that his income is far less, as alleged by the petitioner. He has further averred that he purchased the land from the petitioner and paid full consideration amount. He has contended that in order to harass him respondent No. 2 has managed the petitioner to file the petition against him. He has further averred that the petitioner sold her property for Rs.22,67,000/-. As per respondent No. 1, petitioner is 50% partner in the business of respondent No. 2 and the income of respondent No. 2 is Rs. 5,00,000/- per month. Respondent No. 2 also filed reply and contended that his income is less. However, he averred that a reasonable maintenance amount be awarded to the petitioner. The learned Trial Court, vide its order dated 28.04.2015, allowed the application and granted maintenance allowance @ Rs. 2000/- per month from each of the respondents. Respondent No. 1 feeling aggrieved and dissatisfied, filed a revision petition against the order granting monthly maintenance allowance to the petitioner before the learned Revision Court, but the learned Revision Court, vide its order dated, 20.09.2018, dismissed the revision, hence the present petition is maintained by respondent No. 1 (petitioner herein).

3. I have heard the learned Senior Counsel/counsel for the parties and gone through the available records.

4. The learned Senior Counsel for the petitioner has argued that the impugned orders passed by the learned Courts below are without appreciating the facts and law and the maintenance amount is on very higher side. He has argued that the learned Trial Court, while granting maintenance, took the income of the petitioner on higher side. He has argued that the maintenance granted by the learned Trial Court and upheld by the learned Revision Court is on very higher side and the same is liable to be reduced. On the other hand, learned counsel for respondent No. 1 (petitioner before the learned Trial Court) has argued that in view of the income of the petitioner, the amount of maintenance is just and

reasoned. He has argued that the petition has no merits and the same deserves dismissal and may be accordingly dismissed.

5. In rebuttal, the learned Counsel for the petitioner has argued that keeping in view the income of the petitioner and the fact that the maintenance allowance as awarded by the learned Trial Court is on a very higher side, the petition be allowed and the impugned order passed by the learned Revision Court be quashed and set aside and some reasonable monthly maintenance allowance be granted.

6. The relationship between the parties is not in dispute. The *inter se* relationship between the parties might have weighed in the minds of the learned Courts below in granting the monthly maintenance amount to the petitioner. At this stage, this Court cannot sneak the fact that the learned Trial Courts below had only granted interim maintenance allowance to the petitioner and final maintenance amount is yet to be decided. After perusing the orders of the learned Trial Court, it is discernable that the learned Trial Court granted interim maintenance allowance to the petitioner after scrutinizing the pleadings of the parties and evidence to the support of pleadings is yet to be recorded. Agreeably, status of the parties, reasonable wants of the claimant, income and property of the claimant, liabilities of the claimant etc. are some of factors which a Court must look into while granting monthly maintenance, be it interim maintenance allowance, but all these factors cannot be clearly seen by a Court without examining the witnesses. For granting interim maintenance amount the Courts cannot be oblivious to fact that the claimant has to spend on his/her upkeep or dependants, purchase of essential items etc. The aim of granting maintenance is to prevent vagrancy to the claimant. However, in the case in hand, after weighing the rival contentions of the parties, which emerge from the petition filed by the petitioner in the Court of lowest rung and its replies and the contentions have been also noted by the learned Trial Court, at this stage this Court finds that the contentions of the parties are evenly balanced.

7. In the case in hand, the mother (petitioner) is claiming maintenance from her two sons and one son, i.e., respondent No. 2 has conceded that reasonable maintenance allowance be granted to the petitioner, but respondent No. 1 challenged the orders of the learned Courts below whereby petitioner was granted monthly maintenance allowance Rs. 2,000/-. No doubt, after going through the records, it is clear that the learned Trial Court granted interim maintenance allowance to the petitioner only after scrutinizing the averments of the parties. The status of the parties, reasonable wants of the claimant, income and property of the claimant, liabilities of the claimant etc. are some of factors, which can be judiciously adjudged only after scrutinizing the averments and also the evidence. At this stage, after analyzing the contentions of the parties the interim maintenance allowance, as granted by the learned Trial Court, seems to be on higher side. True it is that the maintenance amount should be reasonable, neither excessive nor exorbitant.

8. Indeed, the petitioner, *prima facie* seems to be entitled for monthly maintenance allowance, however, the rate of monthly maintenance allowance cannot be fixed on an abstract and hypothetical grounds. The petitioner alleged that the monthly income of respondent No. 1 is Rs. 1,00,000/- and respondent No. 2 earns Rs. 30,000/- per month. Respondent No. 1 denied his income, as alleged by the petitioner and besides this, he contended that the petitioner is 50% business partner with respondent No. 2 and monthly income of respondent No. 2 is Rs. 5,00,000/-. Thus, in the petition before the court of lowest rung the petitioner and respondents alleged contrary to each other. The parties are yet to prove what they have alleged by leading evidence and the learned Trial

Court only on the basis of contentions made in the petition granted monthly interim maintenance of Rs. 2,000/- from each of the respondent.

9. In the above backdrop, the petition is allowed and the impugned orders of the learned Trial Court are quashed and set aside and monthly interim maintenance amount is reduced from Rs. 2,000/- to Rs. 1500/- per month from each of the respondents, as the learned Trial Court granted monthly interim maintenance allowance to the petitioner only on abstract and hypothetical grounds, i.e., the averments made by the petitioner and the maintenance amount can always be enhanced at any stage, if the learned Trial Court deems it apt and proper. Therefore, the respondents are directed to pay monthly interim maintenance from of Rs. 1500/- to the petitioner and outstanding amount of arrear be liquidated within two weeks from the date of passing of the judgment. However, it is expected from the learned Trial Court to dispose of the matter expeditiously keeping in view the peculiar facts and circumstances of the case.

10. With the above observations the petition, as also pending application(s), if any, stand(s) disposed of. Parties to appear before the Court below on ***29.07.2019***.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, ACJ AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Sonu and others. …Appellants

Versus

State of Himachal Pradesh. …Respondent

Cr. Appeal No. 92 of 2017 along with
Cr. Appeal Nos. 95 and 161 of 2017
Reserved on: 23.4.2019
Date of decision: 10.6.2019

Code of Criminal Procedure, 1973 (Code)– Section 154– First information report– Essential requirements and relevancy during trial– Held, no doubt, FIR is not to be an encyclopedia but only first information as to commission of offence intended to set investigating agency into motion, but it is also settled law that evidence led in court during trial must run inconsonance with contents of FIR– Any evidence contrary to genesis of case narrated in FIR is fatal to prosecution case. (Para 23)

Indian Penal Code, 1860 – Sections 147, 148, 302 and 323 read with 149 –Rioting, murder etc., by unlawful assembly– Proof -Appeal against conviction– Prosecution alleging accused having caused death of 's' and injuries to 'B' and 'H' in prosecution of common object of unlawful assembly at village water source– Held– Complainant 'B' giving entirely different sequence of events on oath than what he told in statement recorded under Section 154 of Code – Denying statement given in FIR – Witnesses 'VC', 'RD' and 'HY' giving entirely different versions as to manner and sequence of occurrence of incident – Medical examination reports of accused not placed on record by investigating agency –Injured witness saying that on account of darkness, it was not possible to identity persons who were assailants - Identity of accused as assailants beyond reasonable doubts not established– Appeal allowed- Accused acquitted – Conviction set aside. (Paras 25 to 41)

For the Appellants:	Mr.Satyen Vaidya, Senior Advocate with Mr.Vivek Sharma, Advocate in Cr. Appeal No. 92 of 2017, Mr.Manoj Pathak, Advocate in Cr. Appeal No. 95 of 2017 and Mr.George, Advocate in Cr. Appeal No. 161 of 2017.
For the Respondent:	Mr.Vikas Rathore, Additional Advocate General, with Mr.J.S. Guleria, Mr.Kunal Thakur, Deputy Advocate Generals and Mr.Suny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

These appeals, preferred by convicts/appellants against their conviction and sentence imposed upon them vide judgment dated 21.1.2017 passed by learned Additional Sessions Judge II, Solan, District Solan, H.P. in Sessions Trial No. 4-ASJ/7 of 2015, titled as State of Himachal Pradesh Vs. Sher Singh and others, are being decided by this common judgment as common questions of fact and law are involved therein.

2. Vide impugned judgment, each of convicts/appellants have been convicted and sentenced to undergo imprisonment for life and to pay fine of Rs.20,000/- each for commission of offence under Section 302 of Indian Penal Code (in short "IPC") and in case of default of payment of fine, to further undergo rigorous imprisonment for 6 months, rigorous imprisonment for 6 months and to pay fine of Rs.1,000/- each, under Section 323 IPC and in default of payment of fine, to undergo rigorous imprisonment for one month, rigorous imprisonment for 3 years and to pay fine of Rs.5,000/- each under Section 148 IPC and in default of payment of fine, rigorous imprisonment for 6 months and rigorous imprisonment for 1 year with fine of Rs.5,000/- each under Section 147 IPC and in default of payment of fine, to undergo rigorous imprisonment for 3 months.

3. It is informed by learned Additional Advocate General, that proceedings arising out of the same FIR are also pending against juvenile offender Sonu S/o Hukam Singh before Juvenile Justice Board, Solan, which are at the stage of recording evidence of prosecution for 5.7.2019. Trial against the appellants and proceedings against juvenile Sonu are arising out of the same FIR, but forum and process for adjudicating the same is entirely different and the trial before the Court and proceedings before the Juvenile Justice Board are to be concluded by rendering a decision on the basis of material placed before respective forums and not on the basis of evidence. Present appeals are being decided on the basis of material on record placed before the trial Court, which in itself will not have any bearing on the decision of Juvenile Justice Board, as the proceedings before that are to be concluded on the basis of material placed before it in those proceedings. The appellants have suffered conviction and are languishing in jail, therefore, we find it in the interest of justice to proceed with hearing of these appeals.

4. We have heard learned counsel representing convicts/appellants in respective appeals and also learned Additional Advocate General, for the State and have also gone through the record.

5. Brief facts of the case emerging from the record are that on 29.5.2014 at 9:00 P.M., a telephonic information was received from Medial Officer ESI Hospital Parwanoo in Police Station Parwanoo, requesting to send police official as some persons had come to the hospital for treatment after quarrel. The said information was entered in daily station diary vide GD entry No. 52(A) (Ex. PW-13/B) and Head Constable Brij Lal (PW-14) along with

HHG Karam Chand (PW-10) was sent to the hospital. PW-14 H.C. Brij Lal at about 10:05 P.M. had informed from the hospital to Police Station that injuries received by Santosh were reported by the Medial Officer as dangerous to his life and he was referred for treatment from Parwanoo to Government Medical Civil Hospital, Sector 32, Chandigarh and he further informed that on the basis of cursory inquiry and secret inputs, names of Sher Singh, Sonu, Anup, Parmod, Vinod and Vijay etc., belonging to U.P. Bihar, residing in Shanties (Jhugi Jhopari) in village Taksal surfaced as assailants, who had caused injury to Santosh Kumar. The said information was entered in daily station diary vide GD entry No. 53 (A) (Ex.PW-13/C) and after recording reasons that there is possibility of absconding of accused, SHO Inspector Pritam Singh Parmar (PW-16) had rushed to the spot at Taksal along with PSI Rupesh Kant, Constable Suresh Kumar, HHG Dheeraj Kumar (PW-7) and HHG Suresh Kumar in the official vehicle being driven by HHC Bahadur Singh.

6. PW-14 H.C. Brij Lal, in the hospital at Parwanoo, had recorded statement of PW-1 Bitu Chaudhary under Section 154 Cr.P.C., wherein it was stated that he (PW-1) Bitu Chaudhary was residing in Shanties in village Taksal along with PW-4 Prem Ghund, injured Santosh mason (now deceased) and on that date i.e. 29.5.2014, after working with deceased Santosh, he, along with other companions, had come to their respective shanties and he had started cooking meals, whereas Santosh had gone to fetch water from the water source (Bowli) and at about 8:00 P.M., on hearing some voices of quarrel from water source side, he rushed to the spot and saw that 4-5 persons of district Badaiun, were beating Santosh mason with sticks, kicks and fist blows, whose names were not known to him but he knew them by faces only and when he, along with other companions, had tried to rescue Santosh mason, those persons had started beating him also and when they lifted Santosh mason from the spot towards shanties, then also those persons had again beaten Santosh mason brutally, whereupon Santosh mason had become unconscious having no movement in his body. Thereafter, his companions had brought Santosh to ESI, wherefrom Medical Officer referred Santosh to Government Medical Hospital, Chandigarh. Lastly, request for his (PW-1) medical examination and also that of Harinder (PW-1) was made. After reducing the statement into writing and getting the signatures of PW-1 thereon, this statement Ex. PW-1/A was sent to the Police Station through HHG Karam Chand (PW-10), by making endorsement Ex. PW-14/A, for registration of FIR under Sections 307, 323, 147, 148, 149 IPC, which was received at Police Station at about 11:25 P.M. In the meanwhile, information was received in Police Station regarding arrival of Santosh Kumar in Government Medical Civil Hospital, Sector 32, Chandigarh at 11:30 P.M. as a refer case from Parwanoo, which was entered in daily station diary vide GD entry No. 54(a) (Ex. PW-13/D) and concerned Investigating Officer was informed in this regard.

7. On receiving ruka/statement under Section 154 Cr.P.C. (Ex. PW-1/A), FIR Ex. PW-12/A was prepared by PW-13, H.C. Hem Raj, the then MHC and its prints were signed by PW-12 ASI Joginder Singh being officiating SHO and with one copy of FIR, the case file was handed over to H.C. Brij Lal, who in the meanwhile had arrived in Police Station from the hospital. Before that in the hospital, PW-14 H.C. Brij Lal had requested Medical Officer vide application Ex. PW-18/A for medical examination of PW-1 Bitu Chaudhary and PW-11 Harinder Yadav. H.C. Brij Lal (PW-14), on his arrival in the Police Station Parwanoo, had informed that MLCs of three injured would be issued by the Medical Officer in the morning and further that Medical Officer, on his application Ex. PW-8/A, had informed that Santosh was unfit for making statement and injuries sustained by him could be dangerous to his life. The said information was also entered in daily station diary vide GD entry No. 3(A) (Ex. PW-13/E) at 12:30 A.M. On 30.5.2014 at about 12:35 A.M., PW-3 Ram Dev had reached in the Police Station and stated that on 29.5.2014 Vinod Kumar, Sher Singh, Sonu, Anup, Parmod and Vijay etc., at the time of beating Santosh Kumar, had also

beaten him, caused injuries to him and had requested for his medical examination and for taking legal action against those persons. The said fact was entered in daily station diary vide GD entry No. 4(A) at 12:35 A.M. (Ex. PW-13/F) and PW-3 Ram Dev was sent to hospital along with constable Abhinav Chandel (PW-18). At 12:45 A.M., PW-16 SHO Pritam Singh had directed to send PW-14 H.C. Brij Lal along with case file, whereupon after recording GD entry No. 5(A) (Ex. PW-13/G) in daily station diary, Head Constable Brij Lal had departed to village Taksal.

8. PW-16 Inspector Pritam Singh had returned to the Police Station at 12:10 P.M. on 30.5.2014 and had brought Sher Singh, Sonu, Anup and Parmod to Police Station for interrogation. The said fact was recorded in daily station diary at GD entry No. 26(A) (Ex. PW-13/H).

9. On 31.5.2014, on receiving information with respect to death of injured Santosh, PW-14 H.C. Brij Lal, being deputed by PW-16 Inspector Pritam Singh, visited Government Hospital Chandigarh and submitted an application Ex. PW-9/A for conducting post mortem of deceased Santosh, whereupon PW-9 Dr. Arti, after conducting post mortem, had issued report Ex. PW-9/B, stating therein that cause of death, in her opinion, was due to carnio cerebral damage due to blunt trauma/surface impact over the head and she had also handed over the viscera to PW-14 H.C. Brij Lal, which was deposited by him in the Malkhana by handing over to PW-13 H.C Hem Raj, who had entered it in Malkhana register at Sr. No. 383 of 2014 and had sent it to SFL Junga through PW-15 HHC Ramesh Chand vide RC Ex. PW-13/J, who after depositing the same in FSL, Junga had handed over the RC to PW-13 H.C. Hem Raj along with acknowledgment of delivery thereof. Report of State FSL was received back on 25.6.2014 through Constable Balwant Singh (not examined). Copy of extract of Malkhana register is Ex. PW-13/K.

10. On the basis of information supplied by PW-3 Ram Dev on 10.6.2014, accused Sonu S/o Bhupal, who was involved in the incident and was absconding, was arrested by PW-16 Inspector Pritam Singh. It is further case of the prosecution that on 10.6.2014 accused Sonu had produced a bamboo stick to Police in presence of PW-3 Ram Dev and PW-7 Dheeraj, which was taken into possession vide memo Ex. PW-3/A and was sealed in a piece of cloth and parcel was sealed with seal impression "K" and sample impression of seal "K" was taken on a piece of cloth Ex. PW-7/A, which was also witnessed by PW-3 Ram Dev and PW-7 Dheeraj.

11. It is further case of prosecution that accused Vijay, Vinod and Suresh were also absconding and Vijay and Vinod had surrendered on 30.6.2014 and thereafter on 2.7.2014 accused Vijay had produced a bamboo stick, used as a weapon in the incident, in the presence of witnesses PW-7 Dheeraj Kumar and PW Kanya Lal (not examined) and the said bamboo stick was identified by PW-2 Vinod Chaudhary and the same was taken in possession vide memo Ex. PW-2/C after putting it in a parcel of cloth sealed with seal 'P'. On the same day, one five litre plastic canny, a lether belt and a bamboo stick, used as weapon in the incident, were also recovered at the instance of accused Vinod and was taken in possession in presence of PW-7 Dheeraj Kumar and PW Kanhya Lal vide memo Ex. PW-2/A by putting these articles in a parcel of cloth sealed with seal 'P'. The articles were also identified by PW-2 Vinod Chaudhary. On that date, i.e. 2.7.2014 PW-2, Vinod Chaudhary had also produced three plastic cannies along with a bamboo stick used for bringing water in these cannies and these articles were also taken in possession vide memo Ex. PW-2/B in presence of witnesses PW-7 Dheraj Kumar and Kanhya Lal after putting the same in a parcel of cloth, sealed with seal 'P'. The bamboo stick was identified by PW-2 Vinod Chaudhary as a stick being used by the deceased for bringing water, which was snatched by accused Sonu for beating the said witness PW-2 Vinod Chaudhary and deceased Santosh.

Sample impression of seal 'P' was also taken on a piece of cloth Ex. PW-7/C, which was also witnessed by PW-7 Dheeraj and Kanya Lal.

12. According to prosecution, accused Suresh Kumar had surrendered on 14.8.2014 and during his remand, on 16.8.2014 a bamboo stick was recovered at his instance in presence of witnesses PW-2 Vinod Chaudhary and PW-7 Dheeraj Kumar, which was taken into possession vide memo Ex. PW-2/D, after putting it in the parcel of cloth, sealed with seal 'L'. Sample impression of seal 'L' was also taken in piece of cloth Ex. PW-7/B, which was also witnessed by the same witnesses. It is further case of the prosecution that memo of identification of spot Ex. PW-2/E was prepared in pursuance to identification of the spot by said Suresh Kumar.

13. Investigating Officer has also obtained MLCs of deceased Santosh (Ex. PW-8/C), PW-11 Harinder Yadav (Ex. PW-8/L), PW-1 Bitu Chaudhary (Ex. PW-8/M) and PW-3 Ram Dass (Ex. PW-8/E) from the Medical Officer, Civil Hospital Parwanoo. After seizure of cannies and bamboo sticks, the same were deposited in the Malkhana by PW-16 SHO Pritam Singh, which were entered by PW-13 HC Hem Raj in the Malkhana register at Sr. No. 388 of 2014 dated 2.7.2014 and 421 of 2014 dated 16.8.2014, extracts whereof are Ex. PW-13/L, Ex. PW-13/M and PW-13/N. Articles recovered vide memo Ex. PW-3/A, Ex. PW-2/A, Ex. PW-2/B and Ex. PW-2/C were produced by PW-16 Inspector Pritam Singh before Medical Officer PW-8 Dr. Vinod Kumar Kapil seeking his opinion, vide application Ex. PW-8/D and Ex. PW-16/C dated 21.7.2014, whereupon PW-8 Dr. Vinod Kumar Kapil had given his opinion vide endorsement Ex. PW-8/E stating that the injuries sustained by victim can be caused by these bamboo sticks and belt and thereafter these articles, after resealing by the Medical Officer, were again deposited in the Malkhana. Daily station diary vide GD entry No. 38, regarding taking out these articles from Malkhana and GD entry No. 44(A) regarding re-deposit of these articles dated 21.7.2017 entered at 3:00 P.M. and 5:00 P.M. respectively are on record as Ex. PW-13/Q and PW-13/R. The articles taken in possession vide memo Ex. PW-2/D were taken out by PW-16 Inspector Pritam Singh from Malkhana after entering GD entry No. 15(A) dated 17.8.2014 at 8:15 A.M. Ex. PW-13/S and were produced before Medical Officer PW-8 Dr. Vinod Kumar Kapil, seeking his opinion vide application Ex. PW-8/G, whereupon PW-8 Dr. Vinod Kumar Kapil had expressed his opinion vide endorsement Ex. PW-8/H, stating therein that articles shown to him could have caused the injuries mentioned in MLC of deceased Santosh, PW-3 Ram Dev and PW-11 Harinder Yadev. Thereafter vide GD entry No. 19(A) dated 17.8.2014 (Ex. Pw-13/D) entered at 10:15 A.M, the bamboo stick was re-deposited in the Malkhana. During investigation, site map Ex. PW-16/A has also been prepared and photographs Ex. PW-16/A-1 to Ex. PW-16/A-37 were also taken. Photographs of deceased Santosh taken after his death are Ex. PW-16/A-38 and Ex. PW-16/A-39. Photographs of accused have also been placed and proved on record as Ex.PW-16/A-40 to Ex. PW-16/A-47. On the basis of identification of spot by accused Suresh Kumar site map Ex. PW-16/B was also prepared. Chemical analysis reports received from State FSL have also been relied upon by the prosecution as Ex. P-X and P-Y, wherein it is opined that no poison was detected in the viscera and human blood was detected on the clothes of deceased.

14. PW-5 Kamal Kishore Patwari has prepared naksha tatima and jamabandi of the land whereupon the incident had taken place. PW-17 Sh. Partap Bhan Singh is an Accounts Manager of the Corporation with which PW-4 Prem Ghund was working for construction work of building. PW-6 Sh.Raj Kumar was with PW-4 Prem Ghund (brother of deceased Santosh) in the market when a telephonic call was received by PW-4 Prem Ghund from deceased Santosh Kumar regarding quarrel in question taking place.

15. After completion of investigation, challan was presented in the Court and after committal, on finding prima facie complicity of accused in commission of offences, on the basis of record produced before it, trial Court had framed the charges against the accused under Sections 147, 148, 323, 302 IPC read with Section 149 IPC, whereafter the accused were subjected to trial on claiming not guilty.

16. During trial, prosecution has examined 18 witnesses to prove its case. Whereas, after recording of their statements under Section 313 Cr.P.C. accused/appellants had not chosen to lead any evidence in their defense. The defense of the accused is that false case was instituted against them.

17. On conclusion of trial, accused have been convicted for the offences charged and have been sentenced as detailed supra.

18. PW-1 Bitu Chaudhary, complainant, PW-2 Vinod Chaudhary, PW-3 Ram Dev and PW-11 Harinder Yadav are witnesses, who have been examined as spot witnesses by the prosecution. PW-4 Prem Ghund and PW-6 Raj Kumar are the witnesses, who have been relied upon by the prosecution as witnesses who reached on the spot after receiving the information about the incident from deceased Santosh Kumar and their statements may be relevant under Section 6 of the Indian Evidence Act to read with spot witnesses. None of other witnesses are spot witnesses.

19. PW-8 Dr. Vinod Kumar Kapil has conducted the medical examination of deceased Santosh Kumar, PW-1 Bitu Chaudhary, PW-3 Ram Dev and PW-11 Harinder Yadev, whereas PW-9 Dr. Arti has conducted the post mortem of deceased Santosh Kumar.

20. PW-14 H.C. Brij Lal has conducted the part of investigation, whereas major investigation has been conducted by PW-16, Inspector Pritam Singh Parmar.

21. PW-7 Dheeraj Kumar is a common witness to all recovery/seizure memos, whereby articles, including bamboo sticks and belt used as weapon of offence, were taken in possession by the police. Other witnesses are link witnesses, who were associated during investigation for performing their formal role like taking Ruka from the hospital to Police Station, registration of FIR on the basis of Ruka, taking PW-3 Ram Dev to hospital for medical examination, identification of land whereupon the incident had taken place, performing duty of MHC for receiving/depositing the case property in Malkhana and sending the same to State FSL, Junga as well as to Medical Officer and also for sending the viscera to State FSL. Statements of these witnesses will be relevant in case deposition of spot witnesses PW-1 Bitu Chaudhary, PW-2 Vinod Chaudhary, PW-3 Ram Dev and PW-11 Harinder Yadev along with statements of PW-4 Prem Ghund and PW-6 Raj Kumar are found to be convincing and reliable.

22. Scrutiny of statement under Section 154 Cr.P.C. Ex. PW-1/A, made by PW-1 Bitu Chaudhary and deposition of spot witnesses, including this witness, in the Court compel us to draw inference that true version of the incident has not been brought on record before the Court, which constrains us to interfere in the conviction of accused persons, for the reasons stated herein after.

23. No doubt, it is settled position of law that FIR is not to be an encyclopedia, but only first information of commission of offence to set the Investigating Agency/Police in motion is sufficient to be recorded therein and the entire case can be proved by leading elaborate evidence on the basis of the said FIR, despite the fact that minute details are not there in the FIR. However, at the same time, it is also settled that evidence led in the Court

must run in consonance with the contents of FIR and any evidence, contrary to the genesis of the case narrated in the FIR, is fatal to the prosecution case.

24. PW-1 Bitu Chaudhary, complainant, in his statement recorded under Section 154 Cr.P.C (Ex. PW-1/A) has stated that after hearing the noise from the side of water source, where Santosh had gone to fetch water, he had rushed to the spot where he had seen that 4-5 persons, residents of District Badaiun, were beating Santosh with sticks, fist and kick blows and when he tried to save Santosh Kumar along with his companions, he was also beaten by those persons and when they lifted Santosh Kumar from the spot towards shanties, those persons had again beaten Santosh Kumar brutally with sticks causing him unconscious. As per this statement, Santosh Kumar had gone to fetch water alone. While appearing in the Court, in his deposition on oath, PW-1 has narrated a different story, wherein he has stated that deceased Santosh Kumar and PW-2 Vinod Chaudhary had gone to fetch water and PW-2 Vinod Chaudhary had come back to shanty and had informed him that Santosh was being beaten by the person belonging of Badaiun area whereupon he along with Virjan, Rama Nand and Vinod had rushed to the spot but by that time other persons had disengaged the Badaiun people from assaulting the deceased Santosh and they were 4-5 in number and after about 10-15 minutes of their reaching in their shanty along with Santosh, accused persons had again attacked Santosh and when they tried to rescue him, accused also assaulted them causing injuries to him, Rama Nand, Virjan and Vinod. This sequence of events given by him in the Court is in contrast with the version stated by him in Ex. PW-1/A. In cross-examination, he has stated that statement made by him in the Court is correct and the statement made contrary in statement recorded under Section 154 Cr.P.C. Ex. PW-1/A, was not made by him. Even if, his explanation is believed by suspecting that PW-14 H.C. Brij Lal had not recorded correct version of his statement in Ex. PW-1/A, his testimony is not reliable being not corroborated, rather contradicted by other evidence on record.

25. As per prosecution story, PW-2 Vinod Chaudhary was along with deceased Santosh throughout the episode. Contrary to version of PW-1 Bitu Chaudhary, deposed in the Court that Santosh was lifted from Bowali (water source) to Shanty after the first part of the episode, he has stated that when he rushed to the spot along with PW-1 Bitu Chaudhary, Virjan and Rama Nand, other person had already disengaged the quarrel and thereafter deceased Santosh made a call to his brother PW-4 Prem Ghund and informed that he was not allowed to fetch water from the spring, whereupon PW-4 Prem Ghund advised him to take water from other water source whereupon he (PW-2) and Santosh went to another water source, which was adjacent to the first one and after fetching water in the remaining cans, they picked up those cans with bamboo stick and started coming back to their shanty and when they reached near shanty, accused Vijay snatched bamboo stick being from them and assaulted both of them, i.e. PW-2 Vinod Chaudhary and deceased Santosh and thereafter PW-1 Bitu Chaudhary, Rama Nand and Virjan arrived there, but remaining accused persons, who were called telephonically by accused Vijay and Vinod, also reached there and assaulted them with kick, fist and stick blows and due to injuries sustained by Santosh, he fell down. Thereafter PW-4 Prem Ghund was called and Santosh was taken to Hospital Parwanoo, wherefrom he was referred to Chandigarh where he died.

26. PW-3 Ram Dev has a different story to tell. According to him, on the date of incident at about 8:00 P.M., when he was changing his clothes in his shanty, he heard a noise and found that accused Vinod and Sonu were quarreling with deceased and they had also given 2-3 slaps to him and on advising them by him not to quarrel, accused Vinod and his five companions dragged him out of his Shanty and also assaulted him, as a result whereof he fell down and became unconscious. As per his deposition, accused Vinod had

hit him with stick and also had given a blow with bamboo stick on the head of deceased Santosh. He has further stated that after about three hours of beating he went to Police Station whereafter, in the Hospital, he was medically examined. This witness was declared hostile on the claim of Public Prosecutor that he had concealed some material facts and thereafter he was subjected to cross-examination by learned Public Prosecutor and was confronted with his earlier statement Ex. PW-16/D recorded under Section 161 Cr.P.C., wherein it is recorded that Sher Singh, Anup, Parmod and Sonu were beating deceased Santosh and Bitoo. He has stated that he was not having any knowledge of making any such statement to the police, as at that time, he was not in full senses. In cross-examination by defence, he has stated that he had not seen any incident taken place near the Shanty of Santosh and he had identified accused Vinod and Sonu by their voice at the time when they were quarreling with deceased, however, he has not seen any one assaulting deceased Santosh.

27. PW-11 Harinder Yadav is telling another story. According to him, on the date of incident at about 8:00 P.M., when he was in his Shanty, he heard some commotion from outside, whereupon he came out and saw that accused persons were assaulting deceased Santosh with kick, fist and sticks blows. PW-1 Bittu was also assaulted by them. When he (PW-11) intervened, accused persons had also assaulted him causing injuries on his head and due to beating, Santosh fell down on the earth and became unconscious. It is claimed by this witness that he could identify accused only by their face. According to him accused persons had fled away from the spot after leaving behind the sticks. In cross-examination, he has further stated that deceased Santosh, PW-1 Bitu Chaudary and one another person used to reside with him in the same Shanty, wherein no electricity light was available. He has further stated that on account of darkness outside the Shanty, it was not possible to recognize a person and whosoever had come in front of him, he had recognized him.

28. There are contradictions in the versions of the spot witnesses with regard to incident. According to PW-1, the incident had taken place at water source and thereafter near the Shanties, when they had brought Santosh to the Shanty. Whereas, according to PW-2 Vinod Chaudhary, after the first part of incident at water source, PW-3 Prem Ghund was contacted by deceased Santosh and on his advise they went to another water source and after filling up their cannies, they came back to the Shanty and on the way both of them i.e. PW-2 Vinod Chaudhary and Santosh were assaulted, which falsifies the claim of PW-1 that immediately after the first part of incident Santosh was lifted to Shanty in unconscious state. According to PW-2, Santosh had become unconscious after the second assault, when they were coming back to the Shanty with the cannies filled up with water from another source. Whereas PW-1 Bitu Chaudhary is completely silent about fetching of water from second source and assault by accused on PW-2 Vinod and Santosh on the way.

29. The sequence of incident is also contradictory. According to PW-1, immediately after first quarrel at water source, Santosh in an unconscious state was lifted to the Shanty. Whereas according to PW-2 after the first part of incident, he and Santosh had gone to another water source. In his statement Ex. PW-1/A, PW-1 Bitu Chaudhary, has stated that he had seen 4-5 persons, namely, Vijay, Sonu, Anup and Vinod, who were of Badaiun, giving fist and kick blows to Santosh. In the Court he has stated that prior to his arrival on the spot, the quarrelling parties were disengaged by the persons present there and the first episode was over before his arrival on the spot along with Virjan, Rama Nand and Vinod Chaudhary. Whereas, according to PW-2, only two persons, namely, Vinod and Vijay were there, who assaulted Santosh on the Bowri. Whereas according to PW-3 Ram Dev, Vinod and Sonu were quarrelling with the deceased.

30. In his statement, PW-3 Ram Dev has nowhere uttered even a single word that other accused had also assaulted Vinod Chaudhary or deceased Santosh. All other witnesses, except PW-4 Prem Ghund, are completely silent about the name of Sher Singh, whereas PW-4 Prem Ghund has stated that on the way to the hospital, deceased Santosh had informed him that Sher Singh and other persons had assaulted him. Though PW-6 Raj Kumar has endorsed this statement, however, it is matter of fact that none of the spot witnesses i.e. PW-1 Bitu Chaudhary, PW-2, Vinod Chaudhary and PW-3 Ram Dev had ever taken the name of accused Sher Singh as assailant, who attacked the deceased Santosh. On the contrary, PW-3 Ram Dev has categorically stated that accused Vinod had given bamboo stick blow to deceased on his head. He has not named Sher Singh as assailant who had beaten the deceased Santosh. PW-1 Bitu Chaudhary and PW-2 Vinod Chaudhary have also not disclosed his name in their statements as an assailant. It is also again an inconsistency about the names of assailants in the statements of these witnesses.

31. Claim of prosecution is that no other person was present on the spot. However, it is falsified by depositions of PW-1 Bitu Chaudhary and PW-2 Vinod Chaudhary, made on oath in the Court, wherein they have specifically stated that when PW-2 Vinod Chaudhary rushed back to the spot of incident along with PW-1 Bitu Chaudhary, Virjan and Rama Nand, they found that other persons present there had already disengaged the persons quarreling with deceased Santosh, which indicates that other persons were also present on the spot.

32. In his statement Ex. PW-1/A, PW-1 Bitu Chaudhary, had prayed for his medical examination along with PW-11 Harinder Yadav only being injured persons in the incident. He is silent about PW-3 Ram Dev as well as also about Virjan and Rama Nand. Whereas, in his deposition in the Court, he has claimed that Rama Nand and Virjan were also assaulted along with him and PW-2 Vinod Chaudhary and all of them had sustained injuries. PW-2 Vinod Chaudhary, though, has claimed that he was assaulted, but he is silent about receiving injuries, if any, by him. He is also silent about the beatings given by accused to PW-2 Vinod Chaudhary and Rama Nand. Though he has claimed that he was also beaten along with Santosh, but he never presented himself for medical examination at the time of recording Ex. PW-1/A or even thereafter at any point of time. Presence of PW-2 Vinod Chauhdary has also not been claimed on the spot in Ex. PW-1/A, whereas it is claim of prosecution that PW-2 Vinod Chaudhary had witnessed the entire incident, as he was accompanying deceased Santosh since beginning till last when he fell unconscious.

33. Though, it is true that statement Ex. PW-1/A would give only gist of the incident, however, at the same time it should give complete minimum details of incident. In Ex. PW-1/A, it has been categorically stated that deceased Santosh alone had gone to fetch water and it is completely silent about the presence of PW-2 Vinod Chaudhary, either in Shanty or as a companion with deceased Santosh for fetching water. Had he been accompanying the deceased, he must have received some injury. It is claimed by PW-1 Bitu Chaudhary and PW-2 Vinod Chaudhary that PW-2 was also beaten by accused persons, but prosecution has placed on record MLCs Ex. PW-8/C, Ex. PW-8/M, Ex. PW-8/L and Ex. PW-8/P only belonging to deceased Santosh, Bitu Chaudhary, Harinder Yadev and Ram Dev, respectively. As per contents of daily station diary report and statement Ex. PW-1/A and also in the deposition of PW-14 H.C. Brij Lal and PW-16 Pritam Singh, there is no reference of receiving injuries by PW-2 Vinod Chadhary and other two persons, namely, Virjan and Rama Nand, which casts doubt, not only about the presence of PW-2 Vinod Chaudhary on the spot, but credence of the prosecution claim. PW-1 Bitu Chaudhary had not disclosed that PW-3 Ram Dev was also beaten in the incident and in his deposition in the Court also he has not mentioned his name anywhere in his statement. He has named Virjan, Rama

Nand and Vinod Chaudhary. Interestingly, neither these two persons, Virjan and Rama Nand, nor Ram Dev were claimed to be present on the spot and injured in Ex. PW-1/A.

34. Prosecution has, not only, failed to produce the details of injury or MLC, if any of Virjan and Rama Nand on the record, but also the MLCs of the accused persons after conducting their medical examination on the very next day after their arrest. It is stated in his deposition in the Court by PW-16 Inspector Pritam Singh Parmar that accused persons were medically examined, but he has failed to give any satisfactory explanation for not producing their MLCs in the Court during trial in evidence. Withholding the material piece of evidence is also fatal to the prosecution case, as on the basis of injuries received by the accused, if any, it would have thrown light on the reality of the incident.

35. Another fact which in isolation may not be so glaring, but in view of the aforesaid contradictions and inconsistencies in the deposition of the eye witnesses, would also have impact on the fairness and veracity of prosecution story. In station diary report recorded at 12.30 A.M. (Ex. PW-13/E), dated 30.5.2014, PW-14 H.C. Brij Lal has recorded that Medical Officer had told MLCs of injured examined by him would be issued in the morning, whereas from the MLC of deceased Santosh Ex. PW-8/C, MLC of Harinder Yadev Ex. PW-8/L and that of PW-1 Bitu Chaudhary Ex. PW-8/M, these persons were brought to the hospital at 9:10 P.M. and examined at the same time and thereafter date and hour report send to the police has been mentioned as 29.5.2014 at 9:30 P.M. Meaning thereby, that MLCs were issued immediately after examination during night on 29.5.2014. It creates doubt about presence of PW-14 H.C. Brij Lal in the Hospital. It is also noticeable that PW-3 Ram Dev was medically examined at 1:15 A.M. and his MLC was also handed over to the police on 30.5.2014 at 2:55 A.M. Meaning thereby that all the MLCs had been issued during night itself at the time of examination of injured. It also falsifies the contents of daily station diary report Ex. PW-13/E.

36. As per prosecution case as recorded in daily station diary Ex. PW-13/C at 10:05 P.M., on the basis of preliminary inquiry and secret information, names of the assailants were in the knowledge of PW-14 H.C. Brij Lal and also PW-16 Inspector Pritam Singh however, in the statement PW-1/A recorded at 11:25 P.M., name of assailants have not been disclosed and on the basis of said statement FIR was registered at 11:35 P.M. against unnamed persons. It is also evident from daily station diary Ex. PW-13/H that at the first instance Sonu Diwakar, S/o Sh. Hukam Singh was apprehended by the Police, however, later on another Sony S/o Bhopal was also apprehended.

37. As per prosecution case Santosh was shifted to hospital by PW-4 Prem Ghund on the Motor Cycle of PW-6 Raj Kumar, whereas PW-1 Bitu Chaudhary in his statement is silent about the arrival of PW-4 Prem Ghund and PW-6 Raj Kumar on the spot, but has stated that they brought Santosh to the hospital at Parwanoo. PW-2 Vinod Chaudhary has stated that they called Prem Ghund and thereafter they took Santosh to hospital. PW-3 Ram Dev has not stated anything in this regard. According to PW-6 Raj Kumar when he reached on the spot, PW-1 Bitu Chaudhary was lying on the side of Shanty, whereas PW-1 Bitu Chaudhary has not stated so. It creates doubt about the arrival of PW-4 Prem Ghund along with PW-6 Raj Kumar on the spot and therefore, it would not be safe to believe the version of PW-4 that deceased Santosh, on the way to the hospital, has told him that Sher Singh and other persons had assaulted him.

38. In the aforesaid circumstances, there are three stories on record, first one stated in Ex. PW-1/A and second is narrated in the deposition of PW-1 Bitu Chaudhary in the Court and third story has been propounded by PW-2 Vinod Chaudhary. PW-3 Ram Dev and PW-11 Harinder Yadav, though has claimed victim in the incident and have asserted

their presence on the spot, but in their deposition in the Court they have not narrated the incident, as has been narrated by PW-1 Bitu Chaudhary either in Ex. PW-1/A or in his deposition in the Court or PW-2 Vinod Chaudhary in his deposition in the Court. In cross-examination on behalf of accused persons, except accused Parmod, this witness has stated that many persons had gathered on the spot at the time of incident. All these witnesses have been examined as spot witnesses, therefore, it is difficult to believe the manner and the sequence of events of the alleged incident, as propounded by the prosecution, more particularly when there are irreconcilable inconsistencies with regard to manner in which incident had happened, also presence of assailants at two places of alleged incident and also that of other independent persons. There is variance in the examination-in-chief and cross-examination of PW-1, as in his examination-in-chief he has categorically stated that before his arrival at the water source at the time of first part of incident, other persons, present there, had disengaged the quarreling persons, whereas in his cross-examination he has stated that there was no other person at the water spring at the time of first part of incident. Version of PW-2 Vinod Chaudhary is also similar.

39. From the trend of cross-examination, it appears that injuries suffered by deceased Santosh and other witnesses have not been disputed and accordingly there is no dispute with respect to MLCs of deceased Santosh, PW-1 Bitu Chaudhary, PW-3 Ram Dev and PW-11 Harinder Yadav and also the post mortem report of the deceased Santosh. However, the manner in which the complainant party received the injuries has been disputed. As discussed supra, spot witnesses, instead of clarifying the facts, have created confusion.

40. In his statement Ex. PW-1/A, PW-1 Bitu Chaudhary has clearly stated that he did not know the names of assailants, but could identify them by face. In his deposition in the Court, in cross-examination, he has admitted that on account of darkness, it was not possible to identify the persons who were assaulting Santosh, with further clarification that the names of the accused had been told to him by PW-4 Prem Ghund and not by the police. Whereas PW-2 Vinod Chaudhary who also claimed to be residing with PW-1 and Santosh in the same Shanty, has stated in the court that he knew the names of Vijay and Vinod prior to the incident, as they were residing in adjacent Shanty. It is difficult to believe that PW-1 Bitu Chaudhary and deceased Santosh were residing in the same Shanty adjacent to the Shanty of Vijay and Vinod, were not knowing their names. PW-2 Vinod Chaudhary in his cross-examination has stated that he had not seen the incident which had taken place near the Shanty of Santosh and further that he had identified accused Vinod and Sonu throguh their voices heard at the time when they were quarreling with deceased, but he has not seen any one assaulting Santosh. If PW-4 is believed that deceased Santosh had disclosed that Sher Singh and other persons had assaulted him, then at least name of Sher Singh must have been known to the complainant party, however, at the time of recording statement Ex. PW-1/A at 11:25 PM in the hospital, PW-1 had not disclosed the name of any person, rather he had stated that he did not know the names. In daily station diary, recorded at 10.05 P.M. on the basis of information supplied by PW-14 H.C. Brij Lal, it has been recorded by PW-16 Inspector Pritam Singh that on the basis of cursory inquiry and secret information Sher Singh, Sonu, Anup, Parmod, Vinod, Vijay and others were involved in beating Santosh Kumar. When police, on the basis of inquiry, was knowing the names of assailants at 10.05 P.M. it is difficult to believe that PW-1 Bitu Chaudhary who happened to be residing in the adjacent Shanty of the named accused, was not knowing their names, but knowing the assailants by face only. Therefore, it creates doubt about the involvement of the accused in the incident.

41. Prosecution has also relied upon seizure memos Ex. PW-2/A, Ex. PW-2/B, Ex. PW-2/C, Ex. PW-2/D and Ex. PW-3/A and identification memo Ex. PW-2/E prepared on the basis of alleged recovery of weapon of offence and identification of the spot at the instance of accused, when they were in custody. These recoveries have been claimed to have been effected on the basis of statement(s) recorded made by accused during their police custody, but no such statement(s) in accordance with the provisions of Section 27 of Evidence Act, if any, has seen the light of day. So far as the recovery memos are concerned, it is pertinent to notice that there are three dates of recovery of weapon of offence i.e. 10.6.2014, 2.7.2014 and 16.8.2014, but in all three dates witness PW-7 Dheeraj Kumar is a common witness and he has categorically admitted that all the three times, he was called by the Police and in his cross-examination, he has stated that all these weapon of offences i.e. bamboo sticks were produced by accused from their shanties and prior to that Police had already visited the site of incident for many times and all the shanties were adjacent to the Shanty of PW-4 Prem Ghund and Police had also carried out search of these shanties. He has further stated that all the recovery memos and parcels of articles were signed by him in Police Station. Another witness to recovery memo Ex. PW-2/A, Ex. PW-2/B and Ex. PW-2/C was Kanya Lal, who has not been examined. Therefore, these recovery/seizure memos can also not be relied upon for establishing the case of the prosecution.

42. From the evidence on record, it can be said that deceased Santosh has expired on account of injuries received in the incident of quarrel. However, what was real cause of injuries, has not been proved on record. It is not established on record beyond reasonable doubt that it is accused who were assailants and none else, as the evidence of eye witnesses is neither convincing nor reliable or cogent. For such sketchy evidence on record, accused persons cannot be held guilty only on the basis of suspicion. Contradictions, inconsistencies and discrepancies in the deposition of spot witnesses are establishing three parallel stories with respect to manner and sequence of events of the alleged incident and as such they are major in nature, which are demolishing the geneses of prosecution story, rendering the prosecution case unbelievable. The evidence on record is depicting possibility of more than one story, creating doubt on prosecution version and leading to the benefit of doubt in favour of appellants.

43. In view of above discussion, we feel that prosecution has failed to prove the guilt of the accused persons beyond reasonable doubt by leading cogent, convincing and tangible evidence. The trial court has not considered the aforesaid aspect of the evidence on record and therefore, has wrongly convicted the accused persons. Therefore, impugned judgment and order dated 21.1.2017, convicting and sentencing the accused, passed by learned Additional Sessions Judge II, Solan is set aside and the accused are acquitted from the charges framed against them. They shall be released forthwith, if not required in any other case. The appellants shall also be entitled to refund of fine amount, if deposited. Release warrants be prepared accordingly. Record be sent back to the trial Court.

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

Municipal Corporation, Shimla. …Appellant.
Versus
Sh.Surinder Kumar. …Respondent

RSA No. 162 of 2016

Date of decision: 28.6.2019

Indian Contract Act, 1872 - Section 70– Quasi-contract– Duty to pay –Money suit for execution of additional work– Trial court decreeing money suit of plaintiff by holding that he had executed additional work over and above what was awarded and he was entitled to recover amount for same– First appellate court upholding decree– RSA – Held, the then junior engineer, specifically admitting of plaintiff having executed additional work as per directions of executive engineer – And that such work could not be awarded through tender due to enforcement of model code of conduct - Nor the could be entered into measurement book – Additional work was in continuity of awarded work – Execution of additional work not denied even by defendant- Work not of gratuitous nature – Payment of said work cannot be denied on ground that work was not awarded to him through tender process. (Paras 7 to 9)

For the Appellant: Mr.Naresh Gupta, Advocate.
For the Respondent: Mr.Ashok Sood, Senior Advocate, with Mr.Khem Raj, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur J. (Oral).

In present case a suit, filed by respondent/plaintiff, for recovery of Rs.6,13,100/- on account of amount due for the additional works done by him during performing the works awarded to him vide letters No. MCS/XEN/3730/RB/08-2400 and MCS/XEN/3730/RB/08-2402 dated 5.12.2008, has been decreed by learned Civil Judge (Senior Division), Shimla vide judgment dated 18.11.2014, whereby plaintiff was held entitled to recover Rs.4,50,000/- along with costs of Rs.1100/- and interest @ 8% per annum from the date of filing the suit till realization of entire decreetal amount.

2. The judgment and decree passed by learned trial Court was assailed by both the parties. Appellant-Defendant had preferred Civil Appeal under Section 96 of the Code of Civil Procedure, whereas respondent/plaintiff had filed Cross-Objections therein for grant of interest @12% per annum, as claimed in the plaint, instead of awarded interest @8% per annum. The appeal as well as cross-objections were dismissed by learned Additional District Judge-II, Shimla vide common judgment dated 2.1.2016.

3. Thereafter appellant/Municipal Corporation has filed the present appeal, whereas respondent/plaintiff has not assailed the dismissal of his claim qua the interest part.

4. Present appeal was admitted vide order dated 5.7.2016 on the following substantial questions of law:-

> *"1. Whether the courts below have committed illegality by decreeing the suit when there was no proof/evidence with regard to execution of additional works by plaintiff.*
>
> *2. Whether the courts below have failed to appreciate that the suit was bad for non-joinder of necessary parties.*

Question No. 1

5. Perusal of record reveals that plaintiff has demonstrated the additional works done by him with specific details in para 1 of the plaint, claiming that the same was performed by him in addition to awarded work on the request of Executive Engineer of the Municipal Corporation. In the written statement, execution of additional works was denied for want of evidence on record of the Municipal Corporation.

6. Plaintiff in his examination-in-chief, filed in the Court by way of affidavit, re-iterated the pleadings with respect to the execution of additional work. In his cross-examination, nothing impeaching his veracity with respect to the said claim has been brought on record. Respondent/plaintiff has also examined PW-2 J.K. Mahendru to substantiate his claim, who has proved on record the assessment and photographs of the additional work done on spot by respondent/plaintiff. From the trend of cross-examination of the said witness, it is apparent that only thrust of appellant/defendant Municipal Corporation was on questioning existence of award/tender of additional work claimed to be performed by respondent/plaintiff, but not performance of that work.

7. PW-3 Ajeet Kumar examined by respondent/plaintiff in support of his claim was the concerned Junior Engineer of the appellant/defendant Municipal Corporation at the relevant point of time. In his statement, he has deposed that entire awarded work was completed by the respondent/plaintiff under his supervision and thereafter respondent/plaintiff had also performed additional works at the instance of Lalit Bhushan, the then Executive Engineer of the Municipal Corporation. He has endorsed the performance of works by respondent/plaintiff, as claimed in the plaint, by giving details thereof in his statement. He has further clarified that at the time of performance of the said works, Model Code of Conduct was in force due to elections and for that reason during that period neither tender could have been floated nor the works could have been awarded and further that for this reason measurement of this additional work was also not entered in books. He has also deposed that additional works are also got done through the contractors on the site in continuity of the awarded works and formalities, including assessment of the said works, are completed later on and he has asserted that respondent/plaintiff has completed the additional works on the spot. In his cross-examination also, lack of award of additional works has been pressed by the Municipal Corporation, but there is no suggestion in cross-examination, denying the execution of the additional works, as asserted by this witness in his examination-in-chief. PW-4 Sh. Amit Vaid is local resident of the area. He has also endorsed the execution of works on the spot.

8. Appellant/defendant-Municipal Corporation has examined only one witness DW-1 Sanjeev Dharma, Junior Engineer of Municipal Corporation. In his examination-in-chief he has deposed to the extent that no additional work was allotted to the respondent/plaintiff and additional work, claimed in plaint to have been done by him, was never awarded to him and for the awarded work, which was completed by the respondent/plaintiff, entire payment was made. However, not only in cross-examination, but in examination-in-chief also, he has categorically stated that he had never visited the spot. In his cross-examination he has further stated that it was only the concerned Junior Engineer who could have made the statement about the fact that as to whether additional work was performed on the spot or not.

9. From the above discussion, it is evident that there is ample evidence on record so as to establish that additional work was performed by the plaintiff. Not only this, the concerned official i.e. PW-3 Ajeet Kumar has categorically stated that the additional work was performed by respondent/plaintiff at the instance of the then Executive Engineer, Lalit Bhushan. Therefore, it cannot be said that additional work was done by respondent/plaintiff at his own. Otherwise also, the respondent/plaintiff was not going to

be benefited in any manner by doing the additional work done, which was not awarded to him and by taking risk of investing money without award. There is specific allegation that the work was done at the instance of concerned Executive Engineer, but the Municipal Corporation has not come forward with the plea that no such work was ever asked to be performed by the said Executive Engineer nor the said Officer has been examined as a defence witness.

10. From above discussion, it is evident that plea of appellant that Courts below have committed illegality by decreeing the suit without having any proof or evidence on record of execution of additional work by the plaintiff, is not sustainable and the substantial question of law is decided accordingly against the appellant./defendant-Municipal Corporation.

Question No. 2.

11. The second substantial question of law is that the suit was bad for non-joinder of necessary parties. In the written statement, no objection was ever taken to that effect, nor it has been brought in the notice of the trial Court that who was the necessary party for proper and effective adjudication of the suit. However, in appeal, in ground No. 2, this issue was raised for the first time and in present second appeal in ground 6(f), it has been stated that respondent/plaintiff has failed to array the concerned officials/officers of the Corporation as party at whose instance the respondent executed the extra works. It is settled law of land that the ground, which has not been raised in the trial Court, is not available to the appellant in appeal, however, a legal question can be raised at any stage, including in appeal. But in case, this objection is considered even at this stage, then also the same is not sustainable. Each official/officer, under whose supervision work was done, is not necessary to be made a party to the suit, where the work was being performed by respondent/plaintiff for and on behalf of Municipal Corporation and amount is to be paid by Municipal Corporation and Municipal Corporation has been sued through Commissioner, which includes the entire official machinery of the Municipal Corporation. Municipal Corporation is responsible for omission and commission of its employees related to their performance during course of their employment. Such officer/official would have been necessary party in case the respondent/plaintiff would have set up a specific claim against them also, in their personal capacity, which is not a case in present lis. There is no non-joinder of necessary party as the suit can be and has been adjudicated and decided effectively and completely by the trial Court in presence of necessary parties to the suit. It is a dispute between plaintiff and defendant wherein claim has been put forth against defendant and none else. Therefore, point raised regarding non-joinder of necessary party is not sustainable. Therefore, substantial question of law No. 2 is also decided against the appellant/defendant.

12. In view of aforesaid discussion, appeal is dismissed, being devoid of any merits. Record be sent back.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

O.C. Thakur …..Petitioner

Versus

Central Administrative Tribunal & others …Respondents

CWP No. 11695 of 2011
Date of decision: 05.07.2019

Constitution of India, 1950- Article 311- Fundamental Rules,1922 – Rule 29 (1)- Penalty of reduction to lowest stage in existing time scale of pay till retirement – Whether can be imposed ? - State proposing penalty of censure on petitioner, an officer of Indian Police Service – Union Public Service commissioner disagreeing with proposal and recommending reduction to lowest stage in existing time scale of pay till retirement – State imposing penalty accordingly – Central Administrative Tribunal dismissing application of petitioner – Petition against –Held – Order directing reduction to lower stage in time scale of pay of govt. servant as a measure of penalty should state the period for which it shall be effective and whether on restoration, it will operate to postpone future increments if so, to what extent -Reduction to lower stage in time scale of pay is not permissible either for unspecified period or as a permanent measure – Reduction in time scale of pay up to date of retirement is actually a permanent measure. (Paras 21 & 24)

Constitution of India, 1950– Article 320 (3) (c) – Role of Union Public Service Commission in disciplinary matters – Nature of – Held, role of Union Public Service Commission is to find out whether conclusion arrived at by Competent Authority is fair or arbitrary and unjust and to tender necessary advice – Union Public Service Commission cannot independently come to different conclusion as though they have arole of disciplinary authority. (Para-17)

CCS (CCA) Rules, 1965- Disciplinary proceedings on court orders– Effect– Held, direction issued by court while hearing criminal appeal to initiate disciplinary proceedings for major penalty cannot be taken to be a finding of guilt of the delinquent– If same it is to be taken as findings of guilt, then there is no necessity to hold disciplinary proceedings at all.(Para 18)

Cases referred:

State of Uttar Pradesh vs. Manbodhan Lal Srivastava, AIR 1957 SC 912
Union of India and another vs. T.V. Patel, 2007(4) SCC 785

For the petitioner :	Mr. K.D. Shreedhar, Senior Advocate with Ms. Shreya Chauhan, Advocate.
For the respondents:	Mr. Rajesh Kumar Sharma, Assistant Solicitor General of India, for respondents No. 1 to 3.
	Mr. Ashok Sharma, Advocate General with M/s Adarsh Sharma and Ritta Goswami, Additional Advocate Generals, for respondents No. 4 & 5.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice *(Oral)*

Aggrieved by the dismissal of his application by the Central Administrative Tribunal, challenging an order of penalty of reduction to the lowest stage in the time scale of pay till the date of retirement, an Officer of the All India Police Services, has come up with the above writ petition.

2. Heard Mr. K.D. Shreedhar, learned Senior Counsel for the petitioner, Mr. Rajesh Kumar Sharma, learned Assistant Solicitor General of India for respondents No. 2 &

3 and Ms. Ritta Goswami, learned Additional Advocate General appearing for respondents No. 4 & 5.

3. The petitioner was selected and appointed to the Indian Police Services in the year 1988. On 11.06.2008, he was served with a charge-sheet, alleging that while he was working as Superintendent of Police, Mandi in the year 1994, he failed to take congnizance of an offence of rape allegedly committed by the Station House Officer, Sadar and also that he discouraged the prosecutrix from getting herself medically examined.

4. An enquiry followed, in which all but the 3rd charge, were held not proved. At this juncture, it will be useful to extract the five Articles of Charges framed against the petitioner, which read as follows:-

> *"1. Whether he has discouraged Smt. Nirmala Devi from getting herself medically examined immediately?*
>
> *2. Whether he failed to discharge his lawful duties and responsibilities as prescribed under Rule 16.38 of the PPR exercising proper control and supervision over subordinate?*
>
> *3. Whether he failed to exercise his power under Section 36 of Cr.P.C.?*
>
> *4. Whether he failed to comply with the provisions of Rule 3.3(1) of All India Service Conduct Rules?*
>
> *5. Whether he had kept Smt. Nirmala Devi (prosecutrix) waiting outside his office on 19.9.1994 for about 3 hours upto 5 P.M.?"*

5. The petitioner was held guilty of the 3rd Charge alone and Charges 1, 2, 4 & 5 were held not proved. After supplying a copy of the Enquiry Report and calling for his further representation, the Competent Authority, namely the 3rd respondent, took a provisional decision to impose a minor penalty of Censure. This was in view of the fact that even Charge No. 3 was held only partly proved and not fully proved.

6. The proposal of the 3rd respondent-State Government was forwarded to the Union Public Service Commission, which is the 2nd respondent herein, for their concurrence. The Union Public Service Commission disagreed with the proposed penalty and recommended the penalty of reduction to the lowest stage in the existing time scale of pay till the age of retirement. Accordingly, the punishment was imposed by the order dated 06.03.2010. The petitioner subsequently gotsuperannuated on 30th November, 2010.

7. Challenging the said penalty, the petitioner filed Original Application No. 235-HP of 2010 on the file of the Central Administrative Tribunal. The Tribunal dismissed the application on the ground that the Rules of Procedure had been followed and that there was also no violation of the principles of natural justice. Aggrieved by the said order, the petitioner has come up with the above writ petition.

8. It is relevant to note that the complaint of the lady, which formed the basis for disciplinary proceedings, resulted in a Criminal Case against the Station House Officer, Mandi. It also resulted in his conviction. When the matter was taken on appeal to the High Court, the High Court made certain observationsabout the failure on the part of the petitioner to discharge his duties as a Superior Officer. It was the said observation of the High Court that led to major penalty proceedings being initiated against the petitioner. This has perhaps weighedin the mind of the Central Administrative Tribunal in confirming the major penalty imposed upon the petitioner.

9. But *as*rightly pointedout by the learned Senior Counsel for the petitioner, Charges 1, 2, 4 & 5 are more grievous in nature than the 3rd Charge. The Enquiring Authority held these four

Charges not proved. Neither the Disciplinary Authority nor even the Union Public Service Commission disagreed with the findings of the Enquiry Officer with respect to Charges 1, 2, 4 & 5. As an employer, the Government had the power and authority to disagree with the findings of the Enquiry Officer even in respect of Charges 1, 2, 4 & 5, but they did not do so. A look at the recommendations of the Union Public Service Commission would show that even the Union Public Service Commission did not come to a different conclusion with respect to Charges 1, 2, 4 & 5.

10. Once the findings of the Enquiry Officer with respect to more grievous Charges have been accepted by the employer and not even found fault by the Union Public Service Commission, then the only question to be considered was as to whether the penalty proposed was proportionate or disproportionate to the Charge held proved.

11. Let us now come to the findings of the Enquiry Officer with respect to Charge No. 3. The findings, extracted in the order of the Central Administrative Tribunal, read as follows:-

> "(c) *As per the section 36 Cr.P.C. Police Officers superior in rank to an officer in charge of a police station may exercise the same powers throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. The Charged Officer Shri O.C. Thakur, soon after hearing the complainant has taken immediate action by speaking to the Incharge, Police Post, Mandi on telephone and directed him to register a case as soon as the complainant reports at the police Post Mandi.*
>
> *However, nothing would have stopped the SP from taking recourse to Section 36 Cr.P.C. and register a case himself against the SHO Sadar, Mandi. Nevertheless he has taken all steps to ensure that the case is registered against the SHO and informed the DM requesting him to initiate action under 16.38 PPR."*

12. Considering the gravity of the misconduct arising out of Charge No. 3, the Competent Authority, namely the 3rd respondent, chose only to impose a minor penalty of Censure. A look at the recommendations of the Union Public Service Commissioner would show that the Union Public Service Commission did not even examine the correctness of the conclusion reached by the State Government.

13. The recommendations made by the Union Public Service Commission by its letter dated 25.11.2009, comprises of six paragraphs. The second paragraph extracts the Charges against the petitioner. Sub paragraph (1) of paragraph 2 gives an indication of the statement of imputations of misconduct. The 3rd paragraph records as to what happened in the Enquiry. The 4th paragraph, which comprises of six sub-paragraphs, records the statements made by various witnesses in the course of the Enquiry, the conclusion reached, the observations of the High Court in the Criminal Appeal etc. The only portion of the recommendations of the Union Public Service Commission, where an independent analysis of the whole case could be found, are in Paragraphs 4.6 and 4 (after paragraph 4.6, the next paragraph has been numbered again as Paragraph 4, perhaps by typographical mistake). These two paragraphs, containing the recommendations dated 25.11.2009 of the Public Service Commission, read as follows:-

"4.6 The Commission have carefully examined the records of the case including court orders, the IO's report representations made by the MOS, DA's comments and other related documents to come to the conclusion that the MOS should have taken recourse to Section 36 Cr.P.C. and himself had registered a case against the accused SHO, PS, Mandi instead of directing the victim to the Police Post, Mandi. The MOS was obliged by the spirit of Section 36 Cr.PC to register a case and to this extent MOS is guilty of component-3 of the Article of charge.

4. In the light of the observations and findings as discussed above and after taking into account all other relevant aspects of the case, the Commission consider that the ends of justice would be met in this case if the penalty of reduction to the lowest stage in the existing time scale of pay till the date of his retirement is imposed on the MOS, Shri O.C. Thakur. They advise accordingly."

14. A careful look at the portion of the recommendations of the Union Public Service Commission, extracted above, would show that after concurring with the findings of the Enquiry Officer that Charge No. 3 stood proved, the Union Public Service Commission suddenly jumped to the conclusion in Paragraph No. 4 that a penalty of reduction to the lowest stage in the time scale of pay till the date of retirement had to be imposed. There is no whisper in the entire recommendations of the Union Public Service Commission as to how the decision of the Competent Authority, namely the 3rd respondent, to impose the penalty of Censure was vitiated.

15. The Union Public Service Commission did not come to the conclusion that the gravity of Charge No. 3 held proved against the petitioner was such that it warranted the penalty recommended by them.Therefore, it is clear that instead of acting as an Advisory Authority, the Union Public Service Commission donnedtherole of the Original Authority to independently come to the conclusion. This is not what the Union Public Service Commission is called upon to do.

16. On the role of the Union Public Service Commission, it was pointed out by the Hon'ble Supreme Court in **Union of India and another versus T.V. Patel**, reported in ***2007(4) SCC 785*** that the role given to the Public Service Commission under sub Clause (c) of Clause (3) of Article 320 of the Constitution, was to provide advice to the Government. The question as to whether the consultation with the Commission under Article 320 (3) (c) was mandatory or not and the question whether it is binding or not, fell for consideration before a Constitution Bench of the Hon'ble Supreme Court in **State of Uttar Pradesh versus Manbodhan Lal Srivastava**, reported in***AIR 1957 SC 912***. The Court indicated that if the provisions of Article 320 were of a mandatory character, the Constitution would not have left it to the discretion of the Head of the Executive Government to accept or not to accept the advice of the Commission.

17. Therefore, the role of the Union Public Service Commission is to find out whether the conclusion reached by the Competent Authority was fair, arbitrary or unjust and to tender necessary advice. The Union Public Service Commission cannot independently come to a different conclusion as though, they have the role of the Disciplinary Authority. In this case, the Union Public Service Commission did not consider either the question of proportionality or the question as to whether the Competent Authority was justified in reaching the conclusion to impose the minor penalty of Censure.

18. It is true that while dealing with Criminal Appeal No. 393/2003**,** a Bench of this Court directed major penalty proceedings to be initiated against the petitioner. But it

does not necessarily mean that either a penalty should invariably be imposedor a major penalty alone should be imposed. The direction issued by this Court in Criminal Appeal No. 393/2003 to initiate major penalty proceedings against the petitioner cannot be taken to be a finding of guilt. If the same is taken to be a finding of guilty, there is no necessity to hold disciplinary proceedings at all. Therefore, the directions issued by this Court while dealing with the Criminal Appeal will not prevent us from independently examining the outcome of the enquiry.

19. In the course of the enquiry, the Enquiry Officer found Charges 1, 2, 4 & 5 not proved. The Disciplinary Authority accepted the findings. Even the Union Public Service Commission did not find fault with the findings of 'not proved' with respect to Charges 1, 2, 4 & 5. Therefore, we are of the considered view that the imposition of the penalty of reduction to the lowest stage in the existing time scale of pay was grossly disproportionate to the only Charge held proved against the petitioner.

20. The Administrative Tribunal, in its order dated 10.12.2010, merely considered the question of violation of principles of natural justice and the adherence to the Rules of Procedure. In fact, the petitioner did not and could not challenge the penalty of Censure. His challenge before the Tribunal was the imposition of the penalty recommended by the Union Public Service Commission, on the ground that it was disproportionate. On this aspect, the Tribunal did not dwell deep upon. Therefore, the order of the Tribunal calls for interference.

21. An important aspect, that has been lost sight of both by the Government and by the Central Administrative Tribunal, is that under Fundamental Rule 29(1), the Authority ordering reduction to a lower stage in the time scale of pay of a Government servant, as a measure of penalty, should actually state the period for which it shall be effective and whether on the restoration, it will operate to postpone future increments and if so, to what extent. F.R 29(1) reads as follows:

> "*F.R. 29.(1) If a Government servant is reduced as a measure of penalty to a lower stage in his time-scale, the authority ordering such reduction shall state the period for which it shall be effective and whether, on restoration, the period of reduction shall operate to postpone future increments and, if so, to what extent.*"

22. In this case, the order of penalty is dated 06.03.2010. The petitioner retired on reaching the age of superannuation on 30.11.2010. The date, on which his increment was to fall due, was not even noted in the order dated 06.03.2010. Interestingly, the recommendation made by the Public Service Commission is dated 25.11.2009. In the recommendation itself, the UPSC recommended the penalty of reduction to the lowest stage in the time scale of pay till the date of his retirement. On the date on which the UPSC made its recommendation, namely 25.11.2009, the petitioner was left with service for a full period of one year up to 30.11.2010. Therefore, if the intention of the UPSC and that of the State Government was to impose the penalty operative for a period of one year, they must have specified as to what should happen after completion of the period of one year. A penalty of this nature imposed at a time coinciding with the date of retirement of a Government servant, would actually impact the retirement benefits and the pensionary benefits of a Government servant. Therefore, such an impact should have been taken note of by the respondents before passing the orders.

23. Way back in the year 1970, the Government of India issued clarifications on the purport of F.R 29(1) in *D.G., P. & T., Letter No. 6/8/70-Disc. 1, dated the 16th December,*

1970. The first part of the aforesaid letter, which is found in Swamy's Compilation of FRSR reads as follows:

> *"**(2) Reduction to a lower stage in time-scale**.- Doubts have been expressed in regard to the exact interpretation of sub-rule (1) of FR 29. The same are clarified as follows:-*
>
> *(a) Every order passed by a competent authority imposing on a Government servant the penalty of reduction to a lower stage in a time-scale should indicate-*
>
> *(i) the date from which it will take effect and the period (in terms of years and months) for which the penalty shall be operated;*
>
> *(ii) the stage in the time-scale (in terms of rupees) to which the Government servant is reduced; and*
>
> *(iii) the extent (in terms of years and months), if any, to which the period referred to at (i) above should operate to postpone future increments.*
>
> *It should be noted that reduction to a lower stage in a time-scale is not permissible under the rules either for an unspecified period or as a permanent measure. Also when a Government servant is reduced to a particular stage, his pay will remain constant at that stage for entire period of reduction. The period to be specified under (iii) should in no case exceed the period specified under (i)".*

24. It is clear from the above that reduction to a lower stage in a time scale of pay is not permissible either for an unspecified period of time or as a permanent measure. Reduction in the time scale of pay up to the date of retirement is actually a permanent measure.

25. Under the All India Services (Discipline and Appeal) Rules, 1969, a person belonging to the service may be imposed with a penalty of reduction to a lower stage in the time scale of pay for a specified period. Rule 6(1)(v) of the All India Services (Discipline and Appeal) Rules, 1969 shows that reduction to a lower stage in the time scale of pay should only be for a specified period with a further direction as to whether or not, members of the service will earn increments during the period of reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing future increments of his pay. Therefore, a simple order of reduction to lower stage in the time scale of pay until the date of retirement, without considering the impact of such reduction either upon the future increments or upon the pensionary benefits, is not permissible. Even this aspect was not taken into account by the respondents. Therefore, the impugned order of penalty is liable to be set aside.

26. We must also record the fact that the recommendations of the Union Public Service Commission were made on 25.11.2009. The order of penalty pursuant to the recommendations of the Union Public Service Commission was made on 06.03.2010 and the petitioner reached the age of superannuation on 30.11.2010. Therefore, after having completed his tenure in the higher post and towards the end of his career, this penalty of reduction to the lowest stage in the time scale of pay came to be issued.

27. Accordingly, the writ petition is allowed and the impugned order dated 10.12.2010 (Annexure P-17) of the Central Administrative Tribunal is set aside. The application filed by the petitioner in OA No. 235-HP of 2010 shall stand allowed and the order of penalty dated 06.03.2010 (Ext. P-9) is also set aside. The Competent Authority

shall recalculate the difference in salary payable to the petitioner, on account of the impugned order being set aside. The Competent Authority shall also recalculate the terminal and the pensionary benefits payable as a result of this order and shall disburse all the benefits within three months from the date of receipt of a copy of this order.

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

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

Gurbachan Singh …Petitioner.
Versus
Himachal Pradesh State Co-Operative Bank Limited …Respondent

Cr. Revision No. 192 of 2018
Reserved on: 25.6.2018
Date of decision: 8.7.2019

Code of Criminal Procedure, 1973- Section 391- Additional evidence at appellate stage– Adduction of– Grounds– Held, adduction of additional evidence at appellate stage may be allowed only for serving ends of justice– Provision is not intended to remedify negligence or laches of a party– Appellate court cannot allow leading of such evidence at appellate stage where party had opportunity to adduce it before trial court. (Para 14)

Cases referred:
Abdul Latif and others vs. State of Uttar Pradesh, (1978) 1 SCC 466
Brig. Sukhjeet Singh (Retd.) MVC vs. The State of Uttar Pradesh and others, 2019(2) Scale 104
Gaurav Kumar alias Monu vs. State of Haryana, (2019) 4 SCC 549
Rajeshwar Prasad Misra vs. The State of West Bengal and another, AIR 1965 SC 1887

For the Petitioner: Mr.Sandeep Chauhan, Advocate.
For the Respondent: Mr.Sushant Vir Singh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

This petition has been preferred against the impugned order dated 26.5.2018 passed by learned Sessions Judge Sirmour at Nahan in Criminal Appeal No. 47-CR.A/10 of 2017, titled Gurbachan Singh Vs. Himachal Pradesh State Co-operative Bank, preferred by petitioner against his conviction under Section 138 of Negotiable Instruments Act, whereby an application, filed on behalf of petitioner/accused under Section 391 of the Code of Criminal Procedure (herein after referred to as the "Cr.P.C." in short), seeking permission to lead additional evidence in appeal, has been dismissed by the Appellate Court.

2. I have heard learned counsel for the parties and have also gone through the record of the Courts below.

3. Impugned order has been assailed mainly on the ground that the petitioner has taken a specific defence plea during trial that impugned cheque was not issued by him in favour of respondent-Bank, as the petitioner had already mortgaged his landed property in favour of bank against house loan availed by the petitioner/accused from the bank, regarding which entries have also been made in the revenue record and further that cheque in question does not bear his signatures and counsel for the petitioner, despite instructions of the petitioner, had failed to take steps to examine the official witness before the trial Court and further that examination of witnesses related to record is material to prove the innocence of the petitioner and is necessary for effective and proper adjudication of the case, as cheque in question was without consideration and could not have made basis for conviction. It is also contended by learned counsel for the petitioner/accused that cheque book, wherefrom the cheque in question has been alleged to have been issued, was never received by the petitioner/accused from the bank, as the petitioner/accused had never requested for issuance of cheque book in his favour and therefore, in order to prove this fact, additional evidence proposed to be lead in appeal, is necessary for doing the complete justice.

4. Learned counsel for the petitioner, in support of prayer for allowing the prayer of the petitioner/accused for permission to lead additional evidence, has put reliance on the judgments of Apex Court, reported in ***Rajeshwar Prasad Misra Vs. The State of West Bengal and another, AIR 1965 SC 1887, Abdul Latif and others Vs. State of Uttar Pradesh, (1978) 1 SCC 466, Brig. Sukhjeet Singh (Retd.) MVC Vs. The State of Uttar Pradesh and others 2019(2) Scale, 104*** and ***Gaurav Kumar alias Monu Vs. State of Haryana (2019) 4 SCC 549.***

5. Learned counsel for the respondent-Bank has supported the impugned order, for the reasons assigned therein and has prayed for dismissal of the petition.

6. Perusal of record reveals that respondent-Bank had filed a complaint under Section 138 of Negotiable Instruments Act against the petitioner for dishonor of cheque issued for Rs.2,81,000/- by the petitioner/accused against his outstanding liability for repayment of house loan availed by him from respondent-Bank. Evidence of respondent-bank was completed on 6.12.2016, whereafter case was listed on 7.12.2016 for presence and recording petitioner's statement under Section 313 Cr.P.C, but he did not attend the Court on 7.12.2016 and 19.12.2016 and statement of petitioner under Section 313 Cr.P.C. was recorded on 29.12.2016, wherein he had expressed his intention to lead evidence in defence. Accordingly, case was fixed on 24.1.2017 for examination of defence witnesses. However, not only the petitioner did not take steps for examination of defence witnesses for 24.1.2017, but also for dates fixed subsequent thereto i.e. on 23.2.2017, 21.3.2017 and 29.3.2017. On failure to produce defence witnesses on 21.3.2017, last opportunity, for examination of defence witnesses on 29.3.2017, was granted. But on 29.3.2017 also no defence witness was present. Thereafter for non production of evidence despite grant of ample opportunity, the right to lead evidence in defence was struck off on 29.3.2017 and after hearing arguments, ultimately petitioner was convicted vide judgment dated 31.3.2017, but on that date, he was not present and his personal appearance in the Court was exempted on his application, whereafter he was directed to be present for hearing on quantum of sentence on 6.4.2017, but he did not appear on 6.4.2017, 25.5.2017 and lastly on his appearance on 7.6.2017 sentence was announced.

7. Against the impugned judgment dated 7.6.2017 passed by the trial Court, petitioner has preferred an appeal on 5.7.2017 and when appeal, after receiving the record of trial Court, was listed for arguments on 3.11.2017, an application under Section 391

Cr.P.C. for leading additional evidence was filed by petitioner, which has been dismissed by learned Sessions Judge by passing impugned order dated 26.5.2018.

8. In *Rajeshwar Prasad Misra's case supra*the Apex Court has held that the Cr.P.C. gives power to the Appellate Court to take additional evidence, which, for the reasons to be recorded, it considers necessary and the Cr.P.C. gives wide discretion to the Appellate Court to deal appropriately with different cases, but for that again failure of justice is a condition precedent. The Apex Court has further clarified that additional evidence must be necessary, not because it would be impossible to pronounce judgment, but there would be failure of justice without it and thus power must be exercised sparingly and only in suitable cases and additional evidence must not ordinarily be permitted if the party has had a fair opportunity, but has not availed of it, unless the requirement of justice dictates otherwise.

9. In *Abdul Latif's case supra,* the Apex Court has re-iterated that additional evidence ought to be lead must serve useful purpose for arriving at just decision of the case.

10. Referring *Rajeshwar Prasad Mishra's* case (supra), the Apex Court in *Rambha's case* (surpa), has held that Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court and the power, being an exception, shall always have to be exercised with caution and circumspection, so as to meet the ends of justice and this power is not to fill up the lacuna, but to subserve the ends of justice. The Apex Court also held that a very wide discretion in the matter of obtaining additional evidence is available to the Court in terms of Section 391 of Cr.P.C, but additional evidence also cannot and ought not to be received in such a way so as to cause any prejudice to the accused and the order must not ordinarily be made if the prosecution has had a fair opportunity, but has not availed of it. The same principle is applicable in case of application filed by accused.

11. Referring *Rambhau's case*, the Apex Court in *Zahira Habibulla H. Sheikh's case,*has re-iterated that object of Section 391 Cr.P.C. is not to fill in the lacuna, but to subserve the ends of justice and Court considering the salutary principles shall also keep in view that the wide discretion conferred on the Court has to be exercised judiciously, as the legislature has put safety valve by requiring recording of reasons. It is further observed that Section 391 Cr.P.C. is in the nature of exception to Section 386 Cr.P.C. and the necessity for additional evidence arises when the Court feels that some evidence which ought to have been before it, is not before it or that some evidence has been left out or erroneously brought in and in all cases, it could not be laid down as a rule of universal application, that the court has to first find out whether the evidence already on record is sufficient and the nature and quality of the evidence on record is also relevant and this provision is a salutary provision which clothes the Court with power to decide an appeal effectively and being an exception to general rule, it must also be exercised with great care in consonance with the legislature intent for enacting Section 391 Cr.P.C. which empowers the Appellate Court to ensure that justice is done between the parties.

12. After considering its earlier pronouncements in *Rajeshwar Prasad Mishra and Rambhau's cases,* the Apex Court in *Brig. Sukhjeet Singh (Retd) MVC's case*, has again re-iterated that there are no fetters on the power under Section 391 Cr.P.C. of the Appellate Court and that all powers are conferred on the Court to secure ends of justice and ultimate object of judicial administration is to secure ends of justice and the Courts exists for rendering justice to the people.

13. Judgment in *Gaurav Kumar's* case in my considered opinion, is not applicable in present case, as in the given facts and circumstances of the case, it only permits the documents to be taken on record, which were sought to be submitted before the High Court. There is no discussion in this judgment with regard to the provisions of Section 391 Cr.P.C. or the purpose governing taking of additional evidence in a case at appellate stage invoking the provisions of Section 391 Cr.P.C.

14. From the provisions of Section 391 Cr.P.C. and ratio of law laid down by the Apex Court, it emerges that Section 391(1) Cr.P.C. empowers the Appellate Court, dealing with any appeal under Chapter XXIX of Cr.P.C. either to take evidence itself or direct it to be taken by the Courts subordinate to it, but after recording the reasons, if it thinks that additional evidence is necessary. Undoubtedly, the Courts are there for dispensation of justice and necessary reasons for taking additional evidence at appellate stage must be in the interest of justice and for a just and proper decision of the Appellate Court, as not only the primary, but sole purpose of judicial machinery, is to impart justice. Therefore, provisions of this Section should be invoked only for the ends of justice and not for any other reason. This Section is also not intended to remedy the negligence or laches of the party. It is also settled that though power is unfettered, but the recourse to exercise of these powers are not to be made ordinarily in a situation where either of the parties did not avail the opportunity to adduce evidence and accused should not be allowed to adduce the defence evidence at appellate stage, where he has failed to adduce the evidence despite granting of several opportunities. Appellate Court should not admit additional evidence where the party had opportunity to file the same before the trial Court, unless the requirement of justice dictates otherwise.

15. In present case, in his statement recorded under Section 313 Cr.P.C. on 29.12.2016, petitioner/accused had expressed his desire to lead evidence in defence and for the said purpose case was listed on 24.1.2017, but as noticed supra, petitioner/accused did not take any steps for leading evidence in defence on 24.1.2017 and also on subsequent dates i.e. on 23.2.2017, 21.3.2017 and 29.3.2017 and ultimately on 29.3.2017, his right to lead evidence in defence was stuck off by the order of the trial Court. Thus, it is evident from the record that despite grant of ample opportunities by the trial Court to the petitioner/accused to lead evidence in defence, he had failed to adduce the evidence.

16. It is also a fact that not only after recording of statement under Section 313 Cr.P.C., petitioner/accused did not produce any evidence in defence, but also after conclusion of arguments, he did not appear on subsequent dates i.e. 31.3.2017, 6.4.2017 and 25.5.2017, fixed for determination of quantum of sentence. This conduct of the petitioner/accused establishes that he was very keen for lingering the conclusion of trial.

17. By filing application under Section 391 Cr.P.C. petitioner/accused has sought permission to lead additional evidence by examining the Manager/Clerk of the respondent-Bank of concerned Branch along with record of certified copy of account opening form, specimen signatures of the petitioner/accused, saving bank account No. 7212 and also certified copy of mortgage deed executed by petitioner/accused in favour of respondent-Bank. Evidence, sought to be produced now in appeal, was very much in existence during the trial and the petitioner/accused was well aware of the same, but except disputing the issuance of cheque/cheque book and his signatures on the cheque in question verbally, petitioner/accused had not made any endavour to substantiate his version by leading evidence on record, despite existence of the provision of reserve onus under Section 139 of Negotiable Instruments Act.

18. In present case debt liability of petitioner/accused towards respondent-Bank, is an admitted case, as it is no where disputed that petitioner did not owe the amount for repayment of house loan to the respondent-Bank and also it is not in dispute that on the date on which the cheque is stated to have been issued, the amount filled therein was not outstanding against petitioner/accused. Rather plea was taken that when the land of the petitioner was lying mortgaged with the respondent-Bank, neither there was any occasion to the petitioner/accused to issue cheque nor the bank had right to obtain such cheque from the petitioner/accused for recovering the outstanding loan amount, despite the fact that there was default in repayment on the part of petitioner/accused, but respondent-Bank would have resorted to recover its amount by other modes available with it including by selling the land of the petitioner/accused mortgaged with the Bank. Petitioner/accused has disputed his signatures on the cheque, but neither during the trial nor in the application filed under Section 391 Cr.P.C., he has prayed for sending his admitted signatures or handwriting, to Handwriting Expert to have its comparison with the signatures on the cheque, rather he is intending to call for the old record of the Bank, which may or may not be available in the bank after such a long time. It is also not in dispute that account, wherein sufficient funds were not available for honouring the cheque, belonged to petitioner/accused and genuineness and liability of the amount for which cheque was issued is also not in dispute. Loan was availed by the petitioner/accused from the respondent-Bank in the year 2013 and failed to make regular payment of loan amount. Thereafter in last week of June, 2015, on approaching by the Bank Officials for re-payment, petitioner/accused had issued the cheque bearing No.104103 dated 15.7.2015, for repayment of outstanding loan liability. It is not a case where the debt or the liability of the petitioner/accused is in dispute. Debt or liability of the petitioner/accused is with regard to the loan availed by him from the State Co-operative Bank, therefore, the petitioner/accused is enjoying the benefits of public money, but without making its repayment and instead of making attempt to discharge his liability, he is asking the Bank for adopting a long cumbersome exercise to recover its debt by selling land mortgaged with the Bank. Where banker has two options to recover the amount the option to be exercised is to be decided by the banker. The loanee cannot dictate terms to the banker for adopting a particular path for recovery of loan amount.

19. In view of aforesaid discussion, I am of the considered opinion that allowing the application filed for additional evidence by the petitioner/accused would have defeated the interest of justice. When the petitioner/accused was having knowledge of documents during trial, then, unless prevented by sufficient plausible cause, he ought to have called these documents to produce in evidence before trial Court. Now at this stage, and also for discussion herein above, he is not entitled for leading additional evidence, particularly, when he made no efforts to adduce evidence during trial. Learned Sessions Judge has adopted the right course for the ends of justice and therefore, I find no irregularity, illegality and perversity in the impugned order, therefore, the same is affirmed. The petition is dismissed in aforesaid terms.

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

Jagdeep Kumar. …Petitioner.

Versus

Himachal Pradesh State Co-Operative Bank Limited. …Respondent.

Cr. Revision No. 191 of 2018
Reserved on: 25.6.2018
Date of decision: 8.7.2019

Code of Criminal Procedure,1973- Section 391- Additional evidence at appellate stage– Adduction of– Grounds– Held, adduction of additional evidence at appellate stage may be allowed only for serving ends of justice– Provision is not intended to remedify negligence or laches of a party– Appellate court cannot allow leading of such evidence at appellate stage where party had opportunity to adduce it before trial court. (Para 14)

Cases referred:
Abdul Latif and others vs. State of Uttar Pradesh, (1978) 1 SCC 466
Brig. Sukhjeet Singh (Retd.) MVC vs. The State of Uttar Pradesh and others, 2019(2) Scale 104
Gaurav Kumar alias Monu vs. State of Haryana, (2019) 4 SCC 549
Rajeshwar Prasad Misra vs. The State of West Bengal and another, AIR 1965 SC 1887

For the Petitioner: Mr.Sandeep Chauhan, Advocate.
For the Respondent: Mr.Sushant Vir Singh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

This petition has been preferred against the impugned order dated 26.5.2018 passed by learned Sessions Judge Sirmour at Nahan in Criminal Appeal No. 48-CRA/10 of 2017, titled Jagdeep Kumar Vs. Himachal Pradesh State Co-operative Bank, preferred by petitioner against his conviction under Section 138 of Negotiable Instruments Act, whereby an application, filed on behalf of petitioner/accused under Section 391 of the Code of Criminal Procedure (herein after referred to as the "Cr.P.C." in short), seeking permission to lead additional evidence in appeal, has been dismissed by the Appellate Court.

2. I have heard learned counsel for the parties and have also gone through the record of the Courts below.

3. Impugned order has been assailed mainly on the ground that the petitioner has taken a specific defence plea during trial that impugned cheque was not issued by him in favour of respondent-Bank, as the petitioner had already mortgaged his landed property in favour of bank against house loan availed by the petitioner/accused from the bank, regarding which entries have also been made in the revenue record and further that cheque in question does not bear his signatures and counsel for the petitioner, despite instructions of the petitioner, had failed to take steps to examine the official witness before the trial Court and further that examination of witnesses related to record is material to prove the innocence of the petitioner and is necessary for effective and proper adjudication of the case, as cheque in question was without consideration and could not have made basis for conviction. It is also contended by learned counsel for the petitioner/accused that cheque book, wherefrom the cheque in question has been alleged to have been issued, was never received by the petitioner/accused from the bank, as the petitioner/accused had never requested for issuance of cheque book in his favour and therefore, in order to prove this fact, additional evidence proposed to be lead in appeal, is necessary for doing the complete justice.

4. Learned counsel for the petitioner, in support of prayer for allowing the prayer of the petitioner/accused for permission to lead additional evidence, has put reliance on the judgments of Apex Court, reported in ***Rajeshwar Prasad Misra Vs. The State of West Bengal and another, AIR 1965 SC 1887, Abdul Latif and others Vs. State of Uttar Pradesh, (1978) 1 SCC 466, Brig. Sukhjeet Singh (Retd.) MVC Vs. The State of Uttar Pradesh and others 2019(2) Scale, 104*** and ***Gaurav Kumar alias Monu Vs. State of Haryana (2019) 4 SCC 549.***

5. Learned counsel for the respondent-Bank has supported the impugned order, for the reasons assigned therein and has prayed for dismissal of the petition.

6. Perusal of record reveals that respondent-Bank had filed a complaint under Section 138 of Negotiable Instruments Act against the petitioner for dishonor of cheque issued for `9,47,000/- by the petitioner/accused against his outstanding liability for repayment of house loan availed by him from respondent-Bank. Evidence of respondent-bank was completed on 4.3.2016, whereafter statement of petitioner under Section 313 Cr.P.C. was recorded on 23.3.2016, wherein he had expressed his intention to lead evidence in defence. Accordingly, case was fixed on 31.5.2016 for examination of defence witnesses. However, not only the petitioner did not take steps for examination of defence witnesses, but also did not attend the Court on 31.5.2016, whereupon non bailable warrants returnable for 21.6.2016 were issued for securing his presence and ultimately petitioner/accused appeared in the Court on 29.9.2016 with an application for cancellation of non bailable warrants, which was accepted and case was again listed for examination of defence witnesses on self responsibility on 21.10.2016. On failure to produce defence witnesses on 21.10.2016, last opportunity, for examination of defence witnesses on 21.11.2016, was granted. But on 21.11.2016 also no defence witness was present. However, one more opportunity by way of 'exceptional last opportunity' was granted to the petitioner/accused to produce his evidence on 19.12.2016. Thereafter for non production of evidence despite grant of ample opportunity, the right to lead evidence in defence was struck off on 19.12.2016 and after hearing arguments, ultimately petitioner was convicted vide judgment dated 28.1.2017, but on that date, he was not present and his personal appearance in the Court was exempted on his application, whereafter he was directed to be present for hearing on quantum of sentence on 25.2.2017, but he did not appear on 25.2.2017, 29.3.2017, 28.4.2017, 26.5.2017 and lastly on his appearance on 7.6.2017 sentence was announced.

7. Against the impugned judgment dated 7.6.2017 passed by the trial Court, petitioner has preferred an appeal on 5.7.2017 and when appeal, after receiving the record of trial Court, was listed for arguments on 3.11.2017, an application under Section 391 Cr.P.C. for leading additional evidence was filed by petitioner, which has been dismissed by learned Sessions Judge by passing impugned order dated 26.5.2018.

8. In *Rajeshwar Prasad Misra's case supra*the Apex Court has held that the Cr.P.C. gives power to the Appellate Court to take additional evidence, which, for the reasons to be recorded, it considers necessary and the Cr.P.C. gives wide discretion to the Appellate Court to deal appropriately with different cases, but for that again failure of justice is a condition precedent. The Apex Court has further clarified that additional evidence must be necessary, not because it would be impossible to pronounce judgment, but there would be failure of justice without it and thus power must be exercised sparingly and only in suitable cases and additional evidence must not ordinarily be permitted if the party has had a fair opportunity, but has not availed of it, unless the requirement of justice dictates otherwise.

9. In *Abdul Latif's case supra,* the Apex Court has re-iterated that additional evidence ought to be lead must serve useful purpose for arriving at just decision of the case.

10. Referring *Rajeshwar Prasad Mishra's* case (supra), the Apex Court in *Rambha's case* (surpa), has held that Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court and the power, being an exception, shall always have to be exercised with caution and circumspection, so as to meet the ends of justice and this power is not to fill up the lacuna, but to subserve the ends of justice. The Apex Court also held that a very wide discretion in the matter of obtaining additional evidence is available to the Court in terms of Section 391 of Cr.P.C, but additional evidence also cannot and ought not to be received in such a way so as to cause any prejudice to the accused and the order must not ordinarily be made if the prosecution has had a fair opportunity, but has not availed of it. The same principle is applicable in case of application filed by accused.

11. Referring *Rambhau's case*, the Apex Court in *Zahira Habibulla H. Sheikh's case,*has re-iterated that object of Section 391 Cr.P.C. is not to fill in the lacuna, but to subserve the ends of justice and Court considering the salutary principles shall also keep in view that the wide discretion conferred on the Court has to be exercised judiciously, as the legislature has put safety valve by requiring recording of reasons. It is further observed that Section 391 Cr.P.C. is in the nature of exception to Section 386 Cr.P.C. and the necessity for additional evidence arises when the Court feels that some evidence which ought to have been before it, is not before it or that some evidence has been left out or erroneously brought in and in all cases, it could not be laid down as a rule of universal application, that the court has to first find out whether the evidence already on record is sufficient and the nature and quality of the evidence on record is also relevant and this provision is a salutary provision which clothes the Court with power to decide an appeal effectively and being an exception to general rule, it must also be exercised with great care in consonance with the legislature intent for enacting Section 391 Cr.P.C. which empowers the Appellate Court to ensure that justice is done between the parties.

12. After considering its earlier pronouncements in *Rajeshwar Prasad Mishra and Rambhau's cases,* the Apex Court in *Brig. Sukhjeet Singh (Retd) MVC's case*, has again re-iterated that there are no fetters on the power under Section 391 Cr.P.C. of the Appellate Court and that all powers are conferred on the Court to secure ends of justice and ultimate object of judicial administration is to secure ends of justice and the Courts exists for rendering justice to the people.

13. Judgment in *Gaurav Kumar's* case in my considered opinion, is not applicable in present case, as in the given facts and circumstances of the case, it only permits the documents to be taken on record, which were sought to be submitted before the High Court. There is no discussion in this judgment with regard to the provisions of Section 391 Cr.P.C. or the purpose governing taking of additional evidence in a case at appellate stage invoking the provisions of Section 391 Cr.P.C.

14. From the provisions of Section 391 Cr.P.C. and ratio of law laid down by the Apex Court, it emerges that Section 391(1) Cr.P.C. empowers the Appellate Court, dealing with any appeal under Chapter XXIX of Cr.P.C. either to take evidence itself or direct it to be taken by the Courts subordinate to it, but after recording the reasons, if it thinks that additional evidence is necessary. Undoubtedly, the Courts are there for dispensation of justice and necessary reasons for taking additional evidence at appellate stage must be in the interest of justice and for a just and proper decision of the Appellate Court, as not only

the primary, but sole purpose of judicial machinery, is to impart justice. Therefore, provisions of this Section should be invoked only for the ends of justice and not for any other reason. This Section is also not intended to remedy the negligence or laches of the party. It is also settled that though power is unfettered, but the recourse to exercise of these powers are not to be made ordinarily in a situation where either of the parties did not avail the opportunity to adduce evidence and accused should not be allowed to adduce the defence evidence at appellate stage, where he has failed to adduce the evidence despite granting of several opportunities. Appellate Court should not admit additional evidence where the party had opportunity to file the same before the trial Court, unless the requirement of justice dictates otherwise.

15. In present case, in his statement recorded under Section 313 Cr.P.C. on 23.3.2016, petitioner/accused had expressed his desire to lead evidence in defence and for the said purpose case was listed on 31.5.2016, but as noticed supra, petitioner/accused neither took any steps for leading evidence in defence nor attended the Court on the date fixed, which lead to issuance of non bailable warrants against him for his presence. After cancellation of non bailabe warrants on 29.9.2016, on listing the case for defence witnesses on 21.10.2016, 21.11.2016 and 19.12.2016, petitioner/accused did not lead any defence evidence and ultimately on 19.12.2016, his right to lead evidence in defence was stuck off by the order of the trial Court. Thus, it is evident from the record that despite grant of ample opportunities by the trial Court to the petitioner/accused to lead evidence in defence, he had failed to adduce the evidence.

16. It is also a fact that not only after recording of statement under Section 313 Cr.P.C., petitioner/accused remained absent and did not produce any evidence in defence, but also after conclusion of arguments, he did not appear on subsequent dates i.e. date fixed for announcing the order and on numerous subsequent dates thereafter, i.e. 25.2.2017, 21.3.2017, 28.4.2017 and 26.5.2017, fixed for determination of quantum of sentence. This conduct of the petitioner/accused establishes that he was very keen for lingering the conclusion of trial.

17. By filing application under Section 391 Cr.P.C. petitioner/accused has sought permission to lead additional evidence by examining the Manager/Clerk of the respondent-Bank of concerned Branch along with record of certified copy of account opening form, specimen signatures of the petitioner/accused, saving bank account No. 652 and also certified copy of mortgage deed executed by petitioner/accused in favour of respondent-Bank. Evidence, sought to be produced now in appeal, was very much in existence during the trial and the petitioner/accused was well aware of the same, but except disputing the issuance of cheque/cheque book and his signatures on the cheque in question verbally, petitioner/accused had not made any endavour to substantiate his version by leading evidence on record, despite existence of the provision of reserve onus under Section 139 of Negotiable Instruments Act.

18. In present case debt liability of petitioner/accused towards respondent-Bank, is an admitted case, as it is no where disputed that petitioner did not owe the amount for repayment of house loan to the respondent-Bank and also it is not in dispute that on the date on which the cheque is stated to have been issued, the amount filled therein was not outstanding against petitioner/accused. Rather plea was taken that when the land of the petitioner was lying mortgaged with the respondent-Bank, neither there was any occasion to the petitioner/accused to issue cheque nor the bank had right to obtain such cheque from the petitioner/accused for recovering the outstanding loan amount, despite the fact that there was default in repayment on the part of petitioner/accused, but respondent-Bank would have resorted to recover its amount by other modes available with it including by

selling the land of the petitioner/accused mortgaged with the Bank. Petitioner/accused has disputed his signatures on the cheque, but neither during the trial nor in the application filed under Section 391 Cr.P.C., he has prayed for sending his admitted signatures or handwriting, to Handwriting Expert to have its comparison with the signatures on the cheque, rather he is intending to call for the old record of the Bank, which may or may not be available in the bank after such a long time. It is also not in dispute that account, wherein sufficient funds were not available for honouring the cheque, belonged to petitioner/accused and genuineness and liability of the amount for which cheque was issued is also not in dispute. Loan was availed by the petitioner/accused from the respondent-Bank in the year 2007 and the last installment of repayment was made by the petitioner/accused on 22.6.2010. Thereafter in the Month of November, 2014 on approaching by the Bank Officials for re-payment, petitioner/accused had issued the cheque bearing No.281951 dated 3.11.2014 for repayment of outstanding loan liability. It is not a case where the debt or the liability of the petitioner/accused is in dispute. Debt or liability of the petitioner/accused is with regard to the loan availed by him from the State Co-operative Bank, therefore, the petitioner/accused is enjoying the benefits of public money, but without making its repayment and instead of making attempt to discharge his liability, he is asking the Bank for adopting a long cumbersome exercise to recover its debt by selling land mortgaged with the Bank. Where banker has two options to recover the amount the option to be exercised is to be decided by the banker. The loanee cannot dictate terms to the banker for adopting a particular path for recovery of loan amount.

19. In view of aforesaid discussion, I am of the considered opinion that allowing the application filed for additional evidence by the petitioner/accused would have defeated the interest of justice. When the petitioner/accused was having knowledge of documents during trial, then, unless prevent by sufficient plausible cause, he ought to have called these documents to produce in evidence before trial Court. Now at this stage, and also for discussion herein above, he is not entitled for leading additional evidence, particularly, when he made no efforts to adduce evidence during trial. Learned Sessions Judge has adopted the right course for the ends of justice and therefore, I find no irregularity, illegality and perversity in the impugned order, therefore, the same is affirmed. The petition is dismissed in aforesaid terms.

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

Kunal Brahma ....Petitioner.
Versus
The Board of Trustees of IRMT & others ....Respondents.

CWP No.2680 of 2015.
Judgment reserved on : 04.07.2019.
Date of decision: 09.07.2019.

Constitution of India, 1950- Articles 14 & 16– Contractual employee– Termination of service – Challenge thereto- Writ seeking reinstatement and regularization– Maintainability- Held, appointment of petitioner was purely on contractual basis on a non-statutory basis - No scheme of or representation by respondents that petitioner would continue or his service would be regularized - He accepted his appointment with his eyes wide open – Order of

respondents terminating service of petitioner on account of financial crunch faced by respondents not unreasonable, unfair or irrational- Petition dismissed. (Paras 5, 7, 10 & 17)

Case referred:
Gridco Ltd. & Another vs. Sadananda Doloi & Ors, AIR 2012 SC 729

For the Petitioner : Mr. B.N. Mehta, Advocate.
For the Respondents: Mr.Vinod Thakur, Addl. A.G with Mr. Bhupinder Thakur, Dy. A.G and Mr. Ram Lal Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Aggrieved by his termination, the petitioner has filed the instant writ petition for the following reliefs:-

> *"(i) That the petitioner in the facts and circumstances prays that* ***annexure P/4, dated 02.03.2015*** *may be set aside and quashed and the direction may please be issued to re-instate the petitioner in active service in the interest of law and justice with all consequential benefits.*
>
> *(ii) That the respondents may also be directed to pay to the petitioner special compensation of Rs.20 lacs on account of leave salary encashment and payment of gratuity.*
>
> *(iii) The respondents may also be directed to pay due salary of the petitioner w.e.f. February 2015.*
>
> *(iv) That the respondent No.1 may be directed to appoint the petitioner and Dr. Madhaik as Director of the trust in view of the contribution of the petitioner and Dr. Madhaik in the Herbal research."*

2. The petitioner was appointed as an Administrator with the respondent-Trust purely on contractual basis for a period of one year on monthly salary of Rs.15,000/-. However, he continued to serve the respondents up till 01.03.2015 when his services came to be terminated vide order dated 02.03.2015 (Annexure P-4).

3. It is averred that the order of termination is highly illegal and violative of Articles 14, 16, 19 and 21 of the Constitution of India and that the petitioner has been rendered pauper at the age of 56 years for no fault on his part. It is further averred that the State of Himachal Pradesh is regularizing the services of the daily wagers and contract employees on completion of 7 years and, therefore, the services of the petitioner should have been regularized, rather than being terminating.

4. The respondents opposed the petition by filing reply wherein it is averred that the Trust is not getting recurring grant either from the Government of India or from the State Government and is totally dependent and the entire expenditure of the Trust both committed and emergent is being met mainly from the income accruing to the Trust from the sale of tickets and souvenir items. This income by its very nature is highly fluctuating and seasonal. The Trust has two Curator, one Indian and one Russian. The salary of the Indian Curator is met out from the grant received from the Ministry of External Affairs, whereas, the salary of the Russian Curator is being met from the International Centre of

the Roerichs (ICR), Moscow. It is further averred that since the grant given by the Ministry of External Affairs is not a recurring grant and it may not continue, in such a situation, the burden of the Indian Curator i.e. Rs. 20,000/- per month will also have to be met by the Trust. It is after considering the financial position of the Trust that the Board of Trustees in its 17th meeting held on 20.12.2014 decided to abolish the posts of Manager and Cultural Organizer. This was done after due consideration and after weighing all the aspects. It was found that the affairs of the Trust shall not suffer if these positions were ended and the contracts of the incumbents were terminated at the end of their respective terms. The decision is claimed to have been based purely on merit without any ill-will, prejudice or bias towards any individual and has been taken keeping in view the financial constraints and the comparative utility of the positions. It is the posts not the individuals that were found to be redundant.

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

5. It is not in dispute that the services of the petitioner were engaged purely on contractual basis that too only for a year, as is evident from Clause-I of his appointment letter dated 27.04.2006 which reads as under:-

> *"The appointment is purely on contractual basis for a period of one year including probation period. During the period of probation and at the completion of one year his services are liable to be terminated without any notice."*

6. In such circumstances, the petitioner has no right to continue or claim continuity in service, especially, when his services are not being replaced by another contract employee.

7. A careful reading of the letter of appointment leaves no manner of doubt that the appointment offered to the petitioner was a limited one. The respondents at the given time had never offered to the petitioner that he would continue in service or that his services would be regularized. It is not even the case of the petitioner that there was any uncertainty or ambiguity in the appointment made by the respondents as to the tenure on the post on which he had been appointed.

8. There is a clear distinction between public employment governed by the statutory rules and private employment governed purely by contract. No doubt with the development of law, there has been a paradigm shift with regard to judicial review of administrative action whereby the writ court can examine the validity of termination order passed by the public authority and it is no longer open to the authority passing the order to argue that the action in the realm of contract is not open to judicial review. However, the scope of interference of judicial review is confined and limited in its scope. The writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract.

9. However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the administrator to decide whether more reasonable decision or course of action could have been taken in the circumstances. (Refer ***Gridco Ltd. & Another*** vs. ***Sadananda Doloi & Ors***, AIR 2012 SC 729).

10. The petitioner has failed to place before this Court any material to show that the action of the respondents is either unreasonable or unfair or perverse or irrational. As observed earlier, the service conditions of the petitioner makes it abundantly clear that petitioner had been appointed on contractual basis, that too, on a non-statutory scheme.

11. It may be noticed that the petitioner had voluntarily accepted the appointment granted to him subject to the conditions clearly stipulated in the scheme. The appointment subject to the conditions has been accepted with his eyes wide open, therefore, now the petitioner cannot turn around claiming higher rights ignoring the conditions subject to which the appointment had been accepted.

12. It is next contended by the learned counsel for the petitioner that even though there was nothing adverse to the working of the petitioner, yet his services have malafidely been terminated. However, I find that there is no factual foundation laid for the same.

13. As a last ditch effort, learned counsel for the petitioner would contend that even though the order of termination on the face of it appears to be innocuous, however, in case the veil is pierced, then the real reason for the termination would be writ-large.

14. In support of his submission, learned counsel for the petitioner has placed reliance upon the averments made in para-3 on merits of reply to the petition which read thus:-

> *"The services of the petitioner were terminated as the Trust decided to discontinue the posts of Manager and the Cultural Organiser and also on the basis of the acts of commission and omission by the petitioner as is evident in the audit reports, and complaints against him. It is clear from the Audit Report submitted by the Chartered Accountant M/s Lamba Vij and Co., Shimla in 2013, which revealed glaring irregularities and mismanagement of finances and violation of procedures by the petitioner thereby defeating the very purpose of his role as Manager. The copies of the audit report of M/s Lamba Vij & Co., Shimla are attached as Annexure R-5. In addition the Internal Audit carried out by the Department of LAC, Government of HP also revealed that the petitioner had failed to discharge his duties. The report finds mention in the letter dated 06-02-2013 which was sent by the Director, Language, Art & Culture HP to the Principal Secretary (Language, Art & Culture) to the Govt. of HP, the copy of which is attached as Annexure R-6. The letter written in January 2013 by the former Director of IRMT, Mr. O.C. Handa, to the Director, Language, Art & Culture HP also casts aspersions on the working of the petitioner. The copy of said letter is attached as Annexure R-7. Employees of the IRMT vide their letter dated 04.01.2013 made a representation against the working of petitioner, to the President of the IRMT Nagar who is also the Chief Minister of the Government of Himachal Pradesh. The copy of the said representation is attached as (Annexure R-8). The aforesaid audit reports and complaints which indict the petitioner were also taken into account by the Board of Trustees of the IRMT in its meeting held at Shimla on dated 20.12.2014 along with the financial position of Trust as mentioned in preliminary submissions supra. The BOT decided to discontinue the post of Manager and also of Cultural Organiser and as such the petitioner was given a notice dated 2.3.2015 (Annexure R-9) in which it was intimated that the services would be terminated w.e.f. 1st April, 2015 and it was directed to*

handover the charge of files/document, Trust articles/properties and other things to Sh. Ramesh Chander Indian Curator IRMT within 7 days."

15. Even this contention is equally without merit for the simple reason that it was in response to the averments made in para-3 that the respondents had filed the reply as extracted above.

16. Now, in case para-3 of the petition is adverted to, it is stated that the petitioner has been discharging his duties to the entire satisfaction of his superior i.e. respondent No.3 and nothing adverse had been communicated to the petitioner, as would be evident from para-3 of the petition, which reads as under:-

> *"That the petitioner was discharging his duty to the entire satisfaction of the Superior i.e. Respondent No.3 and nothing adverse was ever communicated to the petitioner in nutshell he discharged his duty honestly and without any complaint whatsoever, the petitioner was taken aback when he was served with the order of termination dated 02-03-2015."*

17. No doubt, the stray averments made in the reply in para-3 (supra) suggest that the services of the petitioner were terminated as the Trust decided to discontinue the posts of Manager and Cultural Organiser on the basis of the acts of commission and omission of the petitioner. But, the fact remains that the services of the petitioner were infact terminated only due to financial crunch and not on account of acts of commission and omission on the part of the petitioner as is loosely stated in para-3 of the reply to the petition, as extracted above.

18. It is settled law that the Court can lift the veil of the innocuous order to find out whether it is the foundation or motive to pass an offending order. If misconduct is the foundation to pass the order, then an inquiry into the misconduct should be conducted and an action according to law should follow. But, if it is motive, it is not incumbent upon the competent officer to have the inquiry conducted and the services of the contract employee could be terminated in terms of the order of appointment.

19. The termination of the petitioner is in terms of the order of appointment and, therefore, it is not by way of punishment as a punitive measure. Accordingly, the need to conduct an inquiry into the alleged misconduct does not arise and the termination of services in terms of the contract has to be held to be valid.

20. In view of the aforesaid discussion and for the reasons stated above, I find no merit in this petition and the same is accordingly dismissed. Pending application, if any, also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

CWPNo. 540 of 2019 along with connected matters.
Judgment reserved on : 04.07.2019
Decided on: 10 .7.2019

Constitution of India, **1950**- Articles 14 & 16– Appointment on contractual basis– Regularization of service– Writ jurisdiction- Petitioners initially appointed as instructors/

trainers in different ITIs' between 31.7.2015 and 3.10.2015 on contractual basis, seeking their regularization and restraint against State from disengaging their services after the end of current academic session– Petitioners seeking parity with persons regularized under 'one time measure' who had completed seven years service on cutoff date i.e. 31.7.2015– Held, policy dated 30.10.2015 was intended to be a 'one time measure' that was brought forth pursuant to judgment of this court– What was prescribed as 'one time measure' for existing exploited employees cannot be converted into all time measure by future appointees by exploiting the policy itself– Petitioners were not recruited in accordance with procedure prescribed by R & P Rules– The very advertisements pursuant to which petitioners were selected and appointed were for appointments on contractual basis for one year– Such advertisements would not have certainly attracted more meritorious candidates– Since appointments were not as per R & P Rules, petitioners cannot seek regularization of their services– Petitions dismissed. (Paras 35 & 37)

1. **CWP No. 540/2019**
   Sanjeev Kumar and others .....Petitioners.
   Versus
   State of HP and another .....Respondents.
2. **CWP No. 541/2019.**
   Vinod Kumar and others .....Petitioners.
   Versus
   State of HP and another .....Respondents.
3. **CWP No. 542/2019.**
   Ajay Kumar and others .....Petitioners.
   Versus
   State of HP and another .....Respondents.
4. **CWP No. 543/2019.**
   Pankaj Chauhan and others .....Petitioners.
   Versus
   State of HP and another .....Respondents.
5. **CWP No. 551/2019**.
   Vivek Sangal and others .....Petitioners.
   Versus
   State of HP and another .....Respondents.
6. **CWP No. 743/2019.**
   Jitender Choudhary and others .....Petitioners.
   Versus
   State of HP and others ......Respondents.

Cases referred:
D.S. Nakara and others vs. Union of India, (AIR 1983 SC 130)
Government of Andhra Pradesh & others vs. N. Subbarayudu & others, (2008) 14 SCC 702
Narendra Kumar Tiwari & others vs. State of Jharkhand & others, (2018) 8 SCC 238
Nihal Singh & others vs. State of Punjab & others, (2013) 14 SCC 65
Secretary, State of Karnataka & others vs. Uma Devi (3) & others, (2006) 4 SCC 1
Som Prakash Rekhi vs. Union of India and another, AIR 1981 SC 212
State of Karnataka & others vs. M.L. Kesari & others, (2010) 9 SCC 247
State of Punjab & others vs. Amar Nath Goyal & others, (2005 (6) SCC 754

CWP No. 540/2019 a/w CWPs No. 541 to 543 and 551/2019.

For the Petitioner(s):	Mr. M.L. Sharma, Sr. Advocate with M/s B.L. Soni, G.K. Nadda and Aman Parth, Advocates.
For the respondents:	Mr. Ashok Sharma, Advocate General with Mr. J.K. Verma, Adarsh K. Sharma, Ms. Ritta Goswami, Mr. Ashwani Sharma and Mr. Nand Lal Thakur, Additional Advocates General, for respondents/State.

CWP No. No. 743/2019.

For the Petitioners:	Mr. Sanjay Sharma, Advocate.
	Mr. Ashok Sharma, Advocate General with Mr. J.K. Verma, Adarsh K. Sharma, Ms. Ritta Goswami, Mr. Ashwani Sharma and Mr. Nand Lal Thakur, Additional Advocates General, for respondents/State.
	Mr. S.D. Gill, Advocate, for respondents No. 3 & 5 to 7.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice

The petitioners, who were engaged on contract basis from time to time as Instructors/Trainers in different Industrial Training Institutes, have come up with these writ petitions, challenging the cut-off date of 31.07.2015, fixed under the Notification of the Department of Technical Education, Government of Himachal Pradesh, dated 03.10.2015, for regularization of the services of persons who were similarly appointed. Alternatively, the petitioners pray for a direction to the respondents to frame a similar Policy as framed by the Notification dated 03.10.2015, for the benefit of those who were appointed after the cut-off date, namely 31.07.2015. Incidentally, the petitioners also challenge the last communication dated 23.08.2018, by which their services were directed to be extended till the end of the current academic session/year, with a further direction not to engage their services thereafter.

2. Heard Shri M.L. Sharma, learned Senior Counsel and Mr. Sanjay Sharma, learned Counsel for the respective petitioners, Mr. Ashok Sharma, learned Advocate General for the respondents-State and Mr. S.D. Gill, learned Counsel for the respective respondents.

Brief Preclude:

3. It appears that the Government of India launched a Scheme way back in the year 2003 for the up-gradation of about 500 Government Industrial Training Institutes in the country into Centers of Excellence. The Scheme was actually floated in 2005-2006. As per the statistics, there were 1896 Government Industrial Training Institutes in the country, as on 01.01.2007.

4. In 2007-2008, the Government of India announced the up-gradation of even the remaining 1396 Government ITIs into Centers of Excellence through Public Private Partnership.

5. Accordingly, a Scheme titled "Upgradation of 1396 Government ITIs through Public Private Partnership" with a total outlay of Rs.3,665 crores was framed. The Scheme received the approval of CCEA (Cabinet Committee on Economic Affairs) and guidelines were

issued by the Ministry of Labour and Employment, Director General of Employment and Training of the Government of India, on 01.04.2008.

6. In tune with the aforesaid Scheme, a Tripartite Agreement was entered into between (i) the Government of India; (ii) the Government of Himachal Pradesh and (iii) the Industry Partner of the Government of Himachal Pradesh, namely M/s NTPC Ltd (National Thermal Power Corporation Ltd.).

7. Under this Agreement, the Government of India was to provide interest free loan of up to Rs.2.5 crores to the Institute Management Committee of the ITIs. The Government of India was also required to establish a National Steering Committee as an apex body for grading the implementation and monitoring of the Scheme.

8. In terms of the Agreement, the Government of Himachal Pradesh constituted an Institute Management Committee, which was registered as a Society under the Societies Registration Act. Under Clause 4 (c) (vi) of Section B of the said Agreement, dated 31.10.2008, the Government of Himachal Pradesh undertook to delegate to the Institute Management Committee, adequate administrative and the financial powers to appoint contract faculty as per need. Under Clause 4(g) of Section B of the Agreement, the Government was obliged to ensure that the sanctioned strength of Instructors in ITIs is always filled up.

9. Pursuant to the aforesaid Agreement, a large number of candidates were appointed to the Institute Management Committee as Instructors/Trainers on contract basis. After continuing on contract basis, for a long period of time, the craving for equal pay for equal work and for regularization started. This led to a batch of writ petitions being instituted on the file of this Court in CWP Nos. 2978 of 2012 and batch of cases.

10. A learned Single Judge of this Court allowed the batch of cases by a judgment dated 05.03.2014, declaring that the Instructors/Trainers appointed on contract basis shall be deemed to have been appointed as Lecturers with all consequential benefits. The State was directed to regularize the services of those who had completed six years of uninterrupted service.

11. Challenging the order of the learned Single Judge in the said batch of cases, Letters Patent Appeals were filed both by the State and by a few private parties. These appeals in LPAs No.107/2014 etc. were allowed by a Bench of this Court by a judgment dated 03.12.2014. The Division Bench, eventually, gave a direction to the State Government to examine the case of the petitioners in those batch of cases for regularization or conversion on contractual basis.

12. In implementation of the said judgment of the Division Bench, the Government framed a Policy by way of an 'One Time Measure' and issued a Notification dated 03.10.2015. By this Notification, the Government took over the services of all the teaching and non-teaching employees engaged on contract basis either through the Institute Management Committee or through the Student Welfare Fund. But the benefit was restricted to those engaged up to 31.07.2015. This cut-off date, namely 31.07.2015 was taken on the basis that the same was the date of closing of the academic session 2014-2015 in Government Engineering Colleges, Polytechnics and ITIs.

13. The Scheme made it clear that it is only those who were engaged up to 31.07.2015, will be entitled to the benefit of absorption, upon their completing 7 years of service or 9600 hours of service, whichever was earlier.

14. It may be useful to extract the Notification dated 03.10.2015, as the litigation on hand, is only a product of the said Notification.

"**Notification**

The Governor, Himachal Pradesh is pleased to take over the services of all the teaching and non teaching employees engaged on contract basis through Student Welfare Fund, Institute Management Committee(s) and under other schemes up to 31.07.2015 (i.e date of closing of academic year 2014-2015) in Government Engineering Colleges, Polytechnics and Industrial Training Institutes of the Department of Technical Education Vocational & Industrial Training, on contract basis after completion of 7 years' or 9600 hours whichever is earlier as one time measure, in the public interest, with immediate effect subject to the condition no litigation is subsisting and an undertaking to this effect shall be taken from all the concerned. The terms and conditions are as under:-

(i) *That the service of all such eligible employees shall be taken over on contract basis after completion of 7 years' or 9600 hours service whichever is earlier in accordance with the terms and conditions (for contract) issued by the Department of Personnel vide their letter No. PER (AP) C –B (2) 2/2015 dated 07.05.2015, further amended from time to time and fresh contract agreement in respect of all the existing employees as on 31.07.2015 shall be executed accordingly.*

(ii) *That the services of all such employees shall be taken over on contract basis against available vacancies failing which against resultant vacancies and existing mal-engagement shall be discontinued immediately.*

(iii) *That the services of the all the existing incumbents can be utilized without reducing their salary by transferring/deputing them in other institutions as per requirement from time to time with the approval of competent authority, in the interest of the students. An undertaking to this effect shall be taken from all the existing incumbents immediately.*

(iv) *That the candidate should be medically fit for the post. The medical fitness certificate of the candidate shall be ensured in accordance with the provisions contained in relevant rules.*

(v) *That taking over the services on contract basis shall be subject to verification of character and antecedents of the candidate as provided in relevant rules and the candidate shall be liable to be posted in any institution as per requirement, within the State.*

(vi) *That for the determination of date of birth of the candidate concerned, criteria as laid down in relevant rules shall be observed.*

(vii) *That the services of such candidates shall be subject to the condition that the representation in service for all the reserved categories viz. SC, ST and OBC etc. shall be treated as per the category from which the candidate belongs and the candidate shall submit a certificate of SC, ST, OBC and other categories etc. The remaining points as per reservation roster be filled up through the direct recruitment.*

(viii) *That in future, engagements of any staff on contract basis through Student Welfare Fund, Institute Management Committees and under*

> *any other Schemes in the institutions existing as on 31.07.2015 in the Department of Technical Education shall not be made without the approval of the State Government, failing which suitable disciplinary action shall be initiated against concerned Head(s) of respective institution(s).*
>
> *The Director, Technical Education Vocational & Industrial Training and the concerned Heads of the respective Institution(s) are directed to ensure that all the terms and conditions are kept in view."*

The Case of the Petitioners:

15. It appears that during the interregnum between the cut-off date, namely 31.07.2015 and the date of the Notification, namely 03.10.2015, the petitioners in all these writ petitions, came to be appointed on contract basis at the time of the commencement of the academic year 2015-2016.

16. Though, the initial appointment was for a period of one year, the contracts of appointment of the petitioners herein, were renewed from time to time.

17. At the time of the second renewal, the Government administered a word of caution, by their letter dated 23.08.2018, directing the Director of Technical Education, not to re-engage the petitioners after the expiry of the term of the contract at the end of the academic session/semester. Finding that the said letter nipped their hopes of getting absorbed on regular basis in the bud, the petitioners have come up with the above writ petitions.

Contentions:

18. Contending that the petitioners are also entitled to be absorbed on regular basis, on par with persons who benefitted by the Policy dated 03.10.2015, it was argued by Mr. M.L. Sharma, learned Senior Counsel appearing for the petitioners:-

(i) That the prescription of an artificial cut-off date for extending the benefit of the Policy dated 03.10.2015, is arbitrary and unfair, offending Articles 14 & 16 of the Constitution, as the same has no nexus with the object sought to be archived by the Policy;

(ii) That all persons appointed on contract basis, both before and after 31.07.2015, form the same class and no intelligible differentia exists between the two, justifying a discriminatory treatment;

(iii) That the petitioners herein as well as the beneficiaries of the Policy, dated 03.10.2015 were selected for appointment, in accordance with the same set of procedure; they were appointed by the same Authority; their appointments were approved by identical Selection Committees; they were recruited through a process of selection comprising of written test and interview; they were selected from the open market through newspaper advertisements and their conditions of service were also similar and hence, no artificial discrimination can be made between these two classes of servants; and

(iv) That the petitioners have a legitimate expectation that the Government, which is a model employer, will treat them on equal terms with those who benefitted by the Policy dated 03.10.2015.

19. In response to the aforesaid contentions, it was argued by the learned Advocate General that the Policy dated 03.10.2015 was intended to an 'One Time Measure'; that the appointments on contract basis are actually appointments made otherwise than through the Statutory Rules and, hence, no right of absorption would inure to the appointees; that when the Scheme itself was framed for the benefit of a set of individuals, who were in service as on a particular date, the question of introducing an artificial cut-off date and the question of discriminating between two sets of candidates would not arise and that the arguments based upon articles 14 & 16 of the Constitution are ill-founded

Discussion and Analysis:

20. The first contention of Mr. M.L. Sharma, learned Senior Counsel for the petitioners, is that the prescription of an artificial cut-off date was violative of Articles 14 & 16 of the Constitution and hence, the cut-off date has no nexus with the object sought to be achieved.

21. But, in our considered opinion, the above contention is completely misconceived. We have already brought on record the historical background, in which the Policy dated 03.10.2015 was issued. At the cost of repetition, it may be pointed out that a set of candidates, who were repeatedly appointed on contract basis for a number of years from 2007-208, approached this Court, fought a legal battle up to the Supreme Court and got a direction to the Government to frame a Scheme for their regular absorption. It is only in pursuance of the judgment of the Division Bench of this Court in a group of Letters Patent Appeals that the Policy dated 03.10.2015 was formulated. The very judgment of the Division Bench, dated 03.12.2014, in LPAs No. 107 of 2014 and a batch of cases, was rendered for the benefit of those, who had spent their youth and who had become ineligible to participate in competitive examinations for appointment on regular basis.

22. As a matter of fact, the Division Bench by its judgment dated 03.12.2014, actually over turned the decision of the learned Single Judge, mandating the regularization of the services of the writ petitioners. This was due to the fact that a mandate by this Court to regularize the services of these persons was not permissible in law. But the Division Bench found that by a communication dated 25.04.2011, the Director of Technical Education himself had recommended to the Government to consider the cases of those, who were fully qualified, as per the Recruitment and Promotion Rules and who had been working for a particular number of years continuously.

23. Therefore, by its very nature, the Policy dated 03.10.2015, brought forth pursuant to the decision of this Court, which itself was based upon the recommendations made by the Director of Technical Education, was supposed to be an 'One Time Measure'. The Policy is not to be converted into a death knell for the Recruitment and Promotion Rules. The Policy cannot be converted into an 'All Time Measure' from being an 'One Time Measure'.

24. In fact, the date 31.07.2015 was not chosen by the Government arbitrarily by employing the rule of thumb. The date 31.07.2015 coincides with the date of closure of the academic year 2014-2015. Therefore, there was not even any arbitrariness on the part of the Government in choosing the cut-off date i.e. 31.07.2015. There was a scientific reason as to why the said date was chosen.

25. In so far as fixation of cut-off date is concerned, the Courts have frowned only upon such fixation of cut-off dates that discriminated between two sets of individuals forming part of the same class. Interestingly, most of the cases, in relation to this principle, have arisen out of the grant of the some benefits to the retired pensioners. The earliest

decision of the Supreme Court in ***D.S. Nakara and others*** *Vs.* ***Union of India, (AIR 1983 SC 130)*** also related to the case of pensioners.

26. While explaining the decision in ***D.S. Nakara,*** the Supreme Court pointed out in***Government of Andhra Pradesh & others*** *Vs.* ***N. Subbarayudu & others***, **[*(2008) 14 SCC,* 702]** that a cut-off date is fixed by the Executive Authority keeping in view the economic conditions, financial constraints and many other administrative and attending circumstances. In fact, the rigid view taken in ***D.S. Nakara*** was actually watered down subsequently and the same was noted by the Supreme Court in its decision in ***State of Punjab & others*** *Vs.* ***Amar Nath Goyal & others, (2005 (6) SCC 754).*** It was observed in the said decision as follows:

> *"We are afraid that the refrain of D.S. Nakara has been flayed too often to retain its initial charm, which has been worn thin by subsequent dicta."*

27. In fact, the argument of discrimination, is advanced on the basis of a misconception that persons appointed before 31.07.2015 and those appointed after 31.07.2015 form the same class. They do not. Persons appointed before 31.07.2015 had approached this Court and secured a judgment directing the Government to frame a Policy, in tune with the recommendations made by the Director of Technical Education in his letter dated 22.04.2011. Anyone and everyone appointed before 31.07.2015 were not given the benefit of the Policy dated 03.10.2015. It was only those who completed 7 years or 9600 hours of service, who were to be granted the benefit, upon their completing 7 years of service or 9600 hours of teaching, whichever was earlier.

28. To compare a person who had completed 7 years of service or 9600 hours of teaching before 31.07.2015 on par with the persons who was appointed after 31.07.2015 and who had rendered a few hours of service before the date of issue of the Policy, namely 03.10.2015, is much worse than comparing apples and oranges. They certainly do not form part of the same class and they cannot object to the prescription of the cut-off date.

29. The object sought to be achieved through the prescription of the cut-off date is to render a benefit upon those who have already rendered sufficiently long period of service. Therefore, the first contention of the learned Senior Counsel for the petitioners is wholly unsustainable and hence, it is rejected.

30. The second contention of Mr. M.L. Sharma, learned Senior Counsel for the petitioners, that those appointed before and after 31.07.2015 constitute the same class and that no intelligible differentia exists between these two sets of candidates, is also misconceived. This argument could have held water, if the benefit of the Policy dated 03.10.2015 had been conferred upon all persons who had rendered service even for a single day before the cut-off date, namely 31.07.2015. The benefit of the Policy is extended only to those who had completed a prescribed number of years or number of hours of service.

31. If the argument of the learned Senior Counsel for the petitioners is accepted, then even pension is payable to a person who had not completed qualifying years of service. As pointed out earlier, the persons who benefitted from the Policy, had come to Court complaining that they had rendered long service and that they had become ineligible to appear in any competitive examination for recruitment to public services. It was this grievance that made them to form a separate class than those appointed after 31.07.2015.

32. The learned Senior Counsel for the petitioners placed reliance upon a judgment of the Supreme Court in ***Narendra Kumar Tiwari & others*** *Vs.* ***State of Jharkhand & others*** [***(2018) 8 SCC 238].*** In the said case, the Supreme Court explained

the object and intent of the decision in ***Secretary, State of Karnataka & others****Vs.* ***Uma Devi (3) & others,[(2006) 4 SCC 1]****,* to be two fold, namely (i) to prevent irregular or illegal appointments in the future and (ii) to confer a benefit upon those who had been irregularly appointed in the past. After so explaining, the purpose and the intent of the decision in ***Uma Devi***, the Court recorded a factual finding in ***Narendra Kumar Tiwari*** that the State of Jharkhand continued with irregular appointments for almost a decade even after the decision in ***Uma Devi***. Therefore, it was a case of exploitation.

33. In the case, on hand, the writ petitions cannot, by any stroke of imagination, complain of exploitation. They were appointed on contract basis during the period between 31.07.2015 and 03.10.2015. Even at the time of the second renewal of the contract, the Government woke up and issued Annexure P-8, dated 23.08.2018 not to continue to engage their services.

34. If seen in the light of the above, it will be clear that the letter dated 23.08.2018 issued by the Government, is an attempt to stop the exploitation of the petitioners. By seeking to set aside the said communication, the petitioners want the Government to subject them to exploitation, so that they can have the benefit of the judgment in ***Narendra Kumar Tiwari***. Therefore, the decision in ***Narendra Kumar Tiwari***, rendered in completely different set of circumstances, cannot go the rescue of the writ petitioners.

35. As pointed out earlier, the Policy dated 03.10.2015 was intended to be an 'One Time Measure', that was brought forth pursuant to a judgment of this Court. The Supreme Court noted in ***Narendra Kumar Tiwari*** that the concept of an 'One time Measure' was also explained in ***State of Karnataka & others***Vs. ***M.L. Kesari & others,*** [**(2010) 9 SCC 247].** The decision of the Constitution Bench of the Supreme Court in ***Uma Devi*** itself provided for an 'One time Measure'. Therefore, what was prescribed as an 'One Time Measure' for existing exploited employees cannot be converted into an 'All time Measure' by future appointees by exploiting the policy itself. Hence, the second ground of attack of the petitioners to the impugned action of the Government is also unsustainable.

36. The third contention of the learned Senior Counsel for the petitioners is that the petitioners herein as well as the beneficiaries of the Policy dated 03.10.2015 were selected for appointment, in accordance with the same set of procedure; they were appointed by the same Authority; their appointments were approved by identical Selection Committees; they were recruited through a process of selection comprising of written test and interview; they were selected from the open market through newspapers advertisements and their conditions of service were also similar and hence, no artificial discrimination can be made between these two classes of servants. In fact, the petitioners have given a tabulation indicating that they were also appointed by following the same process of selection and that they had competed with other candidates to be selected for appointment.

37. But the above argument over-looks the fact that the petitioners were not recruited in accordance with the procedure prescribed by the Recruitment and Promotion Rules. The very advertisements, pursuant to which the petitioners were selected and appointed, were for appointments on contract basis for a period of one year. These advertisements inviting applications for appointment on contract basis for one year would not have certainly attracted more meritorious candidates. It is not the case of the petitioners that their selection was in accordance with the procedure prescribed by Recruitment and Promotion Rules. Therefore, they cannot contend that they were recruited by the same procedure, as prescribed for regular employees.

38. Inviting our attention to the observations of the Supreme Court in ***Nihal Singh & others*** Vs. ***State of Punjab & others***, [**(*2013) 14 SCC 65*],** it was contended by the learned Senior Counsel for the petitioners that the appointments of the petitioners cannot be categorized as irregular appointments and that once a procedure of selection had been followed, the petitioners cannot be denied the benefit of the Policy.

39. But, we must remember that the decision in ***Nihal Singh*** arose under extraordinary circumstances. There was a large-scale disturbance in the State of Punjab in 1980s. Since, the State was not in a position to handle the law and order situation with the available police personnel, they resorted to Section 17 of the Police Act, 1861, for appointing Special Police Officers. These Special Police Officers were assigned the duty of providing security to the banks and the financial burden was borne by the banks.

40. The Supreme Court specifically found in ***Nihal Singh*** that the initial appointment of the appellants therein, was made in accordance with the statutory procedure prescribed under Section 17 of the Police Act, 1861.

41. In any case, the appellants before the Supreme Court in ***Nihal Singh*** were also those who had rendered a long period of service before they laid a claim for regularization. Therefore, the petitioners cannot rely upon the said decision.

42. The last contention of the learned Senior Counsel for the petitioner is based upon the theory of legitimate expectation. We do not know how, even at the threshold of their appointment on contract basis, the petitioners could have gained a legitimate expectation. If the petitioners had expected that the Government would never resort to appointments in accordance with the Recruitment and Promotion Rules and if the petitioners had expected that every appointment will be made only through the back door giving rise to a claim for regularization, then such an expectation would not fall under the category of legitimate expectation. The Policy introduced by way of an 'One Time Measure', it must be remembered, was an exception to the rule. One can have a legitimate expectation that the Government would follow the rules. One cannot have a legitimate expectation that the Government would continue to flout the rules, leading to the conferment of a benefit upon some individuals. Therefore, the last contention of the learned Senior Counsel appearing for the petitioners is also liable to be rejected.

43. Relying upon certain observations made by Justice V.R. Krishna Iyer, as he then was, in ***Som Prakash Rekhi*** Vs. ***Union of India and another,*** (***AIR 1981 SC 212*]** the learned Senior Counsel for the petitioners contended that the State is obliged to promote economic justice by acting as a model employer. We have no doubt in our mind that it is so. It is only because the State is supposed to be a model employer that they are obliged to make appointments to public services, only in accordance with the Statutory Rules. It must be remembered that all appointments made otherwise than in accordance with the Recruitment and Promotion Rules, strike at the very root of equality guaranteed under Articles 14 & 16 of the Constitution. At the outset, an appointment sought to be made on contract basis for a period of one year, does not attract the most meritorious. Secondly, the appointments on contract basis may not strictly follow the rule of reservation, which is the bedrock of Articles 14 & 16 of the Constitution. Therefore, this Court cannot be a party to the conversion of an 'One time Measure' issued by the Government, that too, at the instance of this Court, in to a permanent measure.

44. In view of the above, we find no merits in the writ petitions. Hence, they are dismissed alongwith pending application(s), if any.

****

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

Sohan Lal & another .....Appellants.
Versus
Thakur Dass & others .....Respondents.

RSA No. 524 of 2004
Reserved on: 02.07.2019
Decided on: 10.07.2019

Indian Succession Act, 1925 - Section 63– Will - Execution of – Held- Will has to be attested by two or more witnesses– It is not necessary that both these witnesses should be present simultaneously and they put their signatures at each other's presence– Mandatory requirement is that these witnesses must have seen testator signing Will or affixing his mark thereon or they have received personal acknowledgement from testator of his signature or mark on Will– Other mandatory pre-requisite is that attesting witnesses of Will must sign it in presence of testator. (Para 14)
Indian Evidence Act, 1872- Section 68– Will– Proof of– Held, due execution and attestation of Will can only be proved by calling at least one attesting witness of Will, in case he is alive. (Para 16)

Cases referred:
Girja Datt Singh vs. Gangotri Datt Singh, AIR 1955 SC 346
Gopal Swaroop vs. Krishna Murari Mangal & others, (2010) 14 SCC 266
K.M. Varghese and others vs. K.M. Oommen and others, AIR 1994 Kerala 85

For appellant No. 1:	Mr. P.P. Chauhan, Advocate.
For appellant No. 2:	Mr. Tara Singh Chauhan, Advocate.
For the respondents:	Mr. Ramakant Sharma, Sr. Advocate, with Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellants, who were the defendants amongst others before the learned Trial Court (hereinafter referred to as "the defendants"), laying challenge to the judgment and decree, dated 14.10.2004, passed by learned Additional District Judge, Solan Camp at Nalagarh, District Solan, H.P., in Civil Appeal No. 46-NL/13 of 2002, whereby the appeal filed by the respondent, who was plaintiff before the learned Trial Court (hereinafter referred to as "the plaintiff) was partly allowed and defendants No. 1 to 6, 12 and No. 7 to 11 were held as owners-in-possession of the suit land to the extent of $1/9^{th}$ share each and a decree was granted in favour of the plaintiff for permanent injunction restraining the defendants No. 1 and 2 from alienating the share of the plaintiff in the suit land.

2. The key facts of the case can tersely be summarized as under:

The plaintiff maintained a suit seeking declaration that he is co-sharer-in-possession of the land measuring 13 bighas, 7 biswas, being 10/18 shares of land measuring 23 bighas, 19 biswas situated in village Bhatauli and Kasauli, Pargana

Gullarwala, Tehsil Nalagarh, District Solan, H.P. (hereinafter referred to as "the suit land"). The plaintiff also contended that the defendants have no right, title and interest over the suit land and he sought the relief of permanent prohibitory injunction restraining the defendants from alienating the suit land and trees standing thereon and in the alternative for joint possession. As per the plaintiff he was born to Smt. Akki and from the loins of Shri Chuhra. Smt. Anto, predecessor-in-title of proforma defendants No. 7 to 11 and Smt. Shakuntla, proforma defendant No. 12, were also born to Smt. Akki. He has further contended that after the death of Smt. Akki, Shri Chuhra married with Smt. Kishni (defendant No. 3) and subsequently defendants No. 1, 2, 4 and 6 were born to her. The plaintiff and Shri Chuhra had joint Hindu family and they purchased the suit land and other property to the extent of ½ share through trust for the plaintiff. The plaintiff further contended that defendants No. 1 to 6 are admitting his claim that he is co-sharer-in-possession of the suit land by his act, conduct and acquiescence and defendants No. 7 to 12 also admitted the plaintiff to be the co-sharer. Earlier the plaintiff and his father, Shri Chuhra, used to reside at Mastanpura and subsequently they shifted to village Bhatauli and ultimately they came to village Karsoli. The plaintiff has further contended that he and his father built a residential house and also installed a well by contributing ½ shares each. As per the plaintiff, Shri Chuhra died intestate and defendants No. 1 to 6 got the revenue entries change in their favour and for effecting such entries they forged a Will. So, in view of the above contentions, the plaintiff sought a decree for declaration with consequential relief for permanent prohibitory injunction and in the alternative for joint possession.

3. Defendants No. 1 to 3 (i.e., Shri Sohan Lal, Shri Joginder Lal, both sons of deceased Chuhra and Smt. Kishani, widow of Shri Chuhra, respectively) contested the suit of the plaintiff. They raised preliminary objection of maintainability.On merits, defendants No. 1 to 3 contended that the plaintiff started maltreating Shri Chuhra and his step mother Smt. Kishani, so Shri Chuhra started living separately. Defendants No. 1 to 3 further contended that in the year 1958 Shri Chuhra purchased land measuring 22 bighas, 11 biswas, in village Bhatauli from Gurbax Singh, Shri Gurdayal Singh, Shri Harnam Kaur for consideration of Rs. 3500/-. Shri Chuhra also purchased land measuring 1 (one) bigha, 16 biswas in village Bhatauli for Rs. 400/- and land measuring 5 bighas, 13 biswas was exchanged with one Shri Dharam Singh. So, the property of Shri Chuhra was self acquired property, as he purchased it by spending his money, which he used to earn from tailoring. As per defendants No. 1 to 3, the plaintiff used to reside in different villages and he has no concern with the suit land. Shri Chuhra (deceased) executed a valid Will in favour of the defendants and mutation consequent thereto was also attested. Defendants No. 1 to 3 prayed that the suit be dismissed.

4. Defendants No. 4 to 6 filed a separate written statement. They denied the contentions of the plaintiff and asserted that the suit land is self acquired property of the deceased and the plaintiff has no concern in the suit property. These defendants prayed that the suit be dismissed.

5. Defendants No. 7 to 12 also filed separate written statement and they conceded to the claim of the plaintiff.

6. The plaintiff filed replication and refuted the contentions of the defendants. He reiterated the averments made in the plaint.

7. The learned Trial Court on 28.05.1998 framed the following issues for determination and adjudication:

"1. Whether this suit property is joint Hindu family and coparcenary property in the hands of deceased Sh. Chuhra as alleged? OPP

2. If issue No. 1 is proved whether the plaintiff is co-owner and co-sharer in the suit property? OPP

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

4. Whether deceased Sh. Chuhra executed legal and valid Will dated 8.8.95 in favour of the defendant No. 1 to 3? OPD 1-3

5. Whether the suit is not maintainable in the present form? OPD 1-3

6. Whether the plaintiff has no cause of action? OPD 1-3

7. Relief."

8. After deciding issues No. 1 to 3 against the plaintiff, issue No. 4 in favour of defendants No. 1 to 3, issue No. 5 against defendants No. 1 to 3, issue No. 6 against the plaintiff the suit of the plaintiff was dismissed. Subsequently, the plaintiff preferred an appeal before the learned Lower Appellate Court, which was partly allowed, vide impugned judgment dated 14.10.2004, hence the present regular second appeal, which was admitted for hearing on the following substantial question of law:

> ***"Whether the propounder of the Will is discharged of his onus of proving the execution of Will by examining both the attesting witnesses. The onus thereafter Will shift on the person challenging the Will to the unconscionability of the Will, if so its effect thereto."***

9. I have heard the learned Counsel for the appellants and the learned Senior Counsel for the respondents and have carefully gone through the records.

10. Mr. P.P. Chauhan, learned Counsel for appellant No. 1 has argued that the learned Lower Appellate Court has passed the impugned judgment and decree ignoring all the material facts which were brought on record and the learned Lower Appellate Court has failed to appreciate the fact that the Will was duly proved as per Section 63 of The Indian Succession Act, 1925. Mr. Tara Singh Chauhan, learned Counsel for appellant No. 2 has also argued that the Will executed by the deceased in favour of the appellants is valid and the same is as per Section 63 of the Act. He has argued that the appeal be allowed the impugned judgment of the learned Lower Appellate Court be set aside.

11. Conversely, the learned Senior Counsel for respondents No. 1 to 6 has argued that the Will in question failed the test of Section 63(c) of The Indian Succession Act, 1925, as the attesting witness, Shri Nirmal Singh (DW-3) while appearing in the Court did not state that he put his signatures on the Will. He has argued that due to non-compliance of Section 63(c) of The Indian Succession Act, 1925, the present appeal is liable to be dismissed. He prayed that the appeal be dismissed, as the same is devoid of merits. In order to draw lateral support to his arguments the learned Senior Counsel has relied upon the following judicial pronouncements:

1. ***Girja Datt Singh vs. Gangotri Datt Singh, AIR 1955 SC 346;***
2. ***Gopal Swaroop vs. Krishna Murari Mangal & others, (2010) 14 SCC 266.***

12. In rebuttal, the learned counsel for the appellants have argued that after re-appreciating the evidence and law, the appeal be allowed the impugned judgment rendered by the learned Lower Appellate Court be quashed and set aside. Learned Counsel appearing

for appellant No. 2 has relied upon the decision of Hon'ble Kerala High Court rendered in ***K.M. Varghese and others vs. K.M. Oommen and others, AIR 1994 Kerala 85.***

13. In order to appreciate the rival contentions of the parties I have gone through the record carefully.

14. The controversy in the case in hand mainly relates to Section 63(c) of the Indian Succession Act, 1925 (hereinafter referred to as "the Act"). At the very outset the same is extracted hereunder:

> ***"Section 63 in The Indian Succession Act, 1925***
>
> ***63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—***
>
> ***(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.***
>
> ***(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.***
>
> ***(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."***

Thus, as highlighted above, as per the mandate of Section 63(c) of the Act, a Will is to be attested by two or more witnesses, each of them must have seen the testator of the Will putting his/her signatures or affix mark on the Will and the witnesses must put their signatures on the Will in the presence of the testator. Thus, Section 63 of the Act lays down conditions qua proof of execution of valid Will. A Will has to be proved in the manner provided in Section 63 of the Act. Section 63(c) clearly provides that a Will has to be attested by two or more witnesses, but it is not mandatory that both these witnesses should be present simultaneously and they put their signatures in each others' presence. The mandatory requirement is that these witnesses must have seen the testator signing the Will or affixing his mark thereon or they have received personal acknowledgement from the testator of his signature or mark on the Will. Besides this, other mandatory prerequisite is that the attesting witnesses of the Will must sign the Will in presence of the testator.

15. Thus, in view of mandatory requirements laid down by Section 63 of the Act the propounder of the Will must prove that the attesting witnesses saw him signing the Will or affixing his mark thereon and they also signed in his presence.

16. In the above backdrop, it can safely be held that a Will has to be attested by at least two witnesses and they must sign or affix their mark in presence of the testator and the testator also sign the Will or affix his mark in presence of the attesting witnesses. Thus, the law provides that for a valid Will, it should be attested by two witnesses. The law also

postulates that in case a document is required to be attested then it must be proved in the manner provided under Section 68 of the Indian Evidence Act, 1872. Section 68 of the Indian Evidence Act, 1872, for ready reference is extracted hereunder:

> ***"68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"***

Thus, in view of the mandate of law ingrained in Section 68 of the Indian Evidence Act, due execution and attestation of the Will can only be proved by calling at least one attesting witness of the Will, in case he/she is alive. So, in view of the law, as discussed hereinabove, now this Court has to see the testimonies of witnesses examined by both the plaintiff and the defendants.

17. Will, Ex. D-4, in question is dated 08.08.1995. As per the testimony of DW-2, Shri Raj Kumar Sharma, who purportedly is the Scribe of the Will, Ex. D-4, stated that he scribed the Will on the instructions of Shri Chuhra Ram (testator) and Shri Nirmal Singh, DW-3 and Shri Charan Singh, DW-4, were present there. He has further deposed that the Will was readover to the testator and thereafter he affixed his thumb mark thereon. As per this witness, the witnesses also thumb marked and signed the Will at his instance. DW-3, Shri Nirmal Singh was the witness of the Will. Thereafter, he entered the Will in his register at serial No. 540. He also signed the Will and thumb marked the same. Subsequently, the Will was presented before the Sub-Registrar. This witness, in his cross-examination feigned ignorance that what was the time of scribing the Will. He deposed that he was not acquainted with Shri Chuhra Ram (testator) and could not say that on that day Shri Chuhra Ram was wearing spectacles.

18. DW-3, Shri Nirmal Singh, who is a witness to the Will deposed that on 08.08.1995 he and Shri Charan Singh, DW-4, went to Nalagarh with Shri Chuhra Ram (testator), where he got scribed a Will from Shri Raj Kumar, DW-2. As per this witness, Shri Chuhra Ram signed the Will after admitting its veracity and truthfulness. Thereafter, the Will was registered and presented before the Sub Registrar. As per this witness, Shri Chuhra Ram was of sound mind and admitted the execution of the Will. This witness, in his cross-examination, deposed that they reached to the Scribe prior to 09:00 a.m. and in between 10-11 a.m. he signed the Will and 12 noon the Will was presented before the Sub Registrar.

19. DW-4, Shri Charan Singh, is also an important witness in the instance case, as he is second attesting witness of the Will in question. He deposed that Shri Chuhra Ram took him and Shri Nirmal Singh (DW-3) for execution of the Will. As per this witness, Shri Chuhra Ram, after admitting the correctness of the Will, affixed his thumb mark on the Will and Shri Nirmal Singh also signed the same. Thereafter, the Will was presented before the Sub Registrar and there also Shri Chuhra Ram admitted the execution of the Will. He has further deposed that before the Sub Registrar also they signed. This witness, in his cross-examination, deposed that Shri Chuhra Ram executed the Will to the persons who were

looking after him. Subsequently, the Sub Registrar signed the Will and sent the same to Clerk, before whom thumb impressions were obtained and thereafter they again appeared before the Sub Registrar.

20. In the wake of what has been stated by the key witnesses and also keeping in mind the settled position of law, as discussed hereinabove. The present is a case where the Will is not proved, as evidence clearly establish that the Will could not succeed the rigors of Section 63(c) of the Indian Succession Act, 1925, provisions whereof are mandatory in nature. The reasons for not succeeding are that admittedly Will in question is a document of two sheets and both these sheets must bear the thumb impression of the testator, but both the attesting witnesses do not depose that Shri Chuhra Ram (testator) affixed his thumb marks on both the sheets. Shri Nirmal Singh, DW-3, referred to signing of the Will by Shri Chuhra Ram, but DW-4, Shri Charan Singh, deposed that the Will does not bear the signatures of Shri Chuhra Ram and it bears his thumb impression. Thus, there is clear deviance *inter se* the depositions of DW-3 and DW-4 and the same is not ignorable, especially in view of the position of law. In fact, Shri Nirmal Singh, DW-3, did not say that the Will was also signed by him and Shri Chuhra Ram (testator) affixed his thumb mark thereon. Thus, Shri Nirmal Singh cannot be said to be attesting witness of the Will, Ex. D4. Similarly, as per DW-4, Shri Charan Singh, deposed that he alongwith Shri Nirmal Singh signed the Will, but Will, Ex. D4, allegedly contains his thumb impression and not his signatures. Thus, the fact as narrated by DW-4 that he signed the Will stands clearly proved otherwise. The testimony of DW-4 further reveals that neither he had seen the testator signing or affixing thumb impression on the Will nor he had seen DW-3, Shri Nirmal Singh signing or affixing his thumb impression on the Will. In fact, the testimonies of DW-3 and DW-4 are contrary to each other and they fail to stand the test of credibility. After analyzing the testimonies of both these witnesses, it cannot be said with conviction that Shri Chuhra Ram (testator) executed a valid Will in their presence. Admittedly, registration of a Will is no guarantee of valid execution of Will. The deposition of DW-3, Shri Nirmal Singh, stands severely contradicted by DW-4, Shri Charan Singh, as DW-4 specifically deposed that Will was thumb marked before the Clerk and not before the Sub Registrar. This fact also creates a veil of doubt on the genuineness of the Will as to how the signatures of Shri Nirmal Singh (DW-3) were obtained on the Will in question. Indisputably, DW-3 deposed that Will was executed before the Sub Registrar, it was thumb marked by Shri Chuhra Ram in his presence and he and Shri Charan Singh (DW-4) also signed the same, but the testimony of DW-4, who is portrayed to be other attesting witness of the Will, through his testimony, creates doubts on the genuineness of the Will.

21. The learned Counsel/Senior Counsel have relied upon certain judicial pronouncements. Mr. Tara Singh Chauhan, learned counsel for appellant No. 2 has placed reliance on a judgment of Hon'ble Kerala High Court rendered in ***K.M. Varghese and others vs. K.M. Oommen and others, AIR 1994 Kerala 85,*** relevant paras of the judgment (supra) are extracted hereunder:

> ***"33. Section 63 of the Act deals with the execution of Wills. Section 63 of the Act reads thus:***
>
> ***63. Execution of unprivileged wills :--Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an ariman so employed or engaged, or a mariner at sea, shall execute his will acceding to the following rules :***
>
> ***(a).....***
>
> ***(b).....***

(c) The will shall be attested by two or more witnesses, each of whom has been the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signators or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary".

In Ext. A1, there are seven sheets of paper. In all these sheets of paper both the testator and the testatrix have signed. On the reverse of the first sheet both the testator and the testatrix have signed and the Registrar has made his endorsement. As identifying witness one Prathapan has signed, who was examined in this case as P W 3. In the last sheet two persons have signed as witnesses. Raman Narayanan has signed as witness No. 1. He has described himself as licencee AD/B 153. Then one P. K. Sivarama Pillai has singed as witness No. 2.

(He has not been examined since he was not well). He has described as the person who has written Ext. A1 and has given his licence number. Counsel for the first defendant submitted that the two witnesses signed in Ext. A1 are not attesting witnesses. Both the witnesses look animo attestandi and so they cannot be considered as attesting witnesses. Appellant in M.F.A. No. 631/92 submitted that both the witnesses are attesting witnesses and further the identifying witness Prathapan and also the Registrar can be considered as j attesting witnesses in the circumstances of the case. Further he submitted that if this Court is satisfied about the genuineness of the Will and that the Will is beyond reproach for reasons known to law and recognised by law, the court will be slow and hesitant to reject a registered Will on the technical ground that though there are two witnesses signed in the Will they had no animo attestandi. We will never forget when we examine the question of proof of the Will the requirement that the attesting witness examined should satisfy the court that the witnesses signed the will to bear witness to the fact that the signature of the testator was made or acknowledged in their presence.

34. Now we are only concerned with the question whether the document Ext. Al taken without evidence at all can be rejected as not a Will since there are no attesting witnesses. We may not be wrong in saying that no form of attestation is prescribed by statute, but it is necessary that the witness should put his signature with the intention of attesting it and the attestation must follow execution, and not precede it -- vide Pemandes v. Alves, ILR 3 Bombay 322 and in the matter of Hemlata Dobee. (1883) ILR 9 Cal 226. We also think it correct that a witness to be attesting witness need not be labelled as attesting witness and the place at which the signatures or thumb mark of

> ***witness is subscribed to the document is not decisive to hold whether witness was or was not an attesting witness. A mere pcrsual of the document Ext. Al it is difficult to say that there is non-compliance with the provisions contained in Section 63 of the Act. The fact that both the witnesses have given their identifying description referring to their licence numbers and one of the witnesses saying that he is the person who has prepared the document may not be sufficient to say that those witnesses are not attesting witnesses. Counsel for the first defendant very strenuously argued that the second witness can never be treated as an attesting witness, since he has singed not as a witness, but as a person who has written the document. But it has to be noted that in the document it is stated that he is the second witness. We see no reason to be so technical to say that since the witness has written words indicating that he is the person who has prepared/written the document will lose his character as a witness. It is not necessary for the witnesses who are attesting the document to declare in the document itself that they are attesting witnesses."***

The judgment (supra) is of no use to the learned Counsel for appellant No. 2, as the depositions of DWs 3 and 4, who purportedly are the attesting witnesses of the Will in question, fail to withstand the rigors of Section 63 of the Indian Succession Act, 1925. Both these witnesses, through their testimonies, instead of proving the Will create a doubt qua the genuineness and veracity of Will, Ex. D4. DW-4, Shri Charan Singh, one of the attesting witnesses, stated in the Court that he had not signed the Will. In view of this, the judgment (supra) is of no help to the appellants.

22. On the other hand, Mr. Ramakant Sharma, learned Senior Counsel, for the respondents also placed reliance on some judicial pronouncements. First in the queue is a decision of Hon'ble Supreme Court rendered in ***Girja Datt Singh vs. Gangotri Datt Singh, AIR 1955 SC 346,*** paras 14 and 15 whereof, being relevant, are extracted hereunder:

> ***"14. It still remains to consider whether the attestation of the signature of the deceased on the will, Ex. A-36 was in accordance with the requirements of S. 63, Indian Succession Act. Section 63 prescribes that:***
>
> ***"(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator ... ."***
>
> ***In order to prove the due attestation of the will Ex. A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased***

sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be witnesses who had no regard for truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves.

If no reliance could thus be placed upon their oral testimony, where would be the assurance that they actually saw the deceased execute the will in their presence and each of them signed the will in the presence of the deceased. It may as well be that the signature of the deceased on the will was appended at one time, the deceased being there all alone by himself and the attestations were made by Uma Dutt Singh and Badri Singh at another time without having seen the deceased sign the will or when the deceased was not present when they appended their signatures thereto in token of attestation. We have no satisfactory evidence before us to enable us to come to the conclusion that the will was duly attested by Uma Dutt Singh and Badri Singh and we are therefore unable to hold that the will Ex. A-36 is proved to have been duly executed and attested.

When this position was realised the learned counsel for Gangotri fell back on an alternative argument and it was that the deceased admitted execution and completion of the will Ex. A-36 and acknowledged his signature thereto before the Sub-Registrar at Tarabganj and this acknowledgment of his signature was in the presence of the two persons who identified him before the Sub-Registrar, viz., Mahadeo Pershad and Nageshur who had in their turn appended their signatures at the foot of the endorsement by the Sub-Registrar. These signatures it was contended were enough to prove the due attestation of the will Ex. A-36. This argument would have availed Gangotri if Mahadeo Pershad and Nageshur had appended their signatures at the foot of the endorsement of registration 'animo attestandi'.

But even apart from this circumstance it is significant that neither Mahadeo Pershad nor Nageshur was called as a witness to depose to the fact of such attestation if any. One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Indian Evidence Act requires an stetting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri."

The judgment (supra) is applicable to the facts of the present case, as a valid Will has to withstand the test of Section 63 of the Indian Succession Act. In the instant case, the Will in question could not be proved in accordance with the manner as provided under Section 63 of the Act.

23. The learned Senior Counsel for the respondents has also relied upon judgment of Hon'ble Supreme Court rendered in ***Gopal Swaroop vs. Krishna Murari Mangal & others, (2010) 14 SCC 266,*** relevant paras whereof as reproduced hereunder:

> ***"13. Section 68 of the Evidence Act reads as under:***
>
> ***68. Proof of execution of document required by law to be attested - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:***
>
> ***Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specially denied.***
>
> ***It is evident that in cases where the document sought to be proved is required by law to be attested, the same cannot let be in evidence unless at least one of the attesting witnesses has been called for the purpose of proving the attestation, if any such attesting witness is alive and capable of giving evidence and is subject to the process of the Court.***
>
> ***14. Section 63 of the Indian Succession Act deals with execution of unprivileged Wills and, inter alia, provides that every Testator except those mentioned in the said provision shall execute his Will according to the rules stipulated therein. It reads:***
>
> ***63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:***
>
> ***(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.***
>
> ***(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.***
>
> ***(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the***

witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

15. *From a conjoint reading of the two provisions extracted above it is evident that a Will is required to be attested by two or more witnesses each of whom has seen the Testator signing or affixing his mark on the Will or has seen some other person signing the Will in the presence and by the direction of the Testator or has received from the Testator a personal acknowledgment of the signature or mark or his signature or the signature of such other person and that each of the witnesses has signed the Will in the presence of the Testator. Section 68 of the Evidence Act is against the use of a Will in evidence unless one attesting witness has been examined to prove the execution.*

16. *The question, however, is whether the Will propounded by the appellant and purporting to have been attested by two witnesses, namely, Manoj Kumar and Vilas Tikhe has been validly proved. It is not disputed that one of the said witnesses namely, Vilas Tikhe has been summoned and examined as a witness. What is to be seen is whether the examination of the said witness satisfies the requirements of Section 63 of the Evidence Act (supra).*

17. *A careful analysis of the provisions of Section 63 would show that proof of execution of a Will would require the following aspects to be proved:*

(1) That the Testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of the Testator.

(2) The signature or mark of the Testator or the signature of the persons signing for him is so placed has to appear that the same was intended thereby to give effect to the writing as a Will.

(3) That the Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some other person signing the Will in the presence and by the direction of the Testator or has received from Testator a personal acknowledgement of the signature or mark or the signature of each other person.

(4) That each of the witnesses has singed the Will in the presence of the Testator.

18. *The decisions of this Court in Bhagwan Kaur W/o Bachan Singh v. Kartar Kaur W/o Bachan Singh and Ors., 1994 5 SCC 135, Seth Beni Chand (since dead) now by LRs. v. Smt. Kamla Kunwar and Ors., 1976 4 SCC 554, Janki Narayan Bhoir v. Narayan Namdeo Kadam, 2003 2 SCC 91, Gurdev Kaur and Ors. v. Kaki and Ors., 2007 1 SCC 546, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and Ors.,*

> ***2009 4 SCC 780, Rur Singh (dead) Through LRs. and Ors. v. Bachan Kaur, 2009 11 SCC 1 and Anil Kak v. Kumari Sharada Raje and Ors., 2008 7 SCC 695 recognize and reiterate the requirements enumerated above to be essential for the proof of execution of an unprivileged Will like the one at hand. It is, therefore, not necessary to burden this judgment by a detailed reference of the facts relevant to each one of these pronouncements and the precise contention that was urged and determined in those cases. All that needs to be examined is whether the requirements stipulated in Section 63 and distinctively enumerated above have been satisfied in the instant case by the appellant propounder of the Will.***"

Again, as held above, provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, in juxtaposition, provide that a Will has to be attested by two or more witnesses and each of them has seen the testator signing or affixing his mark on the Will or has seen some other person signing the Will. The judgment (supra) is fully applicable to the facts of the present case.

24. In view of settled position of law, as highlighted above, and after analyzing the testimonies of the key witnesses, it is amply clear that the Will in question could not pass the test of Section 63 of the Indian Succession Act. So, in these circumstances, the only substantial question of law is answered holding that the propounder of the Will could not discharge his onus of proving the execution of Will, as one of the attesting witness has not stated that he has signed the Will and there are contradictions with respect to affixing of thumb marks or signatures, as is apparent from the statement of DW-4, Shri Charan Dass. The substantial question of law is answered accordingly.

25. In view of what has been discussed hereinabove, this Court finds that the findings arrived at by the learned Lower Appellate Court are reasoned, after appreciating the evidence, which has come on record, to its true and correct perspective. The learned Lower Appellate Court has also applied the law to the facts of the present case correctly.

26. The net result of the above discussion is that the appeal, which sans merits, deserves dismissal and is accordingly dismissed. However, taking into consideration the facts and circumstances of the case, the parties are left to bear their own costs.

27. In view of the disposal of the appeal, pending application(s), if any, shall also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Geeta Devi …Petitioner.
Versus
State of Himachal Pradesh …Respondent

Cr.MP(M) No.1228/2019
Date of decision: 05.07.2019

Code of Criminal Procedure Code, 1973- Section 439– **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**– Section 3- Regular/interim bail– Grant of- Practice of surrendering before Special Judge/ High Court for obtaining bail, whether in accordance with law? Held, practice of accused surrendering before Special Judge/ High court and thereby obtaining ad interim bail cannot said to be with a view to override legislative intention of restraining grant of anticipatory bail to offenders of offences under Act- Rather few persons who are protected under Act use this legislative intent as a tool to send people in custody– In such cases, it shall be proper to grant ad interim bail to person surrendering before court.(Para 18)

Cases referred:
Bachu Das vs. State of Bihar, 2014(1) R.C.R. (Criminal) 975
Dr. N.T. Desai vs. State of Gujarat, (1997) 2 GLR 942
Karam Dass and others vs. State of H.P., 1995 (1) Shim.L.C 363
Niranjan Singh v. Prabhakar Rajaram Kharote, 1980 Cri.LJ 426
State of M.P. vs. Ram Kishan, 1995(3) SCC 221
Sundeep Kumar Bafna vs. State of Maharashtra, AIR 2014 SC 1745
Vilas Pandurang Pawar vs. State of Maharasthra, 2012 (8) SCC 795

For the Petitioner : Ms. Aanandita Sharma, Advocate.
For the Respondent : Mr. Nand Lal Thakur, Additional Advocate General for State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge (oral)

The present petition is under Section 439 of the Code of Criminal Procedure, seeking ad-interim as well regular bail in FIR No. 156/2010, dated 10.9.2010, registered in Police Station, Bhoranj, District Hamirpur, Himachal Pradesh, under the provisions of Sections 379 and 447 of the Indian Penal Code and Section 3 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'SCST Act').

2. The bail petitioner allegedly called the complainant by name and used the words which are prohibited under the provisions of the SCST Act.

3. Sub Inspector Rajeshwar Singh, Police Station, Bhoranj, District Hamirpur, Himachal Pradesh, is present alongwith record. He has filed the status report, which is taken on record in Cr.MP(M) No.1214/2019 and has also brought the police file. I have seen the status report as well as the police file to the extent it was necessary for the purpose of deciding the present petition and the same stands returned to the police official.

4. On 28.6.2019, this Court passed an interim order, directing the petitioner to be enlarged on bail on petitioner's furnishing personal bond in the sum of Rs.5000/- to the satisfaction of any of the Registrar/Additional Registrar/ Deputy Registrar of this Court, subject to the petitioner complying with the conditions imposed therein. The said interim order is in operation till date.

5. The case set up by the petitioner is as follows:

(a) That the allegations are false, wrong and baseless and the petitioner has no connection with the said offence.

(b) It has been specifically averred that the petitioner has been roped into the case by the police just to save the real culprits and at the behest of the complainant who has inimical relations with the petitioner owing to some land dispute and the present FIR is a counter-blast to that.

(c) Hence, the present F.I.R. under the provisions of Section 3 of the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Sections 379 and 447 of the Indian Penal Code, was registered.

6. I have heard Ms. Aanandita Sharma, learned counsel for the petitioner as also Mr. Nand Lal Thakur, learned Additional Advocate General for the respondent/State. Status report is also perused.

7. It has been admitted in the status report that the petitioner has joined the investigation as was directed by this Court. It has further been submitted that no recovery is to be effected from the bail petitioner. Also in the status report there is no mention of any previous criminal history of the bail petitioner. The petitioner is a permanent resident of the address mentioned in the memo of parties. Therefore, the presence of the petitioner can always be secured. I am satisfied that the no purpose will be served if the bail petitioner is sent to judicial custody.

8. At this stage, reference is being made to Section 437 of the Code of Criminal Procedure where the Legislature has mandated that the provisions of bail for woman are not stringent.

9. Sections 18 & 18-A of SCST Act, 1989, bar the rights of anticipatory bail under Section 438 of the Code of Criminal Procedure. The provisions read as under:-

> "18. Section 438 of the Code not to apply to persons committing an offence under the Act.—Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.
>
> "18A. (1) For the purposes of this Act,— (a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or (b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply. (2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."

10. It is no more *res-integra* that provisions of Section 438 of the Code of Criminal Procedure are not applicable in cases registered under the provisions of SCST Act.

11. In *State of M.P. v. Ram Kishan*, 1995(3) SCC 221, Supreme Court upheld the Constitutional validity of Section 18 of SCST Act, holding:-

> "9. Of course, the offences enumerated under the present case are very different from those under the Terrorists and Disruptive Activities (Prevention) Act, 1987. However, looking to the historical background relating to the practice of "Untouchability" and the social attitudes which lead to the commission of such offences against Scheduled Castes and Scheduled Tribes, there is justification for an apprehension that if the benefit of anticipatory bail is made available to the persons who are alleged to have committed such offences, there is every likelihood of their misusing

their liberty while on anticipatory bail to terrorise their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the said Act. It cannot be considered as in any manner violative of Article 21.

10. It was submitted before us that while Section 438 is available for graver offences under the Penal Code, it is not available for even "minor offences" under the said Act. This grievance also cannot be justified. The offences which are enumerated under Section 3 are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society, and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code.

11. A similar view of Section 18 of the said Act has been taken by the Full Bench of the Rajasthan High Court in the case of Jai Singh v. Union of India, AIR 1993 Rajasthan 177 and we respectfully agree with its findings.

12. In the premises, Section 18 of the said Act cannot be considered as violative of Articles 14 and 21 of the Constitution."

12. In *Vilas Pandurang Pawar v. State of Maharasthra*, 2012 (8) SCC 795, Supreme Court holds as under:-

"9. The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence."

Supreme Court relied upon this precedent in, *Bachu Das v. State of Bihar*, 2014(1) R.C.R. (Criminal) 975.

13. In *Niranjan Singh v. Prabhakar Rajaram Kharote*, 1980 Cri.LJ 426, Justice V.R. Krishna Iyer, J., speaking for the bench of Supreme Court, holds as follows:-

"8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or an least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can, be stated to be in judicial custody when he surrenders before the court and submits to its directions. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and may be, enabled the

accused persons to circumvent the principle of Section 439 Criminal Procedure Code We might have taken a serious view of such a course, indifferent to mandatory provisions by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We, therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but sitting under Article 136 do not feel that we should interfere with a discretion exercised by the two courts below."

14. In *Sundeep Kumar Bafna v. State of Maharashtra*, AIR 2014 SC 1745, Supreme Court holds:-

> "….8….Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word `custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."
>
> "… 26… Once the prayer for surrender is accepted, the Appellant before us would come into the custody of the Court within the contemplation of Section 439 CrPC. The Sessions Court as well as the High Court, both of which exercised concurrent powers under Section 439, would then have to venture to the merits of the matter so as to decide whether the applicant/Appellant had shown sufficient reason or grounds for being enlarged on bail."

15. A Bench of this Court in *Karam Dass and others v. State of H.P.*, 1995 (1) Shim.L.C 363, accepted the surrender of the persons who had been arraigned as accused in an FIR under SCST Act, and released them on bail, by exercising its powers under section 439 CrPC.

16. In, Jones versus State, 2004 Cr.LJ 2755, Madras High Court, observed:-

> "16. This Court recently has brought to light the misuse of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 against people of other community. This is another example of misuse of the Act. The purpose of bringing SC & ST Act is to put down the atrocities committed on the members of the scheduled castes and scheduled tribes. The law enforcing authorities must bear in mind that it cannot be misused to settle other disputes between the parties, which is alien to the provisions contemplated under the Act. An Act enacted for laudable purpose can also become unreasonable, when it is exercised overzealously by the enforcing authorities for extraneous reasons. It is for the authorities to guard against such misuse of power conferred on them."

17. In Dr. N.T. Desai vs. State of Gujarat, (1997) 2 GLR 942, High Court of Gujrat, observed:

> "… 8…. But then having closely examined the complaint more particularly in the context and light of the backdrop of the peculiar facts situation highlighted by the petitioner leading ultimately to filing of the complaint, this Court prime facie at the very outset is at some doubt about the complainant's story and yet if it readily, mechanically like a gullible child accepts the allegations made in the complaint at its face value, it would be surely blundering and wandering away from the path of bail-justice, making itself readily available in the hands of the scheming complainant who on mere asking will get arrested accused on some false allegations of having committed non-bailable offence, under the Atrocity Act, meaning thereby the Court rendering itself quite deaf, dumb and blind mortgaging its commonsense, ordinary prudence with no perception for justice, denying the rightful protection to the accused becoming ready pawn pliable in the hands of sometime scheming, unscrupulous complainants !!! This sort of a surrender to prima facie doubtful allegation in the complaint is not at all a judicial approach, if not unjudicial !! At the cost of repetition, 1 make it clear that these observations are only preliminary, at this stage only in peculiar background of the case highlighted by petitioner-accused and for that purpose may be even in future be so highlighted by the accused in some other cases to the satisfaction of the Court ! The reason is having regard to the basic cardinal tenets of the criminal jurisprudence more particularly in view of the peculiar circumstances highlighted by the accused which allegedly actuated complainant to victimise him, in case if ultimately at the end of trial what the accused has submitted in defence is accepted as probable or true and as a result, the accused is given a clean bill, holding that the complaint was nothing else but false, concoction by way of spite to wreck the personal vengeance then in that case what indeed would be the remedy and redresses in the hands of the petitioner, who in the instant case is Doctor by profession and for that purpose in other cases an innocent citizen? He stands not only stigmatised by filing of a false complaint against him but he shall stand further subjected to trial !! Not only that but before

> that even subjected to arrest before the public eye and taken to Special Court where only he could pray for bail ! Thus, subjected to all sort of agonies, pains and sufferings lowering his image and esteem in the eye of public because the Court when approached adopted the helpless attitude? Under such bewildering circumstances, what indeed would be the face of the Court and the fate of the Administration of Justice denying bail to some victimised innocent accused at crucial stage when he surrenders to the Court custody for the purpose?!! Should the Court proclaiming doing justice stand befooled at the hands of some mischievous complainant with head-down in shame !! Supposing for giving false evidence before the Court, the complainant is ordered to be prosecuted, but then will such prosecutions of complainant bring back the damage already done to an innocent !! Bearing in mind this most embarrassing and excruciating situation created by the complainant when, this Court as a Constitutional functionary is duty bound to zealously protect the liberty of citizen, should it be helplessly watching and passively surrendering itself to sometimes prima facie ex-facie malicious complaint denying simple bail to the accused? In this regard, perhaps, it may be idly said that accused can be given compensation for the malicious prosecution 22 and ultimate refusal of bail or anticipatory bail !! True, but then in that case what compensation can any Court would be in a position to give when the complainant is a person who is poor enough unable to pay a single pie?!! Not only that but in case complainant is rich and able to pay compensation then even can any monetary compensation ever adequately compensate the wrong accused suffered at the hands of the malicious complainant? It is here that the conscience of this Court stands pricked and terribly perturbed and indeed will have a sleepless night if what ought we do not know where the petitioner, in the facts and circumstances of the case be quite innocent and accordingly a needy consumer of bail justice and yet is unnecessarily subjected to arrest taken to the police custody and then before Court because of denial of bail to him at this stage !!"

18. The practice of accused surrendering before Sessions Court or High Court and thereby obtaining *ad-interim* bail, cannot be said to be with a view to override the legislative intention of restraining the anticipatory bail to the violators of the SCST Act. If the allegations are serious, keeping in view the object of the SCST Act and the purpose for which this stringent provision in SCST Act was enacted, then certainly, such kind of accused would not be permitted to take advantage of *ad interim* bails. However, a few persons, who are protected under the SCST Act, try to take undue advantage of the legislative intent, which is to bring them at par with society at large, and which is for their upliftment, and use it as a tool to send people in custody. In those cases, it shall be prudent, proper and legal to grant *ad-interim* bail. The Courts cannot be mute spectators, even when from the face of the allegations, it is seen that provisions of the SCST Act have been invoked simply with a view to deny the benefit of Section 438 of the Code of Criminal Procedure.

19. In the result the present petition is allowed. Interim order dated 28.6.2019 is made absolute subject to further following conditions:

> a) The petitioner is directed to join the investigation as and when called by the Investigating Officer. It shall be open for the Investigating Officer to call the petitioner as and when he feels such a necessity. The petitioner undertakes to appear before the Investigating Officer as and when directed to

do so. However, whenever the investigation takes place within the boundaries of the Police Station or Police Post, then the Petitioner shall not be called before 9 am and shall be let off before 5 pm.

b) The Petitioner shall neither influence nor try to control the investigating officer, in any manner whatsoever.

c) The petitioner undertakes not to threaten or browbeat the complainant or to use any pressure tactics.

d) The Petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

e) The Petitioner shall not hamper the investigation.

f) In case the of the launching of the prosecution, the petitioner undertakes to attend the trial and to appear before the Court which issues the summons or warrants and shall furnish fresh bail bonds to the satisfaction of such Court.

20. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

Petition stands allowed in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Dinesh Kumar …Appellant
Versus
State of H.P. & others …Respondents

LPA No. 69 of 2016
Reserved on:03.7.2019
Decided on: 11th July 2019

Constitution of India, 1950– Articles 14 & 226-Doctrine of procedural fairness- Applicability- Appointment of DPE in a school by PTA Committee– Challenge thereto on ground that procedure adopted by Committee was not fair and transparent– Hon'ble Single Bench dismissing writ and holding selection as valid– LPA– Held, selection criteria was prepared only on date of interview regarding which candidates had no knowledge before participation- Criteria not giving specific marks for possessing M.Phil degree in subject though such marks to be allocated to candidate having done Ph.D.– No material that all candidates who appeared in interview were not of that area– Only selected candidate obtaining full marks under head 'Local dialects' – Petitioner though only candidate with post graduate qualification given 6 marks out of 10 by subject expert whereas selected candidate having lesser qualification getting full marks out of ten– Criteria gave handle to selection committee to discriminate amongst candidates and had actually given them leverage to choose or reject candidate according to their whims and caprice– LPA allowed– Judgment of Hon'ble Single Bench set aside– Appointment of selected candidate set aside. (Paras 5 & 6)

Case referred:

Kailash Chand Sharma vs. State of Rajasthan and others, (2002) 6 SCC 562

For the appellant : Mr. Gaurav Gautam, Advocate.

For the respondents : Mr. Narender Guleria, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General for respondents No.1 to 3 & 5.
Mr. Bhuvnesh Sharma, Advocate, for respondents No. 4 & 6.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

The challenge in this appeal is to the judgment dated 30.09.2015, passed by learned Single Judge, whereby writ petition, filed by the appellant assailing the selection and appointment of respondent No.6, to the post of DPE, was dismissed.

2 **Factual position in the instant case is**:-

2(i) Applications were invited for filling in one post of DPE in Government Senior Secondary School, Jaddu Kuljar, Tehsil Jhandutta, District Bilaspur, under PTA Policy. Last date for applying was 05.10.2007. 53 candidates applied for the post. 25 candidates eventually appeared in the Interview held on 05.10.2007.

2(ii). The result was declared and respondent No.6, was selected for the post of DPE on PTA basis. He joined as such, the very next day of holding of Interview, i.e. on 06.10.2007.

2(iii). The petitioner filed a complaint before Sub Divisional Magistrate-cum-Chairman Inquiry Committee, Ghumarwin, District Bilaspur, against the selection and appointment of respondent No.6 as DPE on PTA basis. Vide order dated 22.09.2008, the Chairman, holding that merit has been ignored by the PTA Committee while appointing respondent No.6, sent the recommendations to the Head of the Institution as well as to the President, PTA, for further necessary action.

2(iv). The appeal filed by respondent No.6 against the above decision of Chairman Inquiry Committee, was allowed by the Additional District Magistrate, Bilaspur, vide order dated 09.04.2010. The order was on the basis that in the selection process, respondent No.6 had secured 58.05 marks, whereas, the petitioner secured 56.43 marks. Therefore, it was observed that merit has not been ignored by the PTA Committee. It was further observed in the order that any criteria which came into force subsequent to the completion of the selection process cannot be applied with retrospective effect.

2(v). Aggrieved by the order passed by the ADM as well as against his non-selection as DPE, the appellant invoked jurisdiction of this Court under Article 226 of Constitution of India by filing a writ petition. This writ petition was initially allowed on 20.12.2012. The appointment of respondent No.6 to the post of DPE was set aside and the order passed by the ADM was also quashed. However, respondent No.6 preferred Letters Patent Appeal, against the judgment dated 20.12.2012. In the appeal, vide decision dated 17.06.2013, the judgment passed by learned Single Judge, was set aside and the writ petition was restored to its original number for it's decision afresh.

2(vi). In view of the above directions, the writ petition came to be decided once again on 30.09.2015. Vide this judgment dated 30.09.2015, impugned in the present appeal, the selection of respondent No.6, has been upheld and the writ petition has been dismissed.

3. Feeling aggrieved against the decision of learned Single Judge, the present appeal has been preferred. We have heard learned counsel for the parties and gone through the record.

4. **Contentions :-**

4(i) Learned counsel for the appellant contended that:-

(a) The selection criteria adopted by the PTA Committee was not fair and transparent. It was made to favour the blue eyed persons of the members of Selection Committee. Prejudice has been caused to him by adoption of a discriminatory and arbitrary selection criteria.

(b) Petitioner was the only Post Graduate candidate with M. Phil degree. But only 4% out of total percentage of marks secured in Post Graduation (M. Phil), was to be allocated in this criteria to such Post Graduate candidates with M. Phil degree. Whereas, candidate with Ph.D degree was to be awarded 10 marks. This is alleged to be unreasonable and arbitrary criteria.

(c) 5 marks allocated in the selection criteria for 'Local Dialects' were meaningless. In the instant case, 5 marks reserved for candidates conversant with local dialects, was only to be a tool in the hands of Member of the Selection Committee, to allocate the same to candidates of their choice, irrespective of their merit.

(d) The marks reserved under the heading 'Local Dialects' is in violation of the judgment passed by the ***Hon'ble Apex Court*** in ***(2002) 6 SCC, 562,*** *titled as* ***Kailash Chand Sharma*** *v.* ***State of Rajasthan and others.***

4 (ii) Per contra, learned counsel for the respondents, submitted that a fair and reasonable criteria was adopted by the PTA Committee for selection of DPE. It is further contended that after participating in the selection process, it is not open for the writ petitioner to challenge the same.

5. **Observations:-**

5(a) We are constrained to observe that the selection criteria adopted by the respondents was faulty, arbitrary and unreasonable. The resultant selection process culminating in selection and appointment of respondent No.6, therefore, cannot be held to be lawful. We are observing so for the following reasons:-

(b) The record shows that selection criteria (***Annexure R-6)*** was prepared only by the President, PTA on 05.10.2007, i.e. on the date of the holding of Interview. The competing candidates were not made aware about this criteria before participating in the Interview. Thus, there was no occasion to challenge the same earlier.

(c) As per this selection criteria, the selection was to be conducted out of 100. It is not clear from the criteria as to whether selection was out of 100% or 100 marks. It will be appropriate to reproduce this criteria hereunder:-

*"**Criteria***

	Academic Examination	***Percentage***	***MM 100***
(1)	*Basic qualification for the post,i.e. +2 or graduation.*	*35% (of the total percentage)*	
(2)	*Professional Education for the post, i.e. B.Ped or B.P.E*	*30%*	*"*
(3)	*Higher Education for the M. Ped.*	*10%*	*"*
(4) (a) M-Phil 4% (of the total percentage)			
(b) Ph. D.		*10*	*(10 marks of Ph.D completed by the candidate)*
	Interview		
(5)	*Subject Expert M.M*	*10*	
(6)	*Local Dialect*	*05*	

***Total**= 100"*

(d) In terms of above criteria, framed by Pradhan-PTA, in case, a candidate is holder of M. Phil degree, he is to be given 4% out of total percentage of marks secured by him in M. Phil. However, in case, the candidate is Ph.D, he is to be given total 10 marks. This defies logic. When a candidate possessing Ph.D degree, could get 10 marks in the criteria, then why not some specific marks could be allocated to a candidate for possessing M. Phil degree. There is no logic to the adopted criteria, of giving 10 marks to Ph. D candidate and 4% out of total percentage of marks to M. Phil candidate. Award of just 4% out of total percentage of marks secured by the appellant in M. Phil degree instead of allocating some specific marks, has definitely caused prejudiced to him. Also, it is not understandable as to why the differentiation was made between holder of M. Phil and Ph. D degree in respect of allocation of percentage of marks and allocation of specific marks. It is to be noticed that petitioner was the only candidate with Post Graduation degree of M. Phil.

(e) It was argued during hearing that PTA Committee perhaps followed the criteria for selection of Para Teachers, a post different to DPE (PTA). However, even if criteria for selection of Para Teachers at (**Annexure R-4/2**) is perused, it shows entirely different picture. The marks there are awarded, which are in turn based on percentage of marks. This is not the position in the instant case. In any case, it is not the pleaded case of the respondent that the selection criteria was based upon Para Teachers' selection criteria.

(f) Looking at this criteria as a whole, it is impossible to fathom as to whether it is out of 100 marks or out of 100% because both ways, it leads nowhere. Neither 100 marks can be secured in the above criteria nor 100%, by a candidate. How the total comes to 100 is baffling.

(g) The criteria allocates 5 and 10 marks respectively under the heading 'Local Dialect' and 'Subject Expert'. The result of the selection process at (**Annexure P-4)** is revealing in various aspects. It is nobody's case that 25 candidates who appeared in the interview did not belong to the area or were not conversant with the 'Local Dialects'. Yet, in this result under the heading 'Local Dialects', it is only the selected candidate/respondent No.6, who has been given complete full 5 marks out of 5. No other candidate has been given

full 5 marks. As per arguments addressed at bar, all candidates were local. Appellant and respondent No.6 belonged to same Tehsil and District, with just 6 K.M. distance between their houses. It is profitable to reproduce relevant Paras of the judgment passed by the ***Hon'ble Apex Court*** in ***(2002) 6 SCC, 562,*** *titled as* ***Kailash Chand Sharma*** *v.* ***State of Rajasthan and others:-***

> ***"33.****The above discussion leads us to the conclusion that the award of bonus marks to the residents of the district and the residents of the rural areas of the district amounts to impermissible discrimination. There is no rational basis for such preferential treatment on the material available before us. The ostensible reasons put forward to distinguish the citizens residing in the State are either non-existent or irrelevant and they have no nexus with the object sought to be achieved, namely, spread of education at primary level. The offending part of the circular has the effect of diluting merit, without in any way promotion the objective. The impugned circular dated 10-6-1998 insofar as the award of bonus marks is concerned, has been rightly declared to be illegal and unconstitutional by the High Court.*
>
> ***34.*** *One more serious infirmity in the impugned circular is that it does not spell out any criteria or indicia for determining whether the applicant is a resident of rural area. Everything is left bald with the potential of giving rise to varying interpretations thereby defeating the apparent objective of the rule. On matters such as duration of residence, place of schooling etc., there are bound to be controversies. The authorities, who are competent to issue residential certificates, are left to apply the criteria according to their thinking,which can by no means be uniform. The decision in State of Maharashtra v. Raj Kumar is illustrative of the problem created by vague or irrelevant criteria. In that case a rule was made by the State of Maharashtra that a candidate will be considered a rural candidate if he had passed SSC Examination held from a village or a town halving only 'C type municipality. The object of the rule, as noticed by this court, was to appoint candidates having full knowledge of rural life so that they would be more suitable for working as officers in rural areas. The rule was struck down on the ground that there was no nexus between the classification made and the objection sought to be achieved because "as the rule stands any person who may not have lived in a village at all can appear for SSC Examination from a village and yet become eligible for selection" (SCC p. 314, para 2). rule rule was held to be violative of Articles 14 and 16. when no guidance at all is discernible from the impugned circular as to the identification of the residence of the applicants especially having regard to the indefinite nature of the concept of residence the provision giving the benefit of bonus marks to the rural residents will fall foul of Article 14."*

(h) The petitioner figuring at Serial No.2 of the result, the only candidate with Post Graduate Qualification, is given 6 marks out of 10 by the subject expert, whereas, respondent No.6, figuring at Sl. No.3 who is not a Post Graduate, gets 10 out of 10 in addition to 5 out of 5 marks under the heading 'Local Dialects'. Considering the way the selection criteria was made and adopted the way the marks have been allocated, distributed, the favouritism cannot be ruled out. For selection of PTA teachers, where all the candidates will invariably be from the area concerned, it defies logic for reserving 5 marks to be awarded for 'Local Dialects'. Such kind of allocation of marks in the facts and circumstances of the case, will obviously give handle to the selection committee to discriminate amongst

the candidates. Selection, therefore, on the basis of such criteria cannot be said to be transparent and free from suspicion.

6. Thus, looking from any angle, the selection criteria adopted by the PTA Committee, neither makes sense nor is in accordance with law. This criteria is bound to give handle to the Members of the Selection Committee to discriminate and has actually given them leverage to choose or reject a candidate according to their whims and caprice, causing prejudice to the deserving candidates. We cannot loose sight of the fact that for one post, there were 53 applicants, out of which, 25 had appeared for the interview.

7. In view of the above discussion, the judgment passed by learned Single Judge, dated 30.09.2015, is set aside. The selection and appointment of respondent No.6, as DPE, in Government Senior Secondary School, Jaddu Kuljar, Tehsil Jhandutta, District Bilaspur, is also set aside. Respondents No.1 to 3, are directed to conduct a fresh selection process by following a reasonable, just and transparent criteria, which is free from ambiguity and which is clear and does not leave any room for its misuse. Though, it will be a fresh selection process, however, 25 candidates, who had appeared in the interview for the post in question on 05.10.2007, will also be at liberty to participate in the fresh selection process. The selection process be initiated and taken to its logical conclusion within 3 months from today.

The appeal is accordingly allowed. Pending application(s), if any, also stand disposed of.

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

Hemant Mohan and another …Petitioners
Versus
State of H.P. …Respondent

Cr.MMO No. 183 of 2018
Date of Decision 10th July, 2019

Factories Act, 1948 – Section 106 and proviso – Time limitation for taking cognizance of offences – Computation thereof – Petitioner challenging cognizance taken by trial court of offences punishable under Act on ground of limitation **–** State alleging cognizance to be within limitation - Held, violations of factory laws were noticed by Labour Inspector during inspection on 23.5.2016 – Three months period for filing complaint expired before 23.8.2016 - Complaint filed on 21.9.2016 was barred by limitation and no cognizance could have been taken by court – Complaint totally silent about written notice having been sent to Manager and receipt of his response by complainant – Complainant cannot rely upon proviso to Section 106 of Act and claim extension in period of limitation –Petition allowed - Complaint quashed.(Paras 7 & 8)

For the P etitioners: Mr.K.D. Sood, Sr. Advocate with Mr. Shubham Sood, Advocate.
For the Respondent: Mr.Desh Raj Thakur, Additional Advocate General with Mr.R.P.Singh, Deputy Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (Oral)

Present petition has been filed against cognizance of offence taken by learned Magistrate in a complaint filed by Inspector appointed under Section 8 of Factories Act, 1948, (hereinafter in short 'the Act') against the petitioner, being occupier of establishment, for alleged violation of various provisions of Factories Act and Rules framed thereunder.

2 Main ground for assailing the institution of complaint against the petitioner is that as per complaint Annexure P-3, the same has been filed for violation of provisions of Factories Act and Rules noticed during the course of inspection dated 23.5.2016, which is in violation of provision of Section 106 of Factories Act, wherein it is provided that no Court shall take cognizance of any offence punishable under the Act unless complaint thereof is made within three months of date on which the alleged commission of offence came to the knowledge of an Inspector.

3 Learned counsel for the petitioners has pointed out that as per complaint preferred by Inspector, the same has been filed on 21.9.2016, for violation of relevant provisions of law noticed during the course of inspection dated 23.5.2016, whereas three months after the inspection had expired on 23.8.2016 and therefore, in view of provisions of Section 106 of the Act, the impugned orders passed by learned Magistrate taking cognizance of complaint so preferred are liable to be quashed.

4 It is contended on behalf of the respondent/State that though the inspection was carried on 23.5.2016, but thereafter vide written order dated 27.5.2016 (Annexure R-4), the petitioner was called upon by the Inspector along with compliance in writing and relevant documents/registers, with regard to violation noticed during the inspection and the petitioner had responded to the said communication vide letter dated 8.6.2016 which was received in office of Labour Inspector on 5.7.2016 and on finding the response of petitioner unsatisfactory the complaint was filed on 21.9.2016 which is within the limitation period in view of proviso of Section 106 of the Act which provides that where the offence consists of disobeying a written order, made by an Inspector, the complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.

5 In response to the plea of respondent/State, learned counsel for the petitioner has pointed out that respondent/State is relying upon documents Annexure R4 and R5 for the first time in reply to present petition, whereas Labour Inspector has never put reliance on those documents and he has preferred the complaint simply on the basis of inspection carried on 23.5.2016, which is evident from the contents of complaint as well as documents filed therewith as also depicted in the list of enclosures mentioned in the complaint.

6 Perusal of record of complaint, filed by the Inspector, received from learned Magistrate, it is evident that complaint has been filed on the basis of inspection carried on 23.5.2016 and there is not even a whisper about issuance of written order dated 27.5.2016 and initiation of complaint by the Inspector after receiving the response from the petitioner and/or failure of petitioners to comply with directions or for unsatisfactory response of petitioners. Rather, it is the petitioners, who along with their reply to complaint have placed on record the response dated 8.6.2016 on record indicating therein that issues raised in inspection dated 23.5.2016 were duly clarified in said reply.

7 Therefore, it is evident from the record, as pleaded by petitioners, that complaint was not on the basis of non-compliance of written order issued to the petitioners but on the basis of inspection dated 23.5.2016 only. Therefore, as noticed supra, in case of filing the complaint on the basis of inspection dated 23.5.2016, the same was to be preferred before 23rd August, 2016 and thus, the complaint is time barred and for this reason, learned Magistrate was precluded from taking cognizance of complaint on the basis of material before him as at the time of taking cognizance neither any written order nor response thereto or any other document or any averment in complaint was before him so as to invoke the proviso of Section 106 of the Act.

8 Even otherwise, if it is considered that there was written order dated 27.5.2016 issued by the Inspector to comply with the provisions of Factories Act and Rules made thereunder, then also after receiving the response of petitioners, with respect to compliance thereof, it was incumbent upon the Labour Inspector to inspect the factory again for pointing out the deficiencies on the part of factory management or non-compliance of written order issued by him, but in the complaint Inspector remained completely silent not only about issuance of written order but also about response received from the petitioners.

9 If the Labour Inspector was claiming the limitation period of six months on the basis of proviso to Section 106 of the Act, then it was incumbent upon him to have referred to this written order as well as response of the petitioners in complaint and also to state in the complaint about the shortcomings in compliance of written order on the basis of response of petitioners and/or after conducting the inspection again for verification of compliance. But it is not the case in the present proceedings.

10 Therefore, without referring to deficiencies in response filed by petitioners, it is not permissible for the respondent/State to justify the action of Inspector on the basis of written order dated 23.5.2016.

11 Learned Additional Advocate General has also contended that in present case there is a continuing offence and therefore, as per Explanation (a) to Section 106 of the Act, the period of limitation shall be computed with reference to every point of time during which the offence continues and as the petitioners have failed to comply with written order issued to them, the limitation period is continuing.

12 First of all, as noticed supra, Labour Inspector is not relying upon the written instructions issued by him and also there is nothing on record to establish that even after issuance of written order, the offence, as alleged, was continuing on the part of petitioners. Therefore, for want of cogent and reliable material/evidence on record, the benefit of Explanation (a) to Section 106 of the Act is also not available to the respondent/State.

13 Perusal of record indicates that Labour Inspector has relied upon document i.e. 'report of offence' dated 22.7.2016 under the Act, but again this report refers the date and time of inspection as 23.5.2016. This report is also silent about issuance of written order, reply received in response thereto and also about any further verification by the Inspector with regard to continuation of offence. Where the petitioners were claiming the compliance of communication sent to them by the Labour Inspector, it was necessary for the Labour Inspector to refer the same in its report and complaint, and also to verify the status of compliance on the part of Management. Had it been so, then definitely the Prosecution Agency was entitled for the benefit of proviso and Explanation (a) to Section 106 of the Act.

14 Therefore, in view of above discussion, the impugned orders dated 4.1.2017 and 21.8.2017 are set aside and proceedings, arising out of complaint filed by the Inspector,

pending before learned Judicial Magistrate 1st Class, in case No. 490-3 of 2016 titled State of H.P. vs. Hemant Mohan and another are quashed. Petition stands disposed of. Record be returned forthwith.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Jagdish ….Appellant
Versus
Shibi Devi & others. ….Respondents/defendants

RSA No. 128/2004
Reserved on: 05.07.2019
Decided on:12.07.2019

Indian Succession Act, 1925– Section 63 – Execution of Will– Proof – Plaintiff claiming title to property by inheritance – Defendant claiming succession by way of Will executed by 'L' – Trial court and appellate court declining plaintiff's claim and dismissing suit/ appeal – RSA – Held **–** 'L' was alone in his old age - He died issueless - His wife predeceased him – Defendant looked after deceased in last 4 – 5 years of his life – Defendant performed his final rituals – Plaintiff or her Power of Attorney never visited village and never served deceased – Due execution of Will proved by examining attesting witness 'MS' also – Will registered one – Findings of lowers Courts regarding due execution of Will are correct. (Para 6)

Indian Succession Act, 1925- Section 63 – Indian Evidence Act, 1872- Section- 68 - Will – Execution of and proof - Participation of beneficiary– Effect – Held – Mere participation by the beneficiary or his relation in execution of Will by itself cannot construed to be a suspicious circumstance.(Para 7)

Cases referred:

Pentakota Satyanarayana and Others vs. Pentakota Seetharatnam and Others, (2005) 8 SCC 67
Sridevi and Others vs. Jayaraja Shetty and Others, (2005) 2 SCC 784
Uma Devi Nambiar and Others vs. T.C.Sidhan (dead), (2004) 2 SCC 321

For the appellant : Mr. B.C. Verma, Advocate.
Respondents already exparte.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

This is appellant/ plaintiff's second appeal for challenging the Will dated 29.02.1988, executed by one Sh. Latu and consequent attestation of mutation on that basis, in favour of the defendant.

2. Original parties to the litigation died during the pendency of present appeal and were substituted by their successors-in-interest. The parties are being addressed hereinafter as 'plaintiff' and 'defendant', as they were in learned Trial Court. Plaintiff (now

successors-in-interest) is the appellant in the present appeal and defendant (now successors-in-interest) is the respondent.

3. **Facts which have come out from the record are**:-

3(i) Latu, the testator of the suit property in question, was owner in possession of the suit land measuring 9-15 bighas, comprised in Khata Khatauni No. 50/96, Khasra Nos.42, 93 and 309, situated in Mauza, Briela, Pargana Giripur, Tehsil Rajgarh, District Sirmour, H.P., as per Jamabandi for the year 1986-87. Latu's wife had predeceased him. He had no issues. The plaintiff (Jatho Devi) is daughter of one Sh. Dhonu, brother of Latu. Jatho Devi, was married years ago and was living separately in her matrimonial home in a separate distant village.

3(ii) Latu died in 1989 due to old age. After his death, Mutation No.195 was initially attested in respect of suit property on 29.09.1989 in favour of Jatho Devi, as his sole surviving legal heir.

3(iii) The above mutation order was challenged by the defendant before the Collector Sub Division Rajgarh in case No. 26/2010. Vide his order dated 24.06.1991, the Collector remanded the matter. Where after, on 22.12.2000, the Assistant Collector reviewed his earlier order dated 29.09.1989 and passed fresh order conferring the suit property owned by Latu in favour of defendant, on the basis of registered Will dated 29.02.1988, executed by Latu, in favour of defendant.

3(iv) Aggrieved against reviewing of mutation No.195 vide order dated 22.12.2000, in favour of the defendant, as well as for seeking a decree for declaration that she is an exclusive owner in possession of the suit property by way of inheritance from late Sh. Latu as his sole legal heir; and also for seeking permanent prohibitory injunction against the defendant in respect of suit property, the plaintiff filed the civil suit on 18.01.2001.

3(v) In his written statement, the defendant propounded Will dated 29.02.1988, executed by late Sh. Latu in his favour, bequeathing the entire suit property in his favour.

3(vi) Evidence was led by the parties. Both the learned Courts below, on appreciation of the pleadings and the evidence on record, have concurrently come to the conclusion that the Will dated 29.02.1988, (Ext. DW-2/A) has been duly proved in accordance with law. And also held that there are no suspicious circumstances surrounding the execution of the Will. Hence, the suit has been dismissed.

4. Feeling aggrieved against the concurrent judgments and decrees, dismissing her suit, the present Regular Second Appeal has been preferred by the plaintiff. This appeal was admitted on 20.09.2005. Following, substantial questions of law were framed on 22.03.2018:-

1. *Whether the Will Ex. DW-2/A as set up by the respondent has not been prepared in conformity with the mandatory provisions of law and the same is shrouded with suspicious circumstances and, therefore, no reliance could be placed thereon;*
2. *Whether the findings, as recorded by both the Courts below are vitiated on account of misreading and mis-appreciating of the pleadings of the parties, as well as, oral and documentary evidence on record;*
3. *Whether the marginal witness in Will Ex. DW-2/A, being near relation of the respondent and so much so that DW-3 Shankar Dass, Kanungo uncle of the respondent and the fact that the respondent himself actively*

participated in the preparation of Will Ex. DW-2/A, therefore, this Will is not legal and valid."

5. I have heard learned counsel for the appellant/plaintiff and gone through the record. No one has put in appearance for the respondent/defendant. They were proceeded against *ex-parte* vide order dated 12.07.2018.

6. **Questions No. 1:**

Execution of the Will:-

6(i) It is settled law that the Will has to be executed in the manner required by Section 63 of the Indian Succession Act, 1925 and has to be proved in accordance with Section 68 of the Indian Evidence Act.

Section 63 of the Indian Succession Act, 1925:-

***"63**. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare,or a mariner at sea, shall execute his Will according to the following rules:*

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Section 68 of the Indian Evidence Act:-

"68.*Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: [Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied]."*

Relevant Statements:-

6(ii) **Defendant as DW-1**:-

For proving the execution of Will as well as for proving its validity, the defendant/the propounder of the Will, stepped into the witness box as DW-1. He has stated that; The testator was alone in his old age; He was issue-less; His wife had predeceased him; His brothers had also died; Jatho Devi/plaintiff had not visited Latu for the last 14-

15 years or more; Plaintiff's General Power of Attorney Smt. Basanti Devi was also married and living in Solan; Both of them never visited village Briela where testator lived and where suit property is situated; It was the defendant, resident of same village, who took care of the testator for around 4-5 years preceding his death; It was the defendant, who had performed last rites of Latu/testator; Neither plaintiff nor her General Power of Attorney had visited village Briela even after the death of the testator; There was no relation of the testator who cared for him; It is because of defendant's care and looking after the testator that the later executed the Will in question in favour of the defendant.

He further stated that for such execution of the Will, the testator took the defendant to the Tehsil office on 29.02.1988; Testator/Latu, was not suffering from any mental or physical incapability at the time of execution of the Will; There was no pressure on him either of the defendant or of anyone else for executing the Will in question; Will was executed by him of his own free volition; The testator had himself requested the scribe for writing the Will; Where after, the scribe had read over the Will to the testator, who after accepting the contents thereof put his thumb impression on it; S/Sh. Jagat Ram and Madan Singh, who were present on that day in Tehsil office in connection with their own work, stood as attesting witnesses to the Will; The attesting witnesses were present at the time of execution of the Will and had put their signatures as such on the Will after the thumb impression were put on it by the testator; Neither plaintiff nor her General Power of Attorney took care of late Sh. Latu and that it was he, who looked after the testator and it is because of such looking after and also taking care of him that the testator had genuinely bequeathed the suit property in his favour by executing the Will in question. DW-1 has further stated that after the Will was executed by late Sh. Latu in presence of scribe and after the attesting witnesses put their signatures on it, the Will was taken for registration before the Sub Registrar/ Tehsildar and was registered on the same day. Latu was in sound disposition of mind.

6(iii). On going through the record, one cannot help but notice that the plaintiff even in the plaint has no where mentioned that either she or her attorney ever looked after Latu. No suggestion was given to DW-1, during his cross-examination that Will was the result of undue influence exercised by the defendant over Latu.

6(iv) **DW-2 (Madan Singh)** :

For proving the due and valid execution of the Will, the defendant has also examined one of the attesting witnesses as per the requirement of Section 68 of the Indian Evidence Act. Sh. Madan Singh (DW-2), stated that he was in the Tehsildar office in connection with his own work regarding registry of his land. In fact, in cross-examination, he has given the complete details of the land, which he got registered in his favour on that very day. He stated that he knew Latu as well as defendant Surat Singh. He further proved the valid execution of the Will by saying that; The Will was scribed by Munshi, thereafter, it was read over to Latu, who admitted it to be correctly drafted as per his desire and then put his thumb impression on it; Thereafter, he and Jagat Ram appended their signatures on the Will as attesting witnesses; Will was thereafter taken by them before the Sub Registrar/Tehsildar for its registration, where Shankar Dass had identified the testator. This witness has identified his as well as Jagat Ram's signatures and thumb impression of Latu on the Will. He has also testified that at the time of execution of the Will, Latu was in perfect mental and physical condition. Plaintiff could not extract anything in her favour from the statement of DW-2.

6(v) **DW-3 (Shankar Dass)**:-

Defendant has also produced in the witness box, Shankar Dass, the identifier of the testator at the time of registration of Will. Shankar Dass as DW-3, has stated that in 1988, he was working as Office Kanugoo in Rajgarh and he knew Latu, as he belonged to adjoining village; Latu had come in 1988 in Tehsil office for execution and registration of the Will. He admitted having identified Latu before the Registrar at the time of registration of the Will. He further says that on the day of execution and registration of the Will, Latu was in good physical condition and suffered from no infirmity either of body or of mind.

6(vi). Considering the above evidence, there is no escape from concluding that execution and registration of the Will has been duly proved in accordance with law by the propounder of the Will. Question is answered accordingly.

Questions No. 2 & 3:

7. **Suspicious Circumstances & Appreciation of Evidence**:-

7(i) It has been argued by learned counsel for the appellant/plaintiff that Will is shrouded with suspicious circumstances, in as much as, beneficiary and his acquaintances have played active part in execution and registration of the Will. This he contended, in itself is suspicious circumstance. The contention merits rejection, in the facts and circumstances of the case.

7(ii) Mere participation by the beneficiary or his relation in execution of the Will, cannot be construed to be a suspicious circumstance. I have gone through the statements of the plaintiff's witnesses as well as statements of defendant's witnesses. The statements of defendant's witnesses are coherent and natural, without any ambiguity or confusion. It is not the case of the plaintiff that either the attesting witness or the identifier or the Registering Authority had any axe to grind against the plaintiff. The will has been proved in accordance with law and the witnesses have been examined. No doubt, the beneficiary was present at the time of execution of the Will, but that cannot be a ground to doubt the valid execution of the Will or to contend that such participation has to be treated as a suspicious circumstance. The beneficiary has not even been put any suggestion by the plaintiff about any undue pressure, influence having been put by him on the testator for executing the Will. It is also not disputed by the plaintiff that the testator was neither incapacitated nor infirmed either in body or in mind because of which, he could not have executed the Will of his own free volition. The attesting witnesses as well as identifier have, off course admitted that they knew the testator. The argument of the plaintiff that the testator has not chosen persons from his own village to be attesting witnesses, will be a suspicious circumstance, cannot be accepted. The argument is illogical. Testator would definitely choose a person upon whom he could trust and place confidence.

7(iii) Another argument has been raised by the appellant that the beneficiary/defendant has stated that he was not related to Sh. Madan Singh/attesting witness, whereas, Sh. Madan Singh (DW-2), has stated that beneficiary was in his near relation. This, in itself, will not make execution of the Will suspicious. Learned counsel also tried to point out a contradiction in the statement of a witness regarding the mode of arrival of testator and beneficiary, in Tehsil office. It is to be noted that the statements were recorded about 14 years after the execution of Will. Resultantly, some minor discrepancies can occur, which are not of the nature to discredit the valid execution of Will and to put it under cloud of suspicious circumstances.

7(iv) Hon'ble Apex Court has held that mere active participation of the propounder/beneficiary in the execution of the Will or his relation/ acquaintances, can not lead to an inference that Will was not genuine. It is profitable to reproduce relevant para of the judgment passed by the ***Hon'ble Apex Court*** in ***(2004) 2 SCC, 321,*** *titled as* ***Uma Devi Nambiar and Others*** *v.* ***T.C.Sidhan (dead), :***

> "*16. A Will is executed to alter the ordinary mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the Court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations (See Puspavati v. Chandraja Kadamba.)In Rabindra Nath Mukherjee v. Panchanan Banerjee, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly*"

Hon'ble Apex Court in (2005) 2 SCC, 784, *titled as* ***Sridevi and Others*** *v.* ***Jayaraja Shetty and Others, held as under:-***

> *"11. It is well settled proposition of law that mode of proving the will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act, 1925. The onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances have to be judged in the facts and circumstances of each particular case. (For this see H. Venkatachala Iyengar v. B.N. Thimmajamma and the subsequent judgments Ramachandra Rambux v. Champabai,Surendra Pal v. Dr. Saraswati Arora, Jaswant Kaur v. Amrit Kaur and Meenakshiammal v. Chandrasekaran)."*

In (2005) 8 SCC, 67, *titled as* ***Pentakota Satyanarayana and Others*** *v.* ***Pentakota Seetharatnam and Others, Hon'ble Apex Court, held as under :-***

"24. In the instant case, the propounders were called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document on his own freewill. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated above. It was argued by learned counsel for the respondent that propounders themselves took a prominent part in the execution of the Will which confer on them substantial benefits. In the instant case, the propounders who were required to remove the said suspicion have let in clear and satisfactory evidence. In the instant case, there was unequivocal admission of the Will in the written statement filed by P. Srirammurthy. In his written statement, he has specifically averred that he had executed the Will and also described the appellants as his sons and Alla Kantamma as his wife as the admission was found in the pleadings. The case of the appellants cannot be thrown out. As already noticed, the first defendant has specifically pleaded that he had executed a Will in the year 1980 and such admissions cannot be easily brushed aside. However, the testator could not be examined as he was not alive at the time of trial. All the witnesses deposed that they had signed as identifying witnesses and that the testator was in sound disposition of mind. Thus, in our opinion, the appellants have discharged their burden and established that the Will in question was executed by Srirammurthy and Ex.B9 was his last will. It is true that registration of the Will does not dispense with the need of proving, execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act. The Registrar has made the following particulars on Ex.B9 which was admitted to registration, namely, the date, hour and place of presentation of document for registration, the signature of the person admitting the execution of the Will and the signature of the identifying witnesses. The document also contains the signatures of the attesting witnesses and the scribe. Such particulars are required to be endorsed by the Registrar along with his signature and date of document. A presumption by a reference to Section 114 of the Evidence Act shall arise to the effect that particulars contained in the endorsement of registration were regularly and duly performed and are correctly recorded. In our opinion, the burden of proof to prove the Will has been duly and satisfactorily discharged by the appellants. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. In such circumstances, the onus shift to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same."

"25. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in Sridevi & Ors vs. Jayaraja Shetty & Ors, (2005) 2 SCC 784. In the said case, it has been held that the onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and the proof of signature of the testator as required by law not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case."

The substantial questions of law are answered accordingly. The findings recorded by learned Courts below are based on correct appreciation of pleadings and evidence on record. Valid execution of Will has been proved, without any suspicious circumstance surrounding it.

Mutation No.195:

Opportunity of Hearing:

7(v) Before parting, it may be noticed that Mutation No.195, initially attested in favour of Jatho Devi/ plaintiff on 29.09.1989 by ignoring the registered Will, was challenged by the defendant before the Collector. The Collector had remanded the matter to the Assistant Collector for fresh decision after giving opportunity of hearing to the parties. On remand, Assistant Collector on 22.12.2000 records the fact that Jatho Devi despite service effected upon her, did not present herself before the Court. Where after, she was given written instructions to remain present in the Court. She did not abide by that also. A proclamation was also issued for informing her about the proceedings. Having failed to remain present, *exparte* proceedings were initiated against Jatho Devi. Consequently, on the basis of registered Will dated 22.02.1988, executed by Latu in favour of the defendant, the entries in respect of the suit land were recorded in ownership and possession of the defendant. It has otherwise come on record that it is the defendant who is actually in possession of the suit property after the death of Latu And subsequent to review of Mutation No.195, carried out on 22.12.2000, has become owner thereof on the basis of registered Will in question.

In view of the above discussion, present appeal fails and is dismissed as such. Pending application(s), if any, also stand disposed of.

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

Sunita .....Petitioner.
Versus
State of Himachal Pradesh & others .....Respondents.

CWP No.2937 of 2015.
Judgment reserved on : 09.07.2019.
Date of decision: 12.07.2019.

Constitution of India, 1950- Articles 14 & 226 – Appointment as Aganwari worker – Setting aside of by Competent Authority (Deputy Commissioner) on ground of her family having higher income at relevant time and thus she was not being eligible for appointment - Challenge thereto – Writ jurisdiction – Held – Husband of petitioner was Home Guard Personnel and his income during relevant period was Rs. 12,740/- which was more than prescribed for Anganwari post – Income certificate issued by patwari and Naib Tehsildar in favour of petitioner not only false but was issued solely with intention to illegally help her – Petitioner has not come to court with clean hands – Petition dismissed with costs – Departmental action directed against patwari and Naib Tehsildar concerned. (Paras 6 , 8, 12 & 16)

Case referred:
Indian Council for Enviro-Legal Action vs. Union of India and others, (2011) 8 SCC 161

For the Petitioner : Mr. Ashish, Advocate vice Mr. Neel Kamal Sood, Advocate.
For the Respondents: Mr.Vinod Thakur, Addl. A.G with Mr. Bhupinder Thakur, Ms. Svaneel Jaswal, Dy. A.Gs and Mr. Ram Lal Thakur, Asstt. A.G., for respondents No. 1 to 4.
Mr. A.K. Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The case has a long-drawn chequered history. Interviews for the post of 'Anganwari Worker' at Anganwari Centre, Devthana by the Integrated Child Development Project Officer, Sangrah, District Sirmaur, were held during the year 2007, in which the petitioner came to be selected. However, her appointment was challenged by respondent No.5 before the Deputy Commissioner, Sirmaur (first appellate authority) on the ground of higher family income, who set aside the selection of the petitioner vide order dated 10.06.2008. The petitioner assailed the order before the Divisional Commissioner, Shimla, who vide his order dated 09.07.2009 dismissed the appeal filed by the petitioner by upholding the order passed by the Deputy Commissioner.

2. The petitioner thereafter approached this Court by filing CWP No.2605/2009 and the same was decided by this Court on 17.05.2010 along with bunch of similar cases with the direction to the appellate authority to hear afresh all these matters in light of the directions/clarifications given by this Court.

3. In compliance to such directions, the issue of income of the petitioner was got verified from the Naib Tehsildar, Sub Tehsil, Nohra, who vide report dated 15.01.2011

(Annexure P-5) reported that income of the family of the petitioner during the year 2007 was Rs. 11,000/- and, therefore, income certificate issued to her was correct. However, the Sub Divisional Magistrate, Rajgarh, in his report dated 25.03.2009 (Annexure P-7) reported that the family of the petitioner had separated on 02.07.2006 (i.e. after 01.01.2004, the date prescribed in the guidelines). He further reported that the husband of the petitioner was employed in the Home guards and had received an amount of Rs.6,300/- as wages during 2006-07, therefore, the income of the petitioner should be taken to be Rs.16,300/- or more. On the basis of such report, the Deputy Commissioner set aside the selection of the petitioner vide his order dated 23.06.2011 (Annexure P-6). Even though, this order was again assailed before the Divisional Commissioner by the petitioner but the appeal so preferred came to be dismissed vide order dated 25.05.2015 (Annexure P-9), constraining the petitioner to file the instant writ petition.

4. The petitioner has filed the writ petition mainly on the ground that the findings recorded by the authorities below are perverse.

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

5. At the outset, it needs to be observed that the petitioner has not approached the authorities and even this Court with clean hands manipulating material facts in support of her petition, more particularly, her income based on false certificate. This is clearly evident from the material placed on record by the respondents along with their reply.

6. Annexure R-5/1 is the certificate of income issued in favour of the petitioner dated 14.05.2007 wherein her income is shown as Rs.16,150/- per annum from all sources. Annexure R-5/2 is the document supplied to the husband of respondent No.5 under Right to Information Act regarding salary details of the husband of the petitioner which reveals that during the relevant time with effect from 01.04.2007 to 07.07.2007, the total income of the husband of the petitioner for these 98 days alone was Rs.12,740/- against the prescribed income of Rs.12,000/-. Notably, this is the income of the husband of the petitioner alone and does not include the income of the petitioner and her other family members.

7. Strong reliance is then placed by the learned counsel for the petitioner on the report of the Patwari and the inquiry conducted by the Naib Tehsildar, Nohra.

8. As regards the report of Patwari, the same has been annexed with the writ petition as Annexure P-8 along with its translation Annexure P-8/T and reads as under:-

> *"(English translation of Annexure P-8)* ***Annexure P-8/T***
>
> *Statement of Shri Khajan Singh Patwari Halqa Devimanal, Sub-Tehsil Nohra, District Sirmaur,H.P.*
>
> *Stated that the Naib Tehsildar Nohra had called me in his office for hearing in Appeal Case No. 44/04-2010 Sunita Devi V/s Santosh Kumari. It is true that in the Income Report which was issued by me on dated 13.1.2006 in favour of Sunita Devi w/o Raghubir Singh, r/o Devamanal, I have mentioned in detail therein that the family of Sunita Devi and Raghubir Singh was separated from the year 2006 and the family consists of four members, out of which two are elders and two are younger and the duty of Shri Raghubir Singh, husband of Sunita, has been mentioned in the Home Guards for three months and his wages have been mentioned as Rs.70/- per day. There is total 10-03 bighas land in the name of family, out of 2-6 bighas is Majrua*

and 7-17 bighas is Gair Majrua and the annual income of the family is assessed at Rs.11000/- from all sources and the report issued by me is based on the true and correct facts. This is my statement.

RO&AC *Sd/-*
V.R.O. Devamanal
Sd/- *7-1-2011*
7-1-11
Naib Tehsildar
Nohra."

9. Adverting to the report of the Naib Tehsildar, the translated copy whereof is annexed with the writ petition as Annexure P-5/T and reads as under:-

"English translation of Annexure P-5 ***Annexure P-5/T***

Office of Naib Tehsildar, Sub-Tehsil Nohra, District Sirmour

High Court matter

Time Bound

Sr.No. 96-Reader/2011 dated 15-1-11

To

The Deputy Commissioner,
Nahan, District Sirmour.

Subject: Appeal No. 44/4 of 2010 titled Sunita Devi Vs. Santosh Kumari AWW Devthana ICDS Block Sangrah (CWP No. 2605/2009)

Fixed for 28-1-2011

Sir,

With reference to your office Letter No. Reader-DC/2010-56493 dated 31.12.2010 on the subject cited above, it is requested that as per your order, Sunita Devi and Santosh Kumari both the parties were called through summonses on 7-1-2011 and both were heard and their statements were recorded, which are enclosed and Patwari Halqa Devamanal was also called. His statement was also recorded, which is enclosed. The income certificate issued to Sunita Devi, which was later on cancelled, was also perused. The income certificate dated 14.11.2006 of Rs.11000/-(Eleven Thousand), which was issued by the Executive Magistrate Nohra in favour of Smt. Sunita Devi, was later on cancelled by the Naib Tehsildar Nohra on dated 29.10.2007. As per Sunita Devi, the income certificate which was issued to her is correct and according to that, she was given appointment in Anganwari and she had joined her duties on 8.8.2007 and the income certificate has been cancelled on dated 29.10.2007.

On perusal of the aforesaid facts and documents, it is found that at the time of interview, the family should be separate prior to 1-1-2004, but the family of Sunita has been shown to be separated in the year 2006, on the basis of which, the Sub Divisional Officer (Civil) had ordered for cancellation of Income Certificate. But as per the documents and spot report, the joint family income of Smt. Sunita during the year 2006 also comes to Rs.11,000/-, because no member from her family was in Government/Semi Government service. The respondent Santosh has told that her husband is appointed in Home Guard, which is wrong, because in this regard the certificate issued by

the Commandant, Home Guard,fourth battalion,Nahan is enclosed, from which it is clear that no wages of any kind is paid to him by the department. The report, therefore, is submitted for further action.

Encls: 4Nos. *Sd/-*
Naib Tehsildar
Sub-Tehsil Nohra,
District Sirmaur

Certified to be true English Translation
Sd/-
(Neel Kamal Sood)
Advocate."

10. In light of the material placed on record, especially, the information obtained by the husband of respondent No.5 under Right to Information Act, it can safely be held that the statement of Patwari as also report submitted by Naib Tehsildar, Sub Tehsil, Nohra, are not only false, but the same have been issued solely with the intention to illegally help the petitioner or else being custodian of the official records, there was no occasion or reason for both these officials to have given false reports regarding the income of the petitioner.

11. Admittedly, interviews for the post in question were held in August, 2007 and as per information (Annexure R-5/3), the husband of the petitioner with effect from 01.04.2007 to 07.07.2007 received an amount of Rs.12,740/- at the rate of Rs. 130/- per day, whereas, Patwari, in his statement has though stated that the husband of the petitioner had been engaged as Home Guard for three months, but his wages were only Rs.70/- per day. As regards, the Naib Tehsildar, he has clearly submitted in his report that even though the husband of the petitioner was appointed as Home Guard, but no wages of any kind were paid to him by the department.

12. Therefore, this is a fit case where departmental inquiry, apart from any other action, that may be taken, needs to be initiated against both these officials, irrespective of the fact whether they are still serving or have retired.

13. Since, the petitioner was not even eligible for being considered to the post of 'Anganwari Worker', therefore, there is no question of her being selected to the said post.

14. It is unfortunate that the petitioner from the year 2007 on one pretext or the other has managed to deprive respondent No.5 from her appointment and thereby converted the litigation into a fruitful industry.

15. The Hon'ble Apex Court in ***Indian Council for Enviro-Legal Action*** *versus* ***Union of India and others (2011) 8 SCC 161*** examined the principles of restitution and the abuse of process of Court and issue of doctrine of unjust enrichment of unscrupulous litigants and in order to ensure that the abuse of legal process is not done, it was also held that Court should adopt a pragmatic approach and also impose realistic costs since litigation has been turned into a fruitful industry by such litigants. The relevant observations of the Hon'ble Apex Court are as under:-

> *"191. In consonance with the principles of equity, justice and good conscience Judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legal process must be effectively*

curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.

192. The court's constant endeavour must be to ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.

197. The other aspect which has been dealt with in great detail is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view:-

(1) It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

(2) When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

(3) Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the court.

(4) A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

(5) No litigant can derive benefit from the mere pendency of a case in a court of law.

(6) A party cannot be allowed to take any benefit of his own wrong.

(7) Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

(8) The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

16. In view of the aforesaid discussion, not only there is no merit in this writ petition, but the same is liable to be dismissed with costs which are assessed at Rs.25,000/- to be paid to respondent No.5. Ordered accordingly. Pending application (s), if any, also stands disposed of.

17. However, before parting, the State Government is directed to initiate departmental proceedings against Shri Khajan Singh, the then Patwari Halqua, Devimanal, Sub Tehsil Nohra, District Sirmaur, H.P. and the then Naib Tehsildar, for having submitted false reports to the Deputy Commissioner. The inquiry be conducted within six months and

report thereof be submitted to this Court on **10.01.2020**, on which date the case be again listed before this Court.

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

Mohinder Guer ....Petitioner.
Versus
Reena Kumari & others ....Respondents.

Cr. MMO No. 4019 of 2013
Decided on: 12.07.2019

Code of Criminal Procedure, 1973 - Section 125(1)–Maintenance– Quantum of– Factors relevant for determination– Held, aim of granting maintenance is to prevent vagrancy to claimant– Maintenance amount should be reasonable, neither low nor excessive and exorbitant– Status of parties, reasonable wants of claimants, income and property of claimants and their liabilities etc., are some of factors which a court must look into while granting monthly maintenance. (Para 6)

For the petitioner: Mr. Malkeeyat Singh, Advocate, vice Mr. Sumit Sharma, Advocate.
For the respondents: Mr. Sanjay Kumar Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner, who was the respondent before the learned Trial Court (hereinafter referred to as "the respondent") under Section 482 Cr.P.C. read with Article 227 of the Constitution of India against the judgment dated 30.11.2012, passed by learned Additional Sessions Judge (Fast Track Court), Hamirpur, H.P., in Criminal Revision No. 6 of 2012, whereby the revision filed by the respondents, who were petitioners before the learned Trial Court (hereinafter referred to as "the petitioners") was allowed.

2. The facts giving rise to the present petition can be encapsulated as under:

The petitioners maintained a petitioner under Section 125 Cr.P.C. seeking maintenance of Rs. 20,000/- per month from the respondent in the Court of lowest rung. Admittedly, petitioner No. 1, Smt. Reena Kumari, is wife of the respondent and petitioners No. 2 and 3, Sagun and Suraj are daughter and son of the respondent. The marriage between petitioner No. 1 and the respondent was solemnized on 27.01.2004 and petitioners No. 2 and 3 were born out of the wedlock. The petitioners alleged that the respondent forcibly took petitioner No. 3 from the custody of petitioner No. 1 and petitioner No. 2 is residing with petitioner No. 1. It is further alleged that the family of the respondent started maltreating petitioner No. 1 and she was often given beatings and was also denied food, raiment and other basic necessities. The respondent leveled allegations of unchastity on petitioner No. 1. Ultimately, due to the coercive and intolerable behaviour of the respondent and his family members petitioner No. 1 left her matrimonial home on 26.09.2008 and since then she is residing in her parental house. It was also alleged that the respondent had

refused to maintain the petitioners without any cause and justification. As per petitioner No. 1, the respondent is doing the business of hardware shop and his income is in lakhs. Thus, the petitioners sought monthly maintenance allowance of Rs.20,000/- to each of them. The petitioners also alleged that they are poor persons having no source of income. The learned Trial Court partly allowed the petition and monthly maintenance amount of Rs. 2,000/- was granted to petitioner No. 2 (minor daughter) and no maintenance was granted to petitioner No. 1, as she was held to be receiving all necessities of her life, including maintenance from the respondent. Feeling aggrieved and dissatisfied, the petitioner, by way of filing criminal revision, approached the learned Revision Court and the learned Revision Court, vide its judgment dated 30.11.2012 (impugned judgment) granted monthly maintenance of Rs. 3,000/- to petitioner No. 1 (wife) and Rs. 2,000/- to petitioner No. 2 (minor daughter) from the date of filing the petition. Hence, the respondent (husband) maintained the present petition laying challenge to the impugned judgment dated 30.11.2012, passed by the learned Revision Court.

3. I have heard the learned Counsel for the parties and gone through the available records.

4. The learned vice Counsel for the petitioner herein has argued that the petitioner is working as servant in a shop and getting Rs. 9,000/- per month, so it is difficult for him to give Rs. 5,000/- per month to the respondents. He has further argued that the petitioner has to spend money on his son also. He has prayed that the petition be allowed and the impugned judgment of the learned Lower Revision Court be quashed and set side and the monthly maintenance amount granted to the petitioners be reduced. Conversely, the learned Counsel for the respondents herein has argued that the petitioner is not working in a shop, but he runs the shop of his father. He has further argued that monthly income of the petitioner is handsome for him Rs. 5,000/- is not a big amount. He has argued that the respondents are poor persons and they could not maintain themselves, as they have no means of livelihood. Petitioner No. 2 is minor daughter and petitioner No. 1 has to spend on her upbringing and education, so they are totally dependant upon the maintenance amount. It is prayed that the petition, which sans merits, be dismissed.

5. In rebuttal, the learned Counsel for the petitioner has argued that keeping in view the income of the petitioner and the fact that the maintenance allowance as awarded by the learned Trial Court is on a very higher side, the petition be allowed and the impugned order passed by the learned Revision Court be quashed and set aside and monthly maintenance allowance be reduced.

6. The relationship between the parties is not in dispute. Agreeably, status of the parties, reasonable wants of the claimant, income and property of the claimant, liabilities of the claimant etc. are some of factors which a Court must look into while granting monthly maintenance. For granting maintenance amount the Courts cannot be oblivious to fact that the claimant has to spend on his/her upkeep or dependants, purchase of essential items etc. The aim of granting maintenance is to prevent vagrancy to the claimant. In the instant case, the record reveals that the learned Lower Revision Court granted monthly maintenance amount Rs. 3,000/- to petitioner No. 1 (wife) and Rs. 2,000/- to petitioner No. 2 (minor daughter). True it is that the maintenance amount should be reasonable, neither excessive nor exorbitant. It has come in the evidence, as also noted by the learned Revision Court, that the father of the respondent runs a business of hardware in Main Bazaar, Ghumarwin. It is highly imaginative that the respondent is engaged as a servant by his father for monthly salary of Rs. 9,000/-. In order to dodge his liabilities towards the petitioners, the respondent unsuccessfully tried to portray that he is working as a servant in the shop of his father. Viewed with the angle that the petitioners, being wife

and minor daughter of the respondent, have no source of income to maintain themselves and respondent is liable to maintain them and also keeping in view the cost of living index, this Court sees no merits in the instant petition. This Court finds that the monthly maintenance amount granted to petitioner No. 1 and 2 is neither excessive nor exorbitant.

7. Plainly, the expression *'maintenance'* means appropriate food, clothing and lodging, but the expression '*maintenance'* is not to be narrowly interpreted. Maintenance is to be fixed and granted by the Courts keeping in view many circumstances, viz., minimum amount for education of children, expenses of upbringing of children, food, raiment, shelter, expenses on health etc. etc. Therefore, maintenance merely to a human body is not sufficient and it does not only mean clothing and food. So, keeping in view the settled position of law as also the evidence, which has come on record and without discussing the same in depth, this Court finds that the learned Lower Revision Court has rightly fixed and granted the maintenance amount to petitioner No. 1 (wife) and petitioner No. 2 (daughter).

8. In view of the above, this Court finds no merits in the instant petition. The petition, which sans merits, deserves dismissal and is accordingly dismissed.

9. With the above observations the petition, as also pending application(s), if any, stand(s) disposed of.

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

Hiru and others …Appellants/Defendants

Versus

Mansa Ram (deceased) through his LRs Chaman Lal and others ….Respondents/Plaintiffs

R.S.A. No. 480 of 2004
Reserved on: 03.07.2019
Date of decision: 10th July, 2019

Indian Evidence Act, 1872–Section 18– Admission– Evidentiary value– Held, admission made by a party on statement on oath before court must be taken to be reliable unless party gives explanation of circumstances in which admission was made or otherwise proves that such admission was erroneous– Duty is cast on party to explain his previous admission- Mere contradictory statement on oath cannot said to be an explanation of circumstances under which such admission was made. (Paras 12 & 14)

Cases referred:
Asif Beg and another vs. Estate Officer/Station Commander, ILR 2016 (III) HP 2002 (D.B.)
Daulat Ram and others vs. State of Himachal Pradesh and others, 1979 SLC 215

For the Appellants: Mr. G.R. Palsra, Advocate.
For the Respondents : Mr. Sanjeev Kuthiala, Senior Advocate, with Ms.Sonia Saini, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The defendants are the appellants, who aggrieved by the judgment and decree passed by learned first appellate Court whereby it allowed the appeal and set-aside the judgment and decree passed by learned trial Court, have filed the instant regular second appeal.

The parties shall be referred to as the plaintiffs and the defendants.

2. The plaintiffs filed a suit for declaration that they were owners in possession of the suit land comprised in Khewat No. 25 min, Khatauni No. 57 min, Khasra Nos. 39, 45, 92, 94, 175, 195, 215 and 218 Kitta 8 measuring 6-2-13 bighas, situated in Village Kheyogi, Illaqua Tilli, Tehsil Chachiot, District Mandi, H.P. and for permanent prohibitory injunction. It was averred that the plaintiffs are in possession of the suit land as non-occupancy tenants since the time of their father on payment of ½ produce as rent to defendant No.1 and prior to him his father Pira. The plaintiffs were also getting receipts of *Galla Batai* and after enforcement of the H.P. Tenancy and Land Reforms Act, had become owners of the suit land and, therefore, defendant No.1 had no right, title and interest in the suit land. However, with a motive to oust the plaintiffs from the suit land, he in collusion with defendant No.3 hatched a conspiracy against the plaintiffs and executed general power of attorney in favour of defendant No.3. Defendant No.3 taking undue advantage of the wrong entries alienated Khasra Nos. 92 and 94 measuring 0-19-9 bighas of land in favour of his son defendant No.2 and defendants No.2 and 3 in collusion with defendant No.1 started interfering in the suit land and cut and remove the wheat crop therefrom. Hence, the suit.

3. The defendants resisted and contested the suit and raised preliminary objections regarding locus standi and maintainability. On merits, it was pleaded that defendant No.1 was owner in possession of the suit land and after sale of some portion thereof, defendant No.2 was owner in possession of that land. It was also averred that the plaintiffs neither were in possession of the suit land as non-occupancy tenants nor had been paying any produce of the land to defendant No.1 nor to his father Pira. The receipts were wrong and did not pertain to the suit land. The part of the suit land had been validly alienated by defendant No.3 in favour of defendant No.2 and there was no conspiracy since the land had been sold for consideration of Rs.2000/-.

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

1. *Whether the plaintiffs were in possession of the land in dispute as tenant, as alleged? OPP*
2. *If issue No.1 is proved whether the plaintiffs have become owners of the land in dispute u/s 104 of the H.P.Tenancy and Land Reforms Act? OPP*
3. *Whether revenue entries showing the defendant No.1 as owner in possession are wrong? OPP*
4. *Whether the plaintiffs have no locus-standi to file the suit and the present suit is not legally maintainable? OPD*
5. *Relief.*

5. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit and aggrieved thereby the plaintiffs filed an appeal before the learned first Appellate Court, who allowed the same vide judgment and decree dated 30.7.2004, constraining the defendants to file the instant appeal.

6. On 2.11.2004, the appeal came to be admitted on the following substantial question of law:

> "Whether the learned Appellate Court misread, misconstrued and misinterpreted the evidence led by the respondents and ignored the evidence on record in holding that the respondents were tenants in the land, subject matter of dispute?"

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

8. Adverting to the judgment and decree passed by learned trial Court, it would be noticed that even though the plaintiffs produced receipts regarding the payment of rent, but it is more than settled that the tenancy is a bilateral agreement between the parties and in absence of payment of rent, there can be no valid tenancy. Admittedly, in the instant case, there is no written agreement of tenancy, however, the plaintiffs on proof placed on record the rent receipts Ex.PW-3/A and Ex.PW-3/B both dated 16.12.1975 which pertained to the receipt of Kharif crop by the defendants. However, these receipts were discarded by the trial Court mainly on the ground that the same did not bear any khasra number in respect of the receipt of Galla Batai, which findings being totally perverse, was rightly set-aside by the learned first Appellate Court.

9. That apart, the rent receipts otherwise stood duly proved on record by the Nambardar, who stepped into the witness box and proved the receipts of Galla Batai, which bear his signatures and also bore the signatures of the defendant/respondent Hiru in Ext. PW-3/A to Ext. PW-3/F and besides Ext.PW-3/B has bore the thumb impression of the father of PW-3 the then Numberdar and thumb impression of the mother of the defendant/respondent. Even though the witness was cross-examined, but nothing fruitful could be elicited therefrom by the defendant. Besides this, even PW-2 Pradhan of the Gram Panchayat has also proved his report Ext.PW-2/A which was made on a complaint made to him by the plaintiffs alleging interference in the suit land by the defendants. Lastly and more importantly is the statement of PW-1 Hiru himself, who though in his examination-in-chief has simply denied the claim of the defendants being a tenant in possession of the suit land, but when confronted with his statement Ex.AW-1/A that was recorded in a suit filed by one Mansa Ram against Shukru where he, apart from denying the said statement, had virtually no explanation for the admissions made therein.

10. Now, adverting to his cross-examination. Hiru admitted that the respondent was in occupation of his land measuring 6 bighas and cultivating the same as a tenant. It would be noticed that the respondent moved an application before the learned first Appellate Court for leading additional evidence under Order 41 Rule 27 CPC seeking permission to tender in evidence certified copy of the statement made by Hiru in Civil Suit No. 17/1996 decided on 9.5.2000. The said application was allowed vide order dated 3.12.2002 and the statement of Hiru was allowed to be placed on record. Thereafter, the parties led evidence and the appellant examined Record Keeper Bimla Devi as AW-1 and closed his evidence. Whereas, the appellant again examined Hiru, who surprisingly enough even feigned ignorance having been made a statement Ex.AW-1/A. The relevant portion of cross-examination of Hiru reads as under:

"........वादग्रस्त जमीन जिसका दावा मंशा ने मेरे उपर किया है उसका रकबा छह बीघा है। यह गलत है कि मैने शुकू के मुदकमा में जब मैं बतौर गवाह DW-2 पैश। हुआ था तो मैने यह कहा हो कि वादी के पास मेरी छह बीघा भूमि बतौर मजारा कास्त के लिए दी थी। यह गलत है कि मैने शुकू की तरफ से गवाह पेश हुआ था तो मैने यह कहा कि शुकू मेरा मुजारा है तथा मालिक मैं स्वर्य हूँ। मुझे याद न है कि बयान Ex.AW-1/A का भाग A से A मैने दिया था या नहीं। मुझे यह भी याद न है कि बयान B to B का भाग मैने दिया था या नही। बयान C से C मैंने सुन लिया है ऐसा बयान मै न दिया था। बयान Ex. AW1/A का भाग D से D भी मैने सुन लिया है ऐसा बयान मैने न दिया था। बयान Ex. AW1/A का भाग E से E मैने सुन लिया है ऐसा बयान मैने Court में न दिया था। बयान Ex. AW1/A का भाग F to F गलत है मैने ऐसा बयान न दिया था।"

11. The purpose of proving an admission of a party is not to contradict a statement given by the party as a witness to the case. The purpose is to prove the case of the party who relies on the admission.

12. It is true that a statement on oath (given as a witness) of the party making an admission will have to be considered along with the admission and unless an explanation as to the circumstances in which the admission was made is given or it is otherwise proved that the admission was erroneous, the statement contrary to the admission must be taken to be reliable.

13. No doubt, evidence in previous suit does not prove anything and it ought to be put to the witness, but it is not so in the case of admission where the party making the admission is required to explain and rebut the same and unless and until that is satisfactorily done the fact admitted must be taken to be established.

14. As already stated, a mere contradictory statement on oath cannot be said to be an explanation of the circumstances under which the previous admission was made, and the duty cast upon the party to explain his previous admission cannot be said to have been satisfactorily discharged unless he offers an explanation, and as the duty is on him to offer an explanation, there is no reason why it should be the duty of the opposite party to ask for his explanation by putting the previous statement to him.

15. Thus, once the admission of the respondent Hiru stands duly proved on record, this Court need not wander here and there to come to the conclusion that the plaintiffs were in possession of the land in dispute as tenant as admitted by Hiru himself and since the vestment under the H. P. Tenancy and Land Reforms Act is automatic on coming into force of the Act, had become owners thereof on the appointed day.

16. Once that be the position, then it is absolutely difficult to countenance and appreciate the stand taken by the appellants/ defendants because under sub section (3) of

Section 104 of the H.P. Tenancy and Land Reforms Act, 1972 , the conferment of proprietary rights upon non-occupancy tenant under the provisions of law was automatic and it commenced from the date of issue of the notification as was held by the learned Single Judge of this Court in ***Daulat Ram and others*** *vs.* ***State of Himachal Pradesh and others 1979 SLC, 215,*** wherein it was observed as under:

> *"15. Under sub-section (3) of section 104 of the Act, all rights, title and interest (including a contingent interest, if any) of the landowner of the land held by tenants shall be extinguished, and all such rights, title and interest shall vest in the tenants free from all encumbrances created by the landowner, with effect from the date to be notified by the State Government in the Official Gazette, provided that if the tenancy is created after the commencement of this Act, the provision of this sub-section shall apply immediately after the creation of such tenancy. It cannot be disputed that the entry of tenancy existed much before the promulgation of the Act, and the respondents cannot question the tenancy when it is so recorded in the revenue papers which is a conclusive proof of the factum of the existence of the tenancy. Once a person is entered as a tenant in the revenue record then notwithstanding any agreement, etc. to the contrary, the person so entered shall become the owner by virtue of the provision of sub-section (3) of section 104 of the Act. The conferment of the proprietary rights under the Act is automatic from the date of the issue of the notification by the State Government in the Official Gazette, and the vestment of ownership shall be free from all encumbrances. Under rule 27 of the Himachal Pradesh Tenancy and Land Reforms Rules 1975, all rights, title and interests in the tenancy land of landowners...shall vest in the non-occupancy tenants with effect from the commencement of these rules. Similarly, the proprietary rights of tenancy land of the non-occupancy tenants on Government land shall also vest in the tenants from the commencement of these rules. These rules came into force on 3.10.1975. Therefore, from that date the ownership rights vested free from all encumbrances on the persons who were so recorded as tenants under the landowners or for the matter of that the State Government in that land. Therefore, the plea taken up by the respondents that they were not the tenants is wholly incorrect because they cannot set up this case when they are so recorded, and once they are so recorded they become the owner of the land by virtue of the operation of law and they actually became owners with effect from the date of the publication of the rules."*

17. This issue has thereafter been considered by a Division Bench of this Court (of which I was a member) in CWP No. 3084 of 2015, titled as ***Asif Beg and another*** *vs.* ***Estate Officer/Station Commander****,* decided on 20.06.2016, wherein it was observed as under:

> "33. In the cases titled as**Shri Bishambhar Nath** versus **Shri Hari Chand and others**, reported in **1993 (3) S.L.J. 2906**; **Sant Ram** versus **Jash Ram,** reported in **1995 (3) S.L.J. 2510**; and **Jethu through K. Guddi and others** versus **Gobind Singh**, reported in **1995 (4) S.L.J.3031**, it has been held that the proprietary rights stand conferred upon the tenants by operation of law. It is apt to reproduce para 27 of the judgment in Jethu's case (supra) herein:
>
> > "27. Thus, on the basis of the aforesaid circumstances examined during the trial both the Courts below acted illegally in ignoring the legally competent evidence supporting the defendants' plea of

tenancy as claimed by them. The defendants having been held to be in occupation of the suit land as tenants since 1954 55, till date, accordingly, under Section 104 of the H.P. Tenancy and Land Reforms Act the proprietary rights in respect of the suit land stood conferred upon them and they have become owners of the same by operation of law."

34. In the case titled as **Mohar Singh** versus **Manju Devi & others**, reported in **1997 (1) S.L.J. 304**, this Court has held that the conferment of proprietary rights under HP Tenancy Act is automatic and by operation of law. It is apt to reproduce relevant portion of para 11 of the judgment herein:

" 11. ....Needless to point out here that after coming into force of the Himachal Pradesh Tenancy and Land Reforms Act, 1972, the conferment of proprietory right is automatic and by operation of law. Rest of the matter is procedural as required under the Act and the rules framed thereunder."

35. This issue stands clinched by the Apex Court in Civil Appeal No. 5424 of 1998, titled as **State of Himachal Pradesh** versus **Chander Dev**, wherein it has been held that conferment of the proprietary rights is automatic. It is apt to reproduce relevant portion of the judgment herein:

".......From the above provisions, it is clear that all rights, title and interest of a landowner shall be extinguished and all such rights, title and interest shall, with effect from the date to be notified by the State Government in the Official Gazette, vest in the tenant free from all encumbrances."

36. The Apex Court in the case titled as **Tarsem Lal and others** versus **Ram Sarup and others**, reported in **2014 AIR SCW 2886**, held that a tenant becomes owner on enforcement of Act. It is apt to reproduce para 13 of the judgment herein:

" 13. As per the aforesaid provision, all right, title and interest including a contingent interest of a land owner other than the land owner entitled to resume land under subsection (1) shall be extinguished and all such rights, title and interest in respect of the land in question vest in the tenant, i.e. original plaintiff, free from all encumbrances from the date the Act came into force. The Act was published in the Official Gazette on 21st February, 1974 vide Act No.8 of 1974. What is not in dispute is that the original plaintiff became owner of the suit land by operation of law and continued to enjoy all the rights including right of irrigation from the common source which was in possession of the original landlord."

37. Thus, it is accordingly held that the conferment of the proprietary rights is automatic, by operation of law."

18. In view of the aforesaid discussion, it cannot be held that the learned first appellate Court has misread, misconstrued and misinterpreted the evidence led by the respondents and ignored the evidence on record while coming to the conclusion that the respondents/plaintiffs were the tenant in the land in dispute.

The substantial question of law is accordingly answered against the appellants.

19. In view of the aforesaid discussion, there is no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Manoj Chauhan …Petitioner.
Versus
Suman Sehgal …Respondent

Cr. Revision No. 122 of 2019
Date of decision : 12.07.2019

Negotiable Instruments Act, 1881– Section 138– **Code of Criminal procedure, 1973**- Section 482– Dishonour of cheque – Complaint– Quashing of proceedings– Inherent powers of High Court– Sessions Court upholding conviction and sentence as recorded by trial court– Revision against– During revision parties compromising matter and petitioner praying for quashing of proceedings – Held, legislature's intention is not to send people to suffer incarceration because of bouncing of cheques but to provide an opportunity to them to pay– Offence under 138 of Act is not serious one but a case of failure to discharge financial liabilities– Fit case to quash proceedings pursuant to compromise– Petition allowed– Revision stands closed– Accused acquitted. (Paras 6 & 7)

Cases referred:
Damodar S. Prabhu vs. Sayed Babalal H., (2010) 5 SCC 663
Madhya Pradesh State Legal Services Authority vs. Prateek Jain, (2014) 10 SCC 690
Shakuntala Sawhney vs. Kaushalya Sawhney, (1979) 3 SCR 639

For the Petitioner : Mr. Vivek Chauhan, Advocate.
For the Respondent : Mr. Manoher Lal Sharma, Advocate.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge. (Oral)

The matter for consideration before this Court is the criminal revision petition, filed under sections 397 & 401 of the Code of Criminal Procedure, 1973, starting now to be called as CrPC. The petitioner is challenging the judgment dated 5.1.2019, passed by Sessions Judge, Solan, dismissing his appeal, (Criminal appeal no. 2-S/10 of 2018) and upholding the decision of the trial Court, dated 19-12-2017, passed by Judicial Magistrate, Ist Class, Court No. 2, Solan, H.P., (Case no. 298-3/2015, Suman Sehgal Vs. Manoj Chauhan), convicting the accused of commission of an offence punishable under section 138 of Negotiable instruments Act, from now on called as NIA. The petition was put up on 11-4-2019, when this Court issued notices to the respondent/complainant.

2. On 19-06-2016, the learned counsel for the parties stated that the parties have entered into a compromise and they have settled all the money transactions in terms of the same. Petitioner has also moved an application under Section 482 Cr.P.C. (Cr.M.P. No.

1051 of 2019) for compounding of the offence in question, annexing therewith the compromise deed (Annexure-A).

3. Today the petitioner, who is present in the Court, has stated that the entire settled amount stands paid to the complainant-respondent and now nothing is outstanding. His statement to this effect also stands recorded separately in Court today. The learned Counsel for the complainant-Respondent does not dispute this statement.

4. The gist of the complaint filed by the complainant/respondent, under Section 138 of the Negotiable Instrument Act is as follows:-

(a) The accused approached the complainant and requested to give him a sum of Rs.2,50,000/- and assured to return that amount. In lieu thereof, the accused issued one cheque for a sum of Rs.2,50,000/-, bearing No. 002309 dated 29-07-2015 drawn at Union Bank of India, the Mall Solan, Tehsil & District- Solan, in favour of the complainant. The complainant presented this cheque for encashment in State Bank of India, The Mall Solan, H.P., but it was returned by the bank as dishonoured, on account of insufficient funds, in the account of the accused.

(b) The complainant got issued a legal notice dated 20-08-2015 to the accused, calling upon him to make the payment of cheque amount, within fifteen days of the receipt of notice. Despite the service of notice, the accused did not pay the cheque amount.

(c) Resultantly, a complaint was filed under Section 138 of the Act.

(d) Learned trial Court put notice of accusation to the accused.

(e) After completion of the trial, accused was convicted and sentenced to undergo simple imprisonment for two months and was also directed to pay compensation to the tune of Rs.2,20,000/- lacs. In case of default in payment of the compensation amount, he shall have to undergo further simple imprisonment for a period of fifteen days.

(f) The appellate Court upheld the judgment of conviction. Resultantly, petitioner filed the present criminal revision.

5. It has been argued by the learned counsel for the appellant/accused that in view of the fact that the parties have compromised the matter, and entire settled amount has been paid by the accused, therefore, this matter be compounded in terms of the Act, and the consequential proceedings arising thereof be quashed. Learned counsel appearing for respondent consented for such closure and therefore, the offence is ordered to be compounded.

6. The jurisprudence behind the Negotiable Instruments Act, 1881 is that the drawer of the cheque, who signs the promissory instrument, honors his commitment, made during a transaction. The legislative intention is not to send the people to suffer incarceration because of the bouncing of the cheques but to provide them an opportunity to pay. These proceedings are to execute the recovery of cheque amount by showing teeth of penal laws.

7. This Court has inherent powers under Section 482 of the Code of Criminal Procedure, which is further supported by Section 147 of the N.I. Act to interfere in this kind of matter, where parties have paid the entire money, to close all the proceedings.

8. Given the entirety of the facts of the case, as well as judicial precedents, I am of the considered opinion that continuation of these proceedings will not suffice any fruitful purpose whatsoever. Therefore, I am of the considered opinion that this is a fit case where the inherent jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure read with 147 of Negotiable Instruments Act, is invoked to quash the criminal proceedings.

9. In *Shakuntala Sawhney v. Kaushalya Sawhney*, (1979) 3 SCR 639, at p 642, *Hon'ble* Supreme Court observed as follows:

> "The finest hour of Justice arise propitiously when parties, despite falling apart, bury the hatchet and weave a sense of fellowship or reunion."

10. Consequently, in view of the compounding of offences, the judgement of conviction passed by the learned trial Court, and affirmed by the learned Additional Sessions Judge, is set aside and quashed.

11. A three judges bench of Supreme Court, in Damodar S. Prabhu v. Sayed Babalal H., *(2010) 5 SCC 663,* laid down the following law for compounding of offences punishable under Negotiable Instruments Act, 1881:

> "THE GUIDELINES
>
> (i) In the circumstances, it is proposed as follows :
>
> (a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.
>
> (b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.
>
> (c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.
>
> (d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.
>
> Let it also be clarified that any costs imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the Court before which compounding takes place. For instance, in case of compounding during the pendency of proceedings before a Magistrate's Court or a Court of Sessions, such costs should be deposited with the District Legal Services Authority. Likewise, costs imposed in connection with composition before the High Court should be deposited with the State Legal Services Authority and those imposed in connection with composition before the Supreme Court should be deposited with the National Legal Services Authority.

17. We are also conscious of the view that the judicial endorsement of the above quoted guidelines could be seen as an act of judicial law-making and therefore an intrusion into the legislative domain. It must be kept in mind that Section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. We have already explained that the scheme contemplated under Section 320 of the Criminal Procedure Code cannot be followed in the strict sense. In view of the legislative vacuum, we see no hurdle to the endorsement of some suggestions which have been designed to discourage litigants from unduly delaying the composition of the offence in cases involving Section 138 of the Act. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the status quo, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance. Bonafide litigants should of course contest the proceedings to their logical end. Even in the past, this Court has used its power to do complete justice under Article 142 of the Constitution to frame guidelines in relation to subject-matter where there was a legislative vacuum.

12. In Madhya Pradesh State Legal Services Authority v. Prateek Jain, (2014) 10 SCC 690, the Supreme Court holds as under:

> "22. What follows from the above is that normally costs as specified in the guidelines laid down in the said judgment has to be imposed on the accused persons while permitting compounding. There can be departure therefrom in a particular case, for good reasons to be recorded in writing by the concerned Court. It is for this reason that the Court mentioned three objectives which were sought to be achieved by framing those guidelines, as taken note of above. It is thus manifestly the framing of "Guidelines" in this judgment was also to achieve a particular public purpose. Here comes the issue for consideration as to whether these guidelines are to be given a go by when a case is decided/settled in the Lok Adalat? Our answer is that it may not be necessarily so and a proper balance can be struck taking care of both the situations.
>
> 23. Having regard thereto, we are of the opinion that even when a case is decided in Lok Adalat, the requirement of following the guidelines contained in Damodar S. Prabhu (supra) should normally not be dispensed with. However, if there is a special/specific reason to deviate therefrom, the Court is not remediless as Damodar S. Prabhu (supra) itself has given discretion to the concerned Court to reduce the costs with regard to specific facts and circumstances of the case, while recording reasons in writing about such variance. Therefore, in those matters where the case has to be decided/settled in the Lok Adalat, if the Court finds that it is a result of positive attitude of the parties, in such appropriate cases, the Court can always reduce the costs by imposing minimal costs or even waive the same. For that, it would be for the parties, particularly the accused person, to make out a plausible case for the waiver/reduction of costs and to convince the

> concerned Court about the same. This course of action, according to us, would strike a balance between the two competing but equally important interests, namely, achieving the objectives delineated in Damodar S. Prabhu (supra) on the one hand and the public interest which is sought to be achieved by encouraging settlements/resolution of case through Lok Adalats."

13. The accused-petitioner is presently unemployed. The respondent has not disputed this fact. On the other hand, counsel for the respondent, on the count of financial difficulties of the accused/convict had agreed to discount the compensation amount. The accused in his statement, which is separately recorded on oath, stated that he has a daughter studying in 1st Year and a son studying in 9th Class and the financial difficulties faced by the petitioner/convict can very well be analyzed. It is not a case under some serious penal offences but a case of failure, to discharge his financial liabilities.

14. Therefore, given the law laid down by Hon'ble Supreme Court in Damodar S. Prabhu vs. Sayed Babalal H., (2010) 5 SCC 663 and further explained in Madhya Pradesh State Legal Services Authority vs. Prateek Jain and another (2014) 10 SCC 690, sufficient reasons exist to waive off the compounding fee. Hence, this Court, need not resort to the powers conferred under section 482 CrPC and all Courts can grant such relief by placing reliance upon the jurisprudence behind the Judicial precedents, cited before. Therefore, this Court is dispensing with the compounding fee, quantified at 15% of the sum, and the same is waived off. The criminal revision stands closed, and in a nutshell, the Court is acquitting the petitioner of all the charged offences.

15. The learned trial Court shall release all the amount deposited in this case, if any, along with interest in favour of respondent, in the account of the complainant in the manner, as desired by her, immediately on production of the certified copy of this judgment.

16. Accordingly, the petition stands allowed in the terms mentioned above. All pending application(s), if any, stand closed.

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

Ram Lal ....Petitioner

Versus

Narcotics Control Bureau ....Respondent

Cr.MP(M) No. 1153 of 2019
Reserved on: 11.07.2019
Decided on: 15.07.2019

Code of Criminal Procedure, 1973- Section 439– **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**– Section 37– Bail– Grant of– Accused allegedly supplied huge quantity of charas to co-accused– Subsequent to registration of FIR, he remained absconded and evaded his arrest for long time- It is third successive application for grant of bail- No change of circumstances is there since dismissal of earlier applications- There are chances of his fleeing away from justice– Petition dismissed. (Para 7)

For the petitioner: Mr. N.S. Chandel, Sr. Advocate, with Mr. Rajesh Verma, Advocate.

For the respondent/NCB: Mr. Ashwani Pathak, Sr. Advocate with Mr. Sandeep Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(*oral*).*

The present bail application has been moved by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case registered vide NCB Crime No. 41 of 2014, dated 20.10.2014, by Narcotic Control Bureau, Sub-Zone Mandi, H.P., under Sections 8 and 20 of the ND&PS Act.

2. The petitioner has preferred the present application seeking his bail. The petitioner had earlier also filed petitions seeking bail. His first petition, being Cr.MP(M) No. 786 of 2018, was dismissed by this Court vide order dated 28th August, 2018. Subsequently, he preferred second petition, being Cr.MP(M) No. 105 of 2019, which was dismissed as withdrawn. Thus, the petitioner has come to this Court third time seeking his bail. The petitioner, like in his earlier petitions, reiterated that he is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, as he is permanent resident of the place, so he may be released on bail.

3. In the earlier bail petition (Cr.MP(M) No. 1153 of 2019), this Court tersely summed up the facts of the case. Again, the facts, which have emerged from prosecution story, are that on 20.10.2014, NCB team was on routine surveillance duty at Kullu. At about 06:30 p.m., a secret information was received that co-accused Nilmani will come near span, which is situated at some distance ahead to village Shat towards Manikaran, around 08:30 p.m and 09:00 p.m., and he will give signal of torch towards the village, situated at the other side of the hill and then the villagers will send 15 to 20 kgs of *charas* through the span towards co-accused Nilmani and he will pick up the contraband. The secret information was given on telephone. A surveillance operation was planned and for interception of the accused persons a team was constituted. NCB team laid a nakka near Shat village and waited for accused Nilmani. Around 08:30 p.m. a person came towards village Shat and near the span he gave signal with torch. After 5-7 minutes some material came through span to the side and the person waiting there picked up the same. The person, who collected the material from the span, was apprehended. That person disclosed his identity as Nilmani alias Nitu. The accused alongwith the bag was taken to NCB, Sub Zone Office, Mandi, where the bag was checked and it was found stuffed with dark brown colour substance, which was wrapped with polythene papers, in the shape of biscuit and square. The recovered substance was tested with the help of drugs detection kit and the same was found to be *charas.* The recovered contraband was weighed and it was found to be 19.780 kgs. Thereafter, requisite codal formalities were completed. During the course of investigation one Khekh Ram was found to have supplied the contraband to accused Nilmani, but he remained absconded. Accused Khekh Ram subsequently surrendered and his custody was handed over to NCB, Mandi. During the course of investigation it was unearthed that accused Mohar Singh and Ambri Lal were instrumental in arranging the consignment of *charas* to co-accused Nilmani alias Nitu. Mobile records of the accused persons reveal that accused persons remained in constant touch with each other. Owner of the span stated that on 20.10.2014 a person, namely Ram Lal (petitioner herein) came to him with two bags and asked him to send those bags through his span and he did not

divulge about the contents of the bags. The petitioner was found to have used mobile No. 9816559297, through which he made several calls. The petitioner was issued notices under Section 67 of the ND&PS Act, but he did not turn up and remained absconded. The investigation further revealed that the petitioner was supplier of the *charas.* Lastly, it is prayed that as the petitioner was found involved in a serious offence and he also remained absconded, the bail petition be dismissed, as there is apprehension that the accused might flee from justice in case, at this stage, he is enlarged on bail and there is also a possibility that he may tamper with the prosecution evidence and there is no change in the circumstances.

4. I have heard the learned Senior Counsel for the petitioner, learned Senior Counsel for the respondent and gone through the record, carefully.

5. The learned Senior Counsel for the petitioner has argued that the petitioner is innocent and has been falsely implicated in the case in hand. He has argued that other accused persons have been acquitted and the petitioner himself surrendered before the police. The petitioner is resident of the place and he is neither in a position to jump over the bail, in case granted in his favour. The petitioner is willing to abide by the terms and conditions of the bail, in case so granted. He has further argued that now there is change in the circumstances and the petitioner is behind the bars for considerable time. Conversely, the learned Senior Counsel for the respondent has argued that there is no change in the circumstances and the bail application of the petitioner stood dismissed by the learned Trail Court on 16.05.2018 and this Court has also once dismissed the bail application of the petitioner and second application preferred by the petitioner was dismissed as withdrawn by this Court. The petitioner was found involved in a serious crime and he is supplier of *charas.* The investigation revealed that he allegedly supplied huge quantity of *charas* and subsequently he remained absconded. The petitioner was aware of the proceedings of the Court and there is every likelihood that he will be convicted on the available evidence, which is with the Narcotic Control Bureau. He has further argued that taking into consideration the huge quantity of contraband allegedly supplied by the petitioner and also the fact that there is no change in the circumstances, the present bail application be dismissed.

6. In rebuttal, the learned Senior Counsel for the petitioner has argued that the petitioner is behind the bars for sufficiently long period and no purpose will be served by keeping him behind the bars for an unlimited period, so the present application be allowed.

7. At this moment, after analyzing the records and hearing the learned Senior Counsel for the parties, this Court finds that there is no change in the circumstances. Admittedly, the petitioner is resident of the place, but this Court cannot shut its eyes to the fact that the petitioner evaded his arrest for long time. The recovered contraband in question is 19.780 kgs and is thus huge quantity. The trial in the case in hand is going on and if at this stage, keeping in view all the above circumstances, the petitioner is enlarged on bail, he may flee from justice and may also influence the witnesses. So, in view of the overall aspects of the case and the material, which has come on record, this Court finds that the present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour.

8. The petition, which is devoid of merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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

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

Cr. Appeal No.32 of 2009
Reserved on: 10.07.2019
Decided on: 15.07.2019

Indian Penal Code, 1860 - Sections 279, 304A & 337 – Rash and negligent driving – Proof – Trial court convicting accused of rash driving and thereby causing death of 'GC' and simple injuries to 'SK' – In appeal, Additional Session Judge acquitting accused – Appeal by State – Held, complainant deposing on oath that accused was not attentive in his driving and he was looking here and there – Statement does not find mention in his version recorded under section 154 of Cr.Pc – 'SK' an occupant of tractor attributing accident to be on account of rash driving of accused – Tractor admittedly loaded with compressor at relevant time – Highly improbable that tractor was being driven rashly – Evidence contradictory and not reliable – Appeal dismissed – Acquittal upheld. (Paras 8, 9 & 12)

Cases referred:
Arun vs. State, (2008) 15 SCC 501
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
T. Subramanian vs. State of Tamil Nadu, (2006) 1 SCC 401

For the appellant: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General.
For the respondent: Mr. Ajit Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/State, laying challenge to judgment dated 10.09.2008, passed by learned Additional Sessions Judge, Fast Track Court, Una, District Una, H.P., in Criminal Appeal No. 8 of 2006, whereby the accused/respondent (hereinafter referred to as "the accused") was acquitted for the commission of the offences punishable under Sections 279, 337 and 304A of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The key facts necessary for adjudication of this appeal can tersely be summarized as under:

As per the prosecution story, on 25.06.2004 police of Police Station, Amb, was informed by Medical Officer, that an injured person has been brought to the hospital. Police reached the spot and recorded the statement of Shri Jitender Kumar (complainant), son of Shri Gian Chand (hereinafter referred to "the deceased") under Section 154 Cr.P.C. The complainant in his statement portrayed that on 25.06.2004 he was standing at Panjoa bazaar and a tube well was being installed there. On the same morning the deceased alongwith Ramesh Chand (accused) went to Una for bringing compressor and at about 03:30 p.m. the accused was driving the tractor and compressor was trussed with the tractor. The

accused was driving the tractor and the deceased alongwith one more person was sitting on the tractor. The tractor rolled down the hill and fell about 15 feet down. So, the complainant and other persons ran towards the spot of accident and found that the deceased and other person sustained minor injuries. Soon, the injured were shifted to PHC, Amb, where the deceased was declared dead. As per the complainant, the accused was found to have sustained no injury in the accident and due to his rash and negligent act the accident took place. On the statement of the complainant, police registered a case against the accused and the investigation ensued. It has come in the police investigation that one Surjit Kumar was also brought to PHC, Amb, at about 03:30 p.m., on 25.06.2004, with the alleged history of road accident. As per the post mortem report, the deceased died due to acute haemorrhage shock, as a result of fracture multiple and damage to the base of heart. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as ten witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he pleaded not guilty. The accused did not lead any evidence in his defence.

4. The learned Trial Court, vide its judgment dated 31.07.2006/04.08.2006 convicted the accused under Sections 279, 337 and 304A IPC and sentenced him to undergo simple imprisonment for three month under Section 279 IPC, rigorous imprisonment for two years and fine of Rs. 5,000/- and in default of payment of fine he was ordered to further undergo simple imprisonment for three months under Section 304A IPC and under Section 337 IPC the accused was sentenced to undergo simple imprisonment for three months. The accused preferred an appeal, laying challenge to the judgment of the learned Trial Court and the learned Lower Appellate Court, vide its judgment dated 10.09.2008 (impugned judgment), acquitted the accused for all the offences, hence the present appeal is preferred by the appellant/State.

5. I have heard the learned Deputy Advocate General for the State, learned counsel for the respondent and carefully gone through the records in detail.

6. Mr. Raju Ram Rahi, learned Deputy Advocate General, has argued that the learned Lower Appellate Court acquitted the accused without appreciating the evidence and law correctly and just on the basis of surmises and conjectures. He has further argued that the learned Lower Appellate Court did not appreciate the fact that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. He has referred to the statement of PW-1, Shri Jatinder Kumar, who is son of the deceased and also the complainant in the instant case. As per the learned Deputy Advocate General, PW-1 has categorically stated that he has seen that the accused was looking here and there, so he could not negotiate the curve and resultantly the tractor fell down. He has argued that due to the rash and negligent driving of the accused the accident occurred and the deceased lost his life. On the other hand, Mr. Ajit Sharma, learned Counsel for the respondent/accused argued that in the instant case the statement of PW-7, Shri Surjit Singh, who was sitting alongwith the deceased on the tractor, is very vital. He has argued that PW-7 gave portrayal of the accident to the police, through his statement, which was recorded under Section 161 Cr.P.C. after 6-7 days of the accident. Learned Counsel for the accused has highlighted the statements of Shri Surjit Singh given to the police and before the Court. He has argued that PW-7, Shri Surjit Singh, made major improvements in his statement before the Court, so his testimony is not reliable. He has further argued that the statement of PW-1, Shri Jatinder Kumar (complainant), son of the deceased, is otherwise also not reliable. PW-1 made improvements in his statement before the Court. He has argued that the appeal sans merits, so the same be dismissed and the accused be acquitted.

7. In rebuttal, the learned Deputy Advocate General, has argued that the evidence, which has come on record, clearly show that due to the rash and negligent driving of the accused the accident occurred and the deceased lost his life. He has argued that after re-appreciating the evidence, which has come on record, the appeal be allowed and the accused be convicted.

8. The edifice of the prosecution case mainly rests upon the testimonies of PW-1, Shri Jatinder Kumar (complainant) and PW-7, Shri Surjit Singh (injured). PW-1, Shri Jatinder Kumar, deposed that on 25.06.2004, at about 03:15 p.m., a tractor was going towards Guga, which was being driven by the accused. He has further deposed that the deceased and Shri Surjit Kumar (PW-7) were sitting on the tractor. The tractor was going on downslope and rolled down the road. The accident took place due to the negligence of the accused, as he was looking here and there. The deceased died in the accident and Shri Surjit Singh sustained injuries. He has further deposed that he reported the matter to the police and his statement is Ex. PW-1/A. This witness, in his cross-examination, deposed that the site of work was visible from the site of accident and at that time five persons were working on the site of work. However, these witnesses were not examined by the prosecution for the reasons known to the prosecution. This witness tried to prove that accident took place due to the negligence of the accused, as he was looking here and there. This witness, in his cross-examination, admitted that he did not mention to the police that the accused was looking here and there and due to this the accident took place. So, it would not be inapt to say that this witness made improvements while deposing in the Court.

9. PW-7, Shri Surjit Singh (injured), another key prosecution witness, feigned ignorance qua the time, date and month of the alleged accident. As per this witness, the accused was driving the tractor on high speed and due to this reason he lost control over the tractor and the tractor rolled down from the road. This deposition of PW-7 is complete mismatch to the testimony of PW-1. PW-1 attributed the cause of accident that the accused was looking here and there, whereas, as per PW-7, the accident took place as the accused was driving the tractor on a very high speed. Now, the key prosecution witnesses have given different causes of accident. Indisputably, at the time of the alleged accident a compressor was trussed with the tractor, so it seems highly improbable that the tractor was going on a high speed. PW-1 and PW-7 have given different causes for the alleged accident and both these witnesses, as per the prosecution case, are the eye witnesses of the accident. However, the depositions of these witnesses are distinct, as they attributed different reason for the alleged accident.

10. Dr. R.K. Garg (PW-6) noticed the following injuries on the person of the deceased:

> ***"1. Multiple abrasions on the right fore arm;***
>
> ***2. Multiple abrasions on the right eye; &***
>
> ***3. Blunt trauma to the back and left shoulder."***

This witness issued medico legal certificate, Ex. PW-6/A. As per this witness, the injuries sustained by the deceased could be caused to a person sitting on the tractor and the tractor rolls down.

11. Even if it is taken that the deceased died in the alleged accident, then also the prosecution has to establish that due to the rash or negligent driving of the accused the alleged accident took place. Firstly, PW-1 attributed the cause of accident that accused was looking here and there and secondly PW-7 attributed the cause of accident that accused was driving the tractor on a high speed, even when a compressor was trussed with the tractor.

Principally, a rash act is an over-hasty act and is thus opposed to a conscious act, but it also includes an act which, though it may be said to be conscious, is yet done without due care and caution. In rashness the criminality lies in running the risk of doing an act with recklessness or indifference to consequences. The prosecution has to prove in the instant case that due to rash or negligent act of the accused the alleged accident took place, but the key prosecution witnesses give divergent portrayal qua the cause of the accident. Thus, it cannot be said that the accused was rash or negligent in driving the tractor.

12. As noted above, the testimonies of PW-1 and PW-7, the key prosecution witnesses, make the prosecution story doubtful. There are other auxiliary contradictions which render the prosecution story tainted with doubts. The first portrayal of the accident was given by PW-1, through his statement, Ex. PW-1/A, under Section 154 Cr.P.C. However, this statement nowhere mentions the name of PW-7, especially when PW-7 was known to PW-1. This Court cannot shut its eyes to the fact that accident took place on 25.06.2004 and the police recorded the statement of PW-7 on 01.07.2004. This unexplained delay of 6-7 days further makes the prosecution story doubtful. As per the prosecution story, the accused, who was driving the tractor, had not sustained any injury, especially when the tractor alongwith the accused, the deceased and PW-7, Shri Surjit Singh (injured) rolled down for 10-15 feet. Thus, the fact that the accused had not sustained any injury in the accident also seems improbable and the prosecution could not offer any explanation why the accused had not sustained any injury in the alleged accident. So, all these facts clearly create doubt qua the veracity of the prosecution story and makes it unbelievable.

13. Though, prosecution has also examined other witnesses, but their depositions are not worth discussing, as the prosecution case fails after examining the key prosecution witnesses, i.e., PW-1 and PW-7, who are also alleged eye witnesses of the accident.

14. After exhaustively discussing the testimonies of key prosecution witnesses, it is safe to hold that prosecution witnesses have not given true version about the accident and, in fact, they tried to exaggerate the things and in their attempt to do so, they created a doubt in the mind of this Court qua the veracity of the prosecutions story. The Hon'ble Supreme Court in ***Arun vs. State, (2008) 15 SCC 501,*** has held that if there are two reasonable views, then the view favouring the accused be adhered to. In the present case also there are two views and the available material on record compels this Court to tilt towards the view favouring the accused.

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. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***1. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***

2. ***The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
3. ***Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***
4. ***An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.***
5. ***If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."***

17. In view of the settled position of the law as discussed hereinabove and also the testimonies of the key prosecution witnesses, which are marred with contradictions and discrepancies, it would be more than safe to hold that the prosecution story is full of doubts and the prosecution could not cogently and convincingly establish the guilt of the accused. Thus, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Therefore, the findings of acquittal, as recorded by the learned Lower Appellate Court do not suffer from any infirmity. This Court sees no ground to overturn the findings of acquittal of the learned Lower Appellate Court.

18. The appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending miscellaneous application(s), if any, shall stand(s) disposed of.

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

Surender Sharma …Petitioner

Versus

Nek Ram Verma …Respondent

Cr. MMO No. 523 of 2018
Reserved on : 01.7.2019
Decided on: 10.07.2019

Code of Criminal Procedure, 1973- Sections 397 and 401-Interlocutory orders– Revision against– Maintainability– Held, order rejecting accused's application for sending disputed cheques to expert for comparison with his admitted/specimen handwriting is purely interlocutory in nature and revision against it is not maintainable. (Para 11)

For the petitioner: Mr. Shyam Singh Chauhan, Advocate.
For the respondent: Mr. Nitin Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition has been maintained by the petitioner/accused under Section 482 of the Code of Criminal Procedure for quashing and setting aside the order dated 04.08.2018 passed by the learned Additional Sessions Judge(1), Shimla, H.P. in Cr. Revision No.6-S/10 of 2018.

2. Briefly stating the facts, giving rise to the present petition are that the respondent/complainant (hereinafter to be referred as the 'respondent') filed a compaint under Section 138 of the Negotiable Instrument Act before the learned Chief Judicial Magistrate, Shimla, H.P. It has been alleged that the learned Chief Judicial Magistrate took cognizance and the petitioner/accused was summoned. Notice of Acquisition was also framed and the petitioner pleaded not guilty and thereafter the case was fixed for evidence on behalf of the complainant/respondent. The complainant was examined on 18.03.2017 and thereafter the evidence on behalf of complainant was closed.

3. As per the petitioner, his case is that he has not filled in the cheque (CW-1A), except the signatures in the alleged cheque and the cheque was given as a security money to the tune of Rs.2,50,000/- to the complainant, which was later on misused by the complainant/respondent by filing fake complaint under Section 138 of the Negotiable Instrument Act before the learned Chief Judicial Magistrate.

4. I have heard the learned Counsel for the parties and gone through the record carefully.

5. It has been alleged that the petitioner had filed an application under Section 45 and Section 73 of the Evidence Act read with Section 311 of Criminal Procedure Code in the Court of learned Chief Judicial Magistrate, Shimla for sending the alleged cheque to the handwriting and ink expert, however, the learned trial Court dismissed the application filed by the petitioner on 16.2.2018. Being aggrieved and dissatisfied, the petitioner filed a Criminal Revision under Section 397 of the Code of Criminal Procedure, against the order dated 16.2.2018 passed by the learned Chief Judicial Magistrate, Shimla before the learned Additional Sessions Judge(I), Shimla and the same was dismissed on 04.8.2018.

6. The learned trial Court vide order dated 16.2.2018, dismissed the application of the petitioner. Thereafter, he maintained the revision petition before the learned Lower Revisional Court and filed a criminal revision petitioner under Section 397 of the Code, which was also dismissed. The petitioner wants to prove on record by way of application that he has not filled the cheque.

7. As per the learned counsel for the petitioner, he has been deprived of by the valuable right to examine the figure mentioned in the disputed cheque from the handwriting expert. As per him, the figure was wrongly mentioned by the complainant.

8. The learned Counsel for the petitioner has argued that the petitioner is innocent and he has admitted that he has issued the cheque in question and also admitted his signatures on it, hence, no case can be made out against him. Conversely, the learned counsel appearing for the respondent has argued that the petitioner has commited a serious offence and that the offence is not compoundable, so, the petition may be dismissed.

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

10. The impugned order dated 16.2.2018 of the learned trial Court is to the effect that the application filed by the petitioner/accused under Sections 45 and 73 of the Indian Evidence Act read with Section 311 of Code of Criminal Procedure to call the report of handwriting expert whether handwritten portion of the cheque in question, except signatures is written by the petitioner or whether the ink used in the signatures and the ink used in filling the name of bearer and amount in words as well as figure are different and the age of the ink used to put the signatures in the cheque.

11. Now, the question arises; whether it is an ingtermediate order and on its reversal in this revision, the procedings would culminate in entirety? Even if, the contention of the revision petitioner is accepted, as correct, and the revision petition is allowed, still the proceedings before the learned trial Court will not come to an end. Even if, it is assumed that the plea of petitioner is accepted and his revision is allowed, so, the impugned order is purely interlocutory in nature and the revision against it is not maintainable.

12. The accused while answering Question No.7 of his statement under Section 313 Cr.P.C., which reads as under:-

> **"Q.No.7.**
>
> **It has further come in the evidence of the complainant led against you accused that on 14.01.2015, you accused issued and executed Cheque No.027548 for a sum of Rs.3,50,000/- (Ext. CW-1/A) in favour of the complainant against your Account No.100028246375, drawn on IndusInd Bank Limited, Shimla Branch, the Mall, Shimla, H.P. What you have to state about it?**
>
> **Ans.**
>
> **"Cheque Maine Khali Hastakshar Karke Rs.2,50,000/- Ke Liye Diya thaa."**

13. It means that the petitioner has admitted that he has issued the cheque, but for Rs.2,50,000/- and has admitted his signatures on the cheque. So, when he has admitted the signatures on the negotiable instrument, no fruitful purpose will be served by sending the same to the handwriting expert. It is further to be noted that he has admitted his signatures on the cheque, in these circumstanes, this Court finds that there is no reason to inherent jurisdiction under Section 482 of the Criminal Procedure Code, as the orders passed by the learned trial Court as well as by the learned Revisional Court are in accordance with law. So, these needs no intereference. Hence, the petition is devoid of merits and deserves dismissal and is accordingly dismissed. Parties through their learned counsel are directed to appear before the Learned Court below on ***25th July, 2019.***

14. Pending application(s) if any, shall also stand disposed of accordingly.

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

Beant Kaur and Anr. ....Appellants/defendants.
Versus
Inder Pal Singh Rana (since deceased) through his legal heirs and others ....Respondents/plaintiffs.

RSA No. 513 of 2004.
Reserved on : 3rd July, 2019.
Decided on : 12th July, 2019.

Indian Succession Act, 1925 –Section 63 – **Indian Evidence Act, 1872**- Section 68 – Execution and proof of Will – Held, mere statements of attesting witnesses regarding due execution of Will per se would not constrain court to mete deference to their testifications - Witnesses if inherently incredible, their deposition cannot be taken as proof of due execution of Will – Will scribed in grossly unnatural manner – Recitals made therein belied from other evidence on record – Marginal witness admitting legatee having assisted him in earlier litigation – Due execution of will not proved. (Para 9)

For the Appellants: Mr. Ramakant Sharma, Sr. Advocate with Mr. Dinesh Bhatia, Advocate.
For the Respondents: Mr. Rajneesh K. Lall, Advocate vice Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit, for, rendition of a decree for declaration, and, also for rendition of a decree, for permanent prohibitory injunction, stood, under concurrently recorded verdicts, hence, decreed by both the learned courts below. The defendants/appellants herein are aggrieved therefrom, hence, institute the instant appeal before this Court.

2. Briefly stated the facts of the case are that one Smt. Karam Kaur, widow of Sh. Moti Singh was owner in possession of the suit land detailed in the plaint. After the death of Moti Singh his estate vested in Karam to the extent of ½ share and in Smt. Shardi widow of Sh. Moti Singh, predecessor-in- tile of the plaintiffs, and, after death of Shardi, her estate was inherited by son of Smt. Jit Kaur, plaintiffs No.1 to 3 and Sh. Surinder Pal Singh Rana. Sh. Surinder Pal Singh Rana died and his estate vested in his widow Smt. Paramjit Kaur, daughter Ekta Rana and Angad Singh. Plaintiffs No. 1 to 3 and their brother Sh. Surinder Pal Singh Rana had been serving, looking after and managing the estate of Smt. Karam Kaur. The plaintiffs are the successors of Smt. Jit Kaur daughter of Shardhi. Smt. Karam Kaur executed a will of her estate in favour of plaintiffs No.1 to 3 on 21.9.1981 to the extent of ¼ share and got the same registered. Shri Surinder Pal Singh Rana died. Smt. Karam Kaur came to village Jagatpur to join a function of retirement of Sh. Avtar Singh. Sh. Raminder Pal Singh son of Plaintiff No.1 accompanied her from Kiratpur Sahib to Jagatpur and stayed in her home. Smt. Karam Kaur executed her last will on 31.1.1997 in faovur of the plaintiffs to provide for inheritance of her estate of the share of Surinder Pal Singh Rana. Smt. Karam Kaur died on 2.2.1997 and her last rites were performed by plaintiff No.1. The estate of Smt. Karam Kaur vested in the plaintiffs to the extent of ¼ share each. The

defendants fabricated a will on 27.1.1997 alleged to have been executed by Smt. Karam Kaur which is the result of forgery and in alternative has been fabricated by way of mis-representation and fraud. The mutation had been sanctioned in favour of defendant No.1, at the instance of defendant No.2, who was working in the office of SDO (Civil) Nalagarh. The plaintiffs are owners in possession of the land in suit and the defendants are threatening to interfere with the possession of the plaintiffs over the land in suit. So, the plaintiff filed the suit for declaration that they were owners in possession of the land in suit and the entries in the revenue record are wrong, illegal, void, invalid, malafide along with a decree for permanent injunction restraining the defendants from forcibly dispossessing and interfering in the possession of the plaintiffs over the land in suit.

3. The defendants contested the suit and filed written statement, wherein, it has been averred that Smt. Karam Kaur was the widow of Sh. Moti Singh. The plaintiffs did not have any concern with Smt. Karam Kaur and she was not being served by the plaintiffs. Smt. Karam Kaur used to reside in village Joghon and was patient of paralysis. The defendants were serving her and her last rites were performed by the defendants. The mutation of the estate of Smt. Karam Kaur had been attested in the names of the defendants on the basis of Will dated 27.1.1997 executed by Smt. Karam Kaur in favour of defendant No.1. Smt. Karam Kaur had executed her last will in favour of defendant No.1 The alleged Will dated 21.9.1981 and 31.1.1997 were manipulated. The mutation had been validly attested in favour of the defendant No.1. The defendant No.1 was absolute owner in possession of the suit land.

4. The plaintiffs filed replication to the written statement of the defendant(s), wherein, they denied the contents of the written statement(s), and, re-affirmed, and, re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court, struck, the following issues inter-se the parties at contest:-

1. Whether deceased Smt. Karam Kaur executed a legal and valid will on 21.9.1981 in favour of plaintiffs No.1 to 3 and Surinder Pal Singh, predecessor-in-title of the plaintiffs No.4 to 6, as alleged? OPP.
2. Whether deceased Karam Kaur executed Will dated 31.1.1997 in favour of the plaintiffs ,as alleged? OPP.
3. Whether the plaintiffs are nearest legal heirs of deceased Smt. Karam Kaur, as alleged? OPP.
4. Whether deceased Smt. Karam Kaur executed a legal and valid will dated 27.1.1997 in favour of the defendant No.1, as alleged? OPD.
5. Whether this suit is not maintainable? OPD.
6. Whether the plaintiffs have no locus standi to file the present suit? OPD.
7. Whether the plaintiffs have no cause of action? OPD.
8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed, the suit, of, the plaintiffs/respondents herein. In an appeal, preferred therefrom, by, the defendants/appellants herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the defendant(s)/appellant(s) herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 24th November, 2004, this Court, admitted the appeal, instituted by the defendant(s)/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial question of law:-

1. Whether the findings of the learned first appellate Court are dehors the evidence on record and wrong application of law, particularly Section 60(c) of the Indian Succession Act?

Substantial question of Law No.1 :

8. The deceased testator one Karam Kaur, allegedly executed three Wills, respectively on 21.9.1981, on 27.1.1997, and, on 31.1.1997. The testamentary disposition executed by deceased Karam Kaur, on 21.9.1981, and, borne in Ex.P-2, is, a registered testamentary disposition, (i) whereas, the subsequent thereto executed testamentary dispositions, respectively on 27.1.1997, and, on 31.1.1997, and, as respectively borne in Ex.D-1, and, in Ex. P-1, are, both unregistered testamentary dispositions. However, the Will propounded by the plaintiffs, and, as, embodied in Ex.P-2, stood concluded, by both the learned courts below, to stand proven, hence, to be validly, and, duly executed, by the deceased testator. The Will, borne in Ex.P-2, annuls the unregistered testamentary disposition, as, executed by deceased testator, and, as respectively borne in Ex.D-1, and, in Ex. P-1. Nonetheless, obviously hence both the learned courts below, proceeded to, concurrently pronounce rather qua the registered testamentary disposition, borne in Ex.P-2, and, executed by the deceased testator, hence prevailing over, the, subsequent thereto, executed unregistered testamentary dispositions, respectively borne in Ex.P-1, and, in Ex.D-1, (I) AND, wherethrough, she, bestowed her estate, upon, her legatees, as, recited therein. The afore pronouncements, as, concurrently recorded, by both the learned courts below, remain unchallenged, at the instance of the plaintiffs/respondents herein, and, the challenge thrown before this Court, by the aggrieved defendants, is centered, upon, both the learned courts below, despite, the scribe, and, marginal witness to Ex. D-1, (ii) exhibit whereof comprises, an unregistered testamentary disposition, executed, vis-a-vis, the defendants, by the deceased testator, hence, within the statutory domain, of, Section 63 of the Indian Evidence Act, making unequivocally echoings, in their respective testification(s) qua (iii) the deceased testator, appending her thumb impression, upon Ex.D-1, respectively in their presence, and, thereafter each of the witnesses, also making their relevant signatures thereon, hence, also in the presence, of, the deceased testator, (iv) yet both the learned courts below proceeding to construe, qua it, not being proven to be validly, and, duly executed, by the deceased testator, rather merely, on anvil, of certain suspicious circumstances, surrounding, the, due and valid execution, of, Will borne, in Ex. D-1.

9. This court has proceeded to, keenly discern, the testification(s) respectively rendered by the scribe of Ex. D-1, namely, Pushpinder Singh, who stepped into the witness box as DW-3, as also, has, with circumspect care and precision, hence, perused the testification, of, a marginal witness thereto, one Randeep Singh, and, who stepped into the witness box as DW-4. However, though, in their, respectively recorded testifications, they rendered echoings, vis-a-vis, (a) the deceased terstator being possessed with, the, requisite compos mentis, (b) hers after being readover, and, explained, the contents borne in Ex.D-1, hers thereafter, in their respective presence(s), hence, appending her thumb impressions thereon, and, thereafter, in her presence, theirs also appending their signatures thereon. The afore testified articulations, occurring, in, the testifications, as, respectively rendered by the scribe, and, the marginal witness to Ex. D-1, do prima facie, fall within the sanctified,

domain of Section 63 of the Indian Evidence Act, (c) and, when thereupon this Court, may proceed, to dis-concur hence with the findings recorded, by both the learned courts below, hence, irrevering their testifications. However, the mere factum, of the afore testifying, rather within the statutory parameters, as, encapsulated in Section 63, of, the Indian Evidence Act, (d) would not per se constrain this Court, to mete deference, to their testifications, (e) as both, the, afore defendants' witnesses, as, is evident, from their respective cross-examinations, and, for the reasons to be assigned hereinafter, rather render their testifications being incredible, (f) given Ex. D-1 standing scribed, by the brother of the legatee, and, it being scribed in a grossly unnatural manner, and, the recitals borne therein, vis-a-vis, the deceased testator, hence during her life time, rather standing served by the defendants, also standing belied by the factum, given, the legatee, during, the course of his cross-examination, being unable to describe, the apt part of the body, of, the deceased testator, whereon she, stood afflicted with paralysis, (g) despite, DW-1 in his cross-examination rendering a testification, with clear echoings therein qua, at the time contemporaneous, to the deceased testator hence executing Ex.D-1, hers being afflicted with paralysis. The testification, of, the marginal witness, vis-a-vis, Ex. D-1, is also unamenable for any meteings, hence, of, any credence thereto, as, upon, a thorough reading, of his deposition, comprised in his cross-examination, he has acquiesced to a suggestion, put thereat, to him, by the counsel for the plaintiff, with, echoings therein, qua the defendant rather assisting him in an earlier case, regarding encroachments made by him, upon, government land, (h) thereupon, when he is a witness, who is deeply interested, in, rather furthering the espousal of the defendants, and, with no explanation, standing, meted, by the defendants, for theirs not joining any independent persons, as marginal witnesses to Ex. D-1, (i) thereupon, when his testimony is stained, with, deep pervasive stains, of his hyper interestedness, vis-a-vis, the, espousal of the defendants, (j) thereupon, dehors the factum, given his rendering, a, testification hence strictly in accordance with provisions, of Section 63 of the Indian Evidence Act, (k) yet would not incline this Court, to accept his testification, (l) rather this Court is constrained to conclude, that, the Will propounded by the defendants, and, borne in Ex. D-1, being stained with gross vices, and, it being executed, by the deceased testator, upon, the legatee(s) thereof, hence, exerting undue influence, and, pressure upon her.

10. The above discussion, unfolds, that the conclusions as arrived by both the learned Courts below, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned courts below have not excluded germane and apposite material from consideration. Accordingly, the substantial question(s), of law are answered in favour of the respondents/plaintiffs, and, against the defendants/appellants.

11. In view of the above discussion, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the judgments, and, decrees, impugned before this Court are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Keshav Ram and others .....Petitioners.

Versus

Assistant Engineer, HPPWD ....Respondent.

CMPMO No. 107 of 2019.
Reserved on: 3rd July, 2019.
Date of Decision: 12th July, 2019.

Land Acquisition Act, 1894– Section 28 -A– Re-determination of compensation – Application for – Limitation – Held, period prescribed for making application under Section 28-A of Act for re-determination of compensation is three months from award and this period cannot be condoned through application under Sections 5 of Limitation Act. (Para 3)
Land Acquisition Act, 1894 – Sections 18, 28A & 54 – Re-determination of compensation on basis of judgment of High Court passed in appeal against award of reference court, whether can be sought by co-owner who had filed reference under Section 18 of Act ? – Held, benefits enshrined in Section 28 A of Act are bestowable only upon those landowners , who after award of land acquisition collector did not constitute a valid reference under Section of 18 Act before District Judge (Paras 3 & 5)

Cases referred:
Md. Maqdoom Ahmed and another vs. Special Deputy Collector, 2003(4) ALD 715
Popat Bahiru Govardhane and others vs. Special Land Acquisition Officer and another, (2013) 10 SCC 765

For the Petitioners: Mr. G.R. Palsra, Advocate.
For the Respondent: Mr. Yudhvir Singh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The lands, of, the predecessors-in-interest, of co- petitioners No.1, 2, and 3 to 6 herein, namely respectively one Lajje Ram, and, one Fattu, stood, under a common notification, of, 23.11.1982, hence, acquired for construction of NH-21. The land acquisition Collector concerned, vis-a-vis, the lands of the afore, determined compensation amount. However, the afore predecessors-in-interest, of, the afore co-petitioners, standing aggrieved by determination of compensation, vis-a-vis, their acquired lands, hence, by the Land Acquisition Collector, rather through, theirs constituting, a valid reference, under, Section 18 of the Land Acquisition Act, before the learned Reference Court concerned, sought enhancement of compensation determined, vis-a-vis, their lands, by the Land Acquisition Collector, (a) and, their land reference petition bearing No. 9 of 1987, stood, under a common verdict rendered thereon, on 1.9.1988, answered in their favour, and, therethrough compensation, vis-a-vis, their land, stood, enhanced. However, the predecessor-in-interest of co-petitioner No.7 to 9, namely Jagat Ram, and, Mansu Ram, did not constitute any valid reference, against the determination of compensation, vis-a-vis, them by the Land Acquisition Collector concerned. However, the effect(s) thereof would be answered hereinafter.

2. Be that as it may, the learned counsel appearing for the contesting litigants, do not controvert, the factum qua the landowners, other than, the predecessors-in-interest, of co-petitioners No.1 to 6 herein, proceeding, to constitute RFAs bearing RFA No. 44 of 1988, RFA No. 72 of 1988, RFA No. 69 of 1988 before this Court, and, (a) therethrough, statutory benefits higher than the one awarded by the learned Reference Court, upon, the apposite land reference petitions hence stood accorded, vis-a-vis, them. Upon, bestowing of

benefits, upon, the landowners concerned, whereuponwhom, this Court through, Annexure P-4, had accorded relief, higher than the one accorded, vis-a-vis, them, in their respectively constituted land reference petitions, (b) one Janawar alias Jorawar, arrayed as co-petitioner No.1 in Land Reference Case No. 6 of 1987, and, one Lajja Ram, one Fateh Chand @ Fattu, and, one Dhani Ram, all respectively arrayed as co-petitioners No. 1, 2 and 3 in Land Reference Case No.9 of 1987, proceeded, to, on 5.6.1997, constitute a petition under Section 28-A of the Land Acquisition Act, for, hence, vis-a-vis, them also compensation amount, being determined, at par, with the appellants, in RFA No. 44 of 1988, decided on 20.03.1986. The afore requisite application, cast under the provisions of Section 28-A, of the Land Acquisition Act before the land Land Acquisition Collector, and, borne in Annexure P-2, stood dismissed, by the latter vide order rendered on 29.1.2014, borne in Annexure P-1. The petitioners are aggrieved therefrom, hence, motioned this Court.

3. As expostulated in a judgment, rendered by the Hon'ble Andhra Pradesh High Court, in a case titled as ***Md. Maqdoom Ahmed and another vs. Special Deputy Collector***, reported in **2003(4) ALD 715,** a period limitation of three months, stands, prescribed, for the relevant purpose, rather in Section 28-A of the Land Acquisition Act, and, the afore being not relaxable nor condonable, through, an application, cast under the provisions of Section 5 of the Limitation Act.

4. Be that as it may, even the afore expostulation of law also find explicit expression, in a judgment, of the Hon'ble Apex Court, rendered in a case titled as ***Popat Bahiru Govardhane and others vs. Special Land Acquisition Officer and another***, reported in (2013) 10 SCC 765, wherein, in paragraph No.14 thereof, (a) the principle of hardship; (b) besides the principle of period of limitation prescribed in Section 28-A, being computable, from, the date of knowledge rather stands discountenanced

5. Even if, assumingly, Annexure P-2, stood instituted within the period of limitation, prescribed, in Section 28-A of the Land Acquisition Act. However, for the reasons to be assigned hereinafter, (a) the endeavour of the petitioners herein to claim, the, benefit(s) of the judgment pronounced by this Court, upon, RFA No. 44 of 1988, RFA No. 72 of 1988, and, RFA No. 69 of 1988, constituted before this Court, by those landowners, who were also aggrieved, by the award pronounced, by the learned Reference Court, upon, their apposite land reference petitions, all rather arising from a notification common hereat, yet cannot be countenanced, (I) as, a plain reading of the provisions of Section 28-A of the Land Acquisition Act, wherewithin, the apt parlance, borne by underlined phrase "*the persons interested in all other land covered by the same notification under Section 4 sub-section (1) notwithstanding that they had not made an application to the Collector under Section 18, by written application to the Collector within three months from the date of the award of the court require that the amount of compensation payable to them may be redetermined on the basis of amount of compensation awarded by the Court*", (ii) is qua it hence carrying, the, natural connotations, vis-a-vis, the benefits enshrined, in, Section 28-A of the Land Acquisition Act, being bestowable, only, upon those landowners concerned, (iii) who after, an, award being rendered, by the Land Acquisition Collector concerned, omit to constitute, a valid reference, under, Section 18 of the Land Acquisition Act, (iv) rather other landowner concerned, whose lands, along with, the land of the landowners, rather proceed, to, canvass the apt statutory remedy, by constituting a valid reference, under, Section 18 of the Land Acquisition Act, and, their striving(s) therethrough begetting success, (v) thereupon, the omitting landowners, being bestowed with a statutory right, to through recoursing Section 28-A, of, the Land Acquisition Act, and, within the period of limitation, prescribed in the proviso, borne underneath, to hence espouse, for parity of determination, of compensation inter se them, and, the landowners concerned, who succeed hence in, the, validly constituted

petition, under Section 18 of the Land Acquisition Act, hence, before the learned Reference Court. However, when the afore underlined phrase occurring in Section 28-A, also does not, narrate any explicit statutory expression (vi) that the landowners concerned, also, upon making omission(s), after, receiving, the, beneficial verdict, vis-a-vis, them, from, the learned Reference Court concerned, as hereat the co-petitioners, through, their predecessors-in-interest, hence, achieved/received, to, thereafter rather constitute a challenge thereagainst, under, Section 54, of the Land Acquisition Act, before the High Court, (vii) thereupon, also theirs being entitled, to the benefits, of Section 28-A of the Land Acquisition Act. In other words, the landowners concerned, who constitute a valid reference, under, Section 18 of the Land Acquisition Act, upon, failing to thereafter, cast a challenge thereto, by availment of the remedy constituted, under Section 54 of the Land Acquisition Act, and, whereas, others recoursing the afore remedy, thereupon, upon, the latters' remedy begetting success, rather would not bestow, any, entitlements, vis-a-vis, any omitting landowners, qua, the, benefits, of, Section 28-A, of, the Land Acquisition Act.

6. In view of the above, there is no merit in the instant petition, and, it is dismissed accordingly. The impugned order is maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Rachna Devi ......Appellant/Respondent.

Versus

Smt. Sushila ......Respondents.

FAO No. 243 of 2018 along
with FAO No. 189 of 2019.
Reserved on: 3rd July, 2019.
Decided on : 12th July, 2019

Motor Vehicles Act 1988- Section 166– Motor accident– Permanent disability–Assessment of compensation under head "Future pain and suffering, loss of amenities" etc – Held, medical disability not proved by examining medical officer – No evidence that disability mentioned in disability certificate would permanently render claimant disabled from doing household work – Disability of 41% accruing from 26% mild hearing impairment and 20% loss of olfaction – Auditory impairment may be reparable with auditory aids – Olfactory disability appertains to loss of smell – Disability does not render claimant incapable to perform household chores – Compensation reduced to Rs. 75000/- towards failure pain & suffering and loss of amenities of life. (Para 4)

For the Appellant(s): Mr. Divya Raj Singh, Advocate in FAO No.243 of 2018 and Mr. Amrinder Singh Rana, Advocate in FAO No. 189 of 2019.

For Respondents: Mr. Amrinder Singh Rana, Advocate in FAO No. 243 of 2018, and, Mr. Divya Raj Singh, Advocate, in FAO No. 189 of 2019.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The owner-cum-driver of the offending vehicle, and, also the disabled claimant, are, both aggrieved, by the award rendered, by the learned Motor Accident Claims Tribunal-III, Una, H.P., upon MAC Petition No. 64 of 2015, (i) wherethrough, compensation amount comprised in a sum of Rs.3,25,000/-, stood awarded, vis-a-vis, the disabled claimant, and, thereon stood levied interest, at, the rate of 9% per annum, and, was ordered to commence from the date of petition, and, till realization, of, the afore compensation amount. The apposite indemnificatory liability thereof, stood fastened, upon, registered owner-cum-driver of the offending vehicle.

2. Through, FAO No. 243 of 2018 reared before this Court, by the registered owner-cum-driver, of the offending vehicle concerned, the latter concerts, to, reverse the findings, recorded upon issue No.1, appertaining to the relevant mishap which occurred, inter se, the offending vehicle, and, the vehicle, whereon the disabled claimant was astride upon its pillion, standing pronounced, to be sequelled by, the, rash, and, negligent manner of driving of the offending vehicle, by one Rachna Devi, the appellant herein (in FAO No. 243 of 2018). Obviously, since, the offending vehicle, did not, carry any insurance cover, thereupon, the learned counsel appearing for the registered owner-cum-driver of the offending vehicle, does not contest, the, fastening of the apposite indemnificatory liability, upon her. The learned counsel appearing for the registered owner-cum-driver, of the offending vehicle, has made a vehement submission, before this Court (a) that the dependence, as, made by the tribunal, upon, the ocular narratives, vis-a-vis, the relevant occurrence, wherein, the tort of negligence stood squarely ascribed, vis-a-vis, the appellant herein, hence, being a gross mis-dependence, (b) given PW-2, being an interested witness, and, PW-4's corroborative testification, vis-a-vis, the testification of PW-2, being also overlookable, and, discardable, (c) as, at the relevant stage, vis-a-vis, the happening, of, the ill-fated occurrence, he, given his serving as a clerk, with an advocate practising, at Courts located at Una, rather was naturally required, to be present within the precincts of, the Court than, at the site of occurrence, hence his version being both concocted, and, invented. However, the interestedness of PW-2, in his purportedly rendering a testification hence holding leanings, vis-a-vis, the disabled claimant, (d) arising from his being her relative, would not, per se negate the probative vigour of his testification, (e) unless, pointed suggestions stood meted to him, during, the course of his being subjected, to cross-examination, by the learned counsel, for the registered owner-cum-driver, of the offending vehicle, qua his not being present, at the site of occurrence, and, his hence rendering a concocted, and, invented version qua the occurrence, and, thereupon, rather his testimony being discardable. However, PW-2, is, also the informant, vis-a-vis, the relevant collision, which occurred, inter se, the apposite vehicle, (f) and, the offending vehicle, and, upon his purveying information to the police agencies concerned, the apposite FIR, borne in Ex.PW1/A stood registered, (g) and, furthermore, with a close scrutiny, of his testification, borne, in his cross-examination, hence not, making any emergences, that, the counsel for the registered owner-cum-driver, denying the afore factum, rather through his meteing suggestions, to him, vis-a-vis, his not being present, at the relevant site of occurrence, (h) nor his attempting to bely his version qua the occurrence, embodied in his examination-in-chief, wherein, he has pointedly, and, squarely, rather ascribed tort of negligence, vis-a-vis, the appellant herein. Conjoining, the afore, with, despite, it being open for the driver, of, the offending vehicle, to, mete, vis-a-vis, PW-2, hence, a suggestion, appertaining qua, in the relevant collision, the tort of negligence rather standing committed by the driver of the vehicle, whereon, on its pillion, the disabled claimant was astride, emphatically, given the latter vehicle occupying, the, inappropriate side of the road, (i) yet, with, even the afore espousal remaining un-recoursed, by the counsel for the appellant, as, visibly no suggestion compatible therewith, stood meted to PW-2, during the course, of his cross-examination, (j) hence, wants of all afore suggestion(s) being meted to PW-2, by the counsel for the registered

owner-cum-driver, of the offending vehicle, hence, cumulatively fillip an inference, that, not only the owner-cum-driver of the offending vehicle, driving it, in a rash and negligent manner, also, the vehicle driven by her, rather occupying the inappropriate site of the road, hence, hers committing the tort of negligence.

3. Even though, the meteing of credence, vis-a-vis, PW-2's testification, vis-a-vis, the relevant occurrence, was,sufficient to render affirmative findings hence in consonance therewith, upon, issue No.1, yet corroborative thereto testification, is, also encapsulated in the deposition rendered by PW-4, Ram Singh, another ocular witness tot he occurrence, (i) who alike PW-2 has squarely ascribed the tort of negligence, vis-a-vis, the registered owner-cum-driver, of, the offending vehicle. Even though, he may be serving, as a clerk, with an advocate practising at Courts located at Una, and, even if, the relevant occurrence rather occurred, at a time, whereat he was expected, to be present within the precincts of the Courts located at Una, (ii) however, when he has meted an explanation qua his proceeding, to the site of occurrence in connection with his personal work, (iii) thereupon, his being merely expected to hence remain present, within the court precincts, would not belittle the efficacy, of the testification rendered by him. Consequently, the affirmative findings rendered by the learned tribunal, upon, issue No.1 are upheld.

4. Through, FAO No. 243 of 2018, and, FAO No. 189 of 2019, the learned counsel appearing for the litigating parties, respectively contend, vis-a-vis, reduction of compensation,and, for enhancement of compensation. The learned tribunal had, vis-a-vis, the disabled claimant assessed hence compensation, under, various heads, i.e. under head “conveyance charges” Rs.21,000/-, under head “unreimbursed bills” Rs.3,858/-, under head “Attendant Charges” Rs.24,000/-, under head “Special diet” Rs.20,000/-, under head “Actual loss of earning” Rs.30,000/-, under head “Pain and sufferings” Rs.75,000/-, and, under head “Future pain and suffering, loss of amenities of life, future loss of income on account of disability, Rs.1,51,200/-, hence, in total compensation of Rs.3, 25,100/- stood assessed, vis-a-vis, the disabled claimant. The serious contention which has emerged inter se the contesting litigants, is confined, vis-a-vis, under assessment, and, contrarily over assessment, by the learned tribunal, on anvil of “future pain and suffering, loss of amenities of life, future loss of income, on account of disability”, and, comprised in a sum of Rs.3,25,100/-. Even though, the, disability certificate issued vis-a-vis the disabled claimant, borne in Ex.PW6/A-27, stood tendered by PW-6, during, the course of recording her testification, obviously when it stands rather not tendered by the author thereof, (a) yet the afore omission would not stain, it, with any aura of invalidity, (b) hence, also renders it to be possessing the requisite probative efficacy, as, during the course of cross-examination of PW-6, no suggestion stood meted, vis-a-vis, her hence qua PW6/A-27 being forged, and, fictitious, and, also qua it not holding any nexus with the injuries encumbered, upon her, during the course of the collision, which occurred inter se the apposite vehicle, whereon she was astride, as a pillion, and, the offending vehicle. Moreover, with the learned counsel appearing for the registered owner-cum-driver, rather permitting the exhibition, of, the afore disability certificate tendered, during, the course of examination-in-chief of PW-6, whereupon, he is rather concluded to acquiesce qua authenticity(ies) thereof. Though, the per centum of disability encumbered, upon, the disabled claimant, is quantified therein in 41%. However, the afore per centum, of, disability, do not, per se hence entitle the disabled claimant, to, apart from hers being disabled to perform household chores, during the course, of her hospitalization also hence rear any claim for compensation being assessed, vis-a-vis, and, towards loss of future income, arising, from hers, being enjoined to pay for the service(s) of domestic helps, for the latter, rather performing the hitherto household chores, and, wheretowhich, she maybe entitled for monetary compensation. The reason, for making the afore conclusion, is, generated from the doctor concerned, not, proving the

disability hence permanently, prohibiting the disabled claimant, to perform, the household chores, and, with the disability pronounced in Ex.PW6/A-27 being 41%, yet with also enunciation, rather standing borne therein, vis-a-vis, 41 % disability, rather erupting from 26% mild hearing impairment, and, 20% loss of olfaction, (a) and, when the auditory impairment, may be, repairable with auditory aids, and, when, the, olfaction disability rather appertains to loss of smell, (b) and, also when qua therewith, a, minimal per centum, of, disability, hence stands entailed upon her, (c) thereupon, unless the doctor concerned, had while stepping into the witness box, rendered a testification qua the disabled claimant, throughout her life, being disabled to perform the household chores, thereupon, the afore inference also bolsters a deduction, that, the afore disability neither, prohibiting the disabled claimant, to, throughout her life, hence, perform the household chores nor it besetting her with perennial pain and suffering nor hence, compensation under the head “future pain and suffering, loss of amenities of life, future loss of income on account of disability”, borne in a sum of 1,51,200/- is, assessable, vis-a-vis, her. Nonetheless, only a sum of Rs.75,000/- is, assessed towards “future pain and suffering, loss of amenities of life”.

5. For the foregoing reasons, the appeal filed by the registered owner-cum-driver of the offending vehicle, bearing FAO No. 243 of 2018, is partly allowed, whereas, the appeal filed by the disabled claimant, bearing FAO No.189 of 2019 is dismissed. In sequel, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the disabled claimant/appellant, is, held entitled to a total compensation of Rs.2,48,900/- (Rs. Two Lakh, forty eight thousand, nine hundred only) along with interest @ 9%, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, the afore compensation amount, shall be, of the registered owner of the offending vehicle. All pending applications also stand disposed of. Records be sent back forthwith.

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

Saurabh .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr. Revision No. 131 of 2019.
Reserved on: 19th June, 2019.
Date of Decision: 12th July, 2019.

Juvenile Justice (Care and Protection of Children) Act, 2015–Sections 3 (iv) and 18 (1) (a)- Dispositional orders– Principle of best interest– Juvenile Justice Board ordering detention of juvenile in conflict with law in observation home for one month – Sessions court upholding order in appeal– Revision against– Juvenile in conflict with law found having tendered apology at very first opportunity to victim and her parents– No history of his ill conduct subsequent or prior to said incident– Dispositional order modified– He is let off after due admonition. (Para 12)

For the Petitioners: Mr. Vijender Katoch, Advocate.
For the Respondent: Mr. Hemant Vaid & Mr. Desh Raj Tahkur, Addl. A.Gs. With Mr. Y.S. Thakur, and, Mr. Vikrant Chandel, Dy. A. Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Criminal Revision Petition, stands directed, by the petitioner, against, the concurrently recorded verdicts, made, both by the Juvenile Justice Board, Kangra at Dharamshala, vis-a-vis, the inquiry conducted, under Sections 354, 354-A and Section 354-B, of, the IPC, and, under Section 12, of, the Protection of Children from Sexual Offences Act, and, the affirming thereto verdict, recorded by the learned Sessions Judge, Kangra at Dharamshala, (a) wherethrough, the juvenile in conflict, with law was found involved in the offences punishable, under Sections 354, 354-A and Section 354-B of the IPC, and, under Section 12, of, the Protection of Children from Sexual Offences Act, (b) and, he was ordered to be kept, in custody for a period of one month, hence, at an observation home, and, also compensation, vis-a-vis, the victim was assessed, and, was directed to be defrayed, vis-a-vis, the victim, by the DLSA.

2. The facts relevant to decide the instant case are that on 8.10.2014, Banita Devi came to Police Station and got recorded her statement under Section 154 of the Cr.P.C., wherein, she has stated that on 5.1.0.2014 at about 9 p.m., after having dinner her daughter (prosecutrix) had told her that in the day time when she went to the house of child in conflict with law then child in conflict with law had taken her to his room and had lowered her and his pent. It is alleged that the appellant also made the prosecutrix to sit in his lap. On these allegations, the FIR was registered and inquiry was made by the police. Thereafter, the police completed all the investigation formalities.

3. On conclusion of the investigations, into the offences, allegedly committed by the juvenile in conflict with law, a report under Section 173, of, the Code of Criminal Procedure, stood hence prepared, and, filed before the Juvenile Justice Board, Kangra at Dharamshala.

4. The accused/petitioner herein, stood put, notice of accusation, by the Juvenile Justice Board, for his, committing offences, punishable under Sections 354, 354-A and 354-B of the IPC, and, under Section 12, of, the Protection of Children from Sexual Offences Act. In proof of the prosecution case, the prosecution examined 13 witnesses. On conclusion of recording, of the prosecution evidence, the statement of the juvenile, in conflict with law, stood, under Section 13(4) of the Juvenile Justice (Care and Protection of Children) Rules 2007, hence recorded by the Board, wherein, he claimed innocence, and, pleaded false implication, in the case.

5. On an appraisal of the evidence on record, the Board, returned findings of conviction, upon, the juvenile in conflict with law/petitioner herein, for his, committing offences punishable Sections 354, 354-A and 354-B of the IPC, and, under Section 12, of, the Protection of Children from Sexual Offences Act. In an appeal preferred therefrom, by the petitioner herein, before the learned Sessions Judge concerned, the latter affirmed the apposite findings of conviction, and, sentence, as, stands recorded in impugned therebefore judgment, as, pronounced by the Board, and, affirmed by the learned Sessions Judge concerned.

6. The the petitioner herein/juvenile in conflict with law, stands aggrieved, by the findings recorded, by the learned Sessions Judge concerned, in, affirmation, to the judgment of conviction recorded against him, by the Board. The learned counsel appearing for the petitioner herein/juvenile in conflict with law, has concertedly, and, vigorously contended qua the findings of conviction, recorded by the learned Sessions Judge

concerned, rather standing not based, on, a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in, the exercise of its revisional jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, the learned Deputy Advocate General has with considerable force, and, vigour, contended qua the findings of conviction, recorded by the learned Sessions Judge concerned, rather standing based on a mature and balanced appreciation, by him, of the evidence on record, and, theirs not necessitating any 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. The learned counsel appearing, for the juvenile in conflict with law, has contended, (a) that the concurrent verdicts rendered, upon, the juvenile, in conflict with law, rather arising from gross mis-appreciation, of evidence existing, on record. He has in making, the afore espousal, before this Court, hence, focused, upon, (b) the minor prosecutrix through declared fit, by the board, to make a statement, hers thereafter while meteing an answer, to a question, "have you remember, what you have told your mother?" rather through gesture in, the, disaffirmative, hence, by nodding her head, obviously declined, to, render any affirmative answer thereto, (c) hence he contends that the concurrent verdicts recorded, vis-a-vis, the inquired into offences rather warranting interference by this Court. However, the afore submission, addressed before this Court, is not amenable, for acceptance by this Court, (d) as, the learned counsel appearing for the juvenile in conflict with law, has remained oblivious, vis-a-vis, the prior thereto question meted to her, by the board, with an echoing therein, qua, the juvenile in conflict with law, holding his residence in the neighbourhood, of the prosecutrix, (e) and, whereto, she meted, an, answer in affirmative, (f) and, also he has remained unmindful, to a query put to her by the Board, vis-a-vis, hers proceeding to join, the company of the juvenile, in conflict with law, rather for playing with him, whereto also she meted, an answer, in the affirmative. He has also slighted, the effect of a query put to her, by the Board, vis-a-vis, hers making any disclosure to her mother, whereto, she answered in the affirmative. The effect thereof,when stands combined, with, the learned counsel for the juvenile, in conflict with law, not cross-examining the prosecutrix, and, more particularly, hers meteing, an, answer in, the, affirmative to a query put to her qua hers, making disclosures, to her mother, (g) and, upon, conjoining the afore, with her mother, during, the course of her examination-in-chief, rendering, a, testification in consonance, with, the narratives, borne in the FIR, embodied in Ex.PW11/C, (h) besides with hers, during, the course of her cross-examination, by the learned defence counsel, standing meted, a, suggestion qua hers, during, night hours, visiting the house of the juvenile, in conflict with law, and, thereat, the latter rendering apologies, and hers thereto, hence, meteing an answer in the affirmative, (i) rather all galvanising an inference qua the defence acquiescing qua the relevant occurrence rather taking place, and, further effect thereto, is that, all the effects, of the minor prosecutrix, upon, query(ies) being put to her by the Board, vis-a-vis, hers remembering the content(s), of, the, disclosures made by her to her mother, rather through the nod of head, rendering an answer, in the disaffirmative, hence standing throughly effaced.

10. However, the learned counsel, appearing for the juvenile in conflict with law, has hence, thereafter proceeded to also address a submission, before this Court (i) that with PW-9, during, the course of his cross-examination rather admitting a suggestion put to him, vis-a-vis, the patient examined, by him, lacking the basic sexual knowledge, (ii) thereupon, the inquired into penal misdemeanors, and, orders of conviction, concurrently recorded,

upon, the juvenile in conflict with law, not carrying hence the requisite mens rea. However, the afore submission is rendered rudderless, and, is also obliterated, vis-a-vis, all its relevant effects, (iii) given the learned defence counsel while cross-examining, the mother, of the prosecutrix rather meteing a suggestion to her qua the juvenile in conflict with law, during, night hours, upon, the parents of the prosecutrix, visiting his house, rather his thereat rendering apologies, to them, rather obviously hence, are, personificatory, vis-a-vis, the juvenile in conflict with law, at the relevant time, also holding the requisite mens rea, for, his committing the inquired into offences.

11. The learned counsel appearing for the juvenile in conflict with law, has proceeded, to make a further submission, for lessening the rigour, of the punishment imposed, upon, the juvenile in conflict with law, wherethrough, he was ordered to be kept, for a period of one month, in an observation home, (a) as, extantly, the juvenile in conflict in law, has joined the military services, and, also when he has, since, the occurrence and uptill now, reformed himself, and, when there, is no evidence on record, vis-a-vis, his previous ill conduct, thereupon, hence, the ends of justice would met in case, the juvenile in conflict with law, is let off, after admonition, hence, in consonance, with sub-section 1(a) of Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The learned Additional Advocate General, however, opposes the afore prayer, made before this Court, by the learned counsel appearing for the juvenile in conflict with law, (a) and, has made a submission, that the proviso, to sub-section (1) of Section 24 of the Juvenile Justice (Care and Protection of Children) Act, 2015, when, is not applicable, vis-a-vis, the juvenile in conflict with law, (b) thereupon, the benefit of sub-section (1) (a), of, Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015, is, not bestowable, upon, the juvenile in conflict with law, (c) and, even if the orders made initially, by the Board, and, later affirmed, by the learned Sessions Judge concerned, wherethrough, the juvenile in conflict with law, stands, directed to be detained, at an observation home, are meritworthy, thereupon also hence with the juvenile in conflict with law, rather, joining, the, military services rather would not statutorily attract, any stigma, of, any disqualification.

12. This Court, has considered, the respective submissions, as, addressed before this Court, by the learned counsel appearing for the juvenile in conflict with law, and, by the learned Additional Advocate General, and, though, this Court affirms the impugned verdicts, of, conviction, concurrently made, upon, the juvenile in conflict with law, initially by the Juvenile Justice Board, and, lateron affirmed by the learned Sessions Judge concerned, (I) yet rather with both the Juvenile Justice Board, and, the learned Sessions Judge concerned, hence maintaining, the defrayment of compensation, to the victim, by the DLSA concerned, (ii) and, when hence it would appropriately alleviate, the, grievance(s) of the minor prosecutrix, (iii) besides when the juvenile in conflict with law, has, at the earliest tendered apology, for his penal misdemeanor, to the prosecutrix, and, her parents, besides when there is no evidence on record, with, respect to his prior ill-conduct, and, also, vis-a-vis, his subsequent ill-conduct, consequently, the order directing, the juvenile in conflict with law to be kept, for a period of one month, in an observation home, is modified, to his, being let off, on admonition.

13. For the reasons which have been recorded hereinabove, the instant criminal revision petition, is partly allowed, and, the verdicts impugned before this Court is/are modified in the afore manner. Consequently, the dispositional order rendered by the Juvenile Justice Board, wherethrough, the juvenile in conflict is ordered to be kept for a period of one month, in a observation home, is modified to his being, let off on admonition. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Shashi Bala & Anr. .....Appellants/defendants.

Versus

Sh. Shankru (since deceased) through his legal heir Smt. Samitra Devi alias Harpreet Kaur .....Respondent/plaintiff.

RSA No. 60 of 2005.
Reserved on : 2nd July, 2019.
Decided on : 12th July, 2019.

Transfer of Property Act, 1882- Section 53 A – **Himachal Pradesh Tenancy and Land Reforms Act, 1972**– Section 118– Held, when in previous litigation, agreement to sell in question itself has been held as void being in contravention of provisions of Section 118 of Himachal Pradesh Tenancy and Land Reforms Act, then person cannot claim protection of Section 53 A of Transfer of Property Act. (Para 8)

For the Appellants: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate

For the Respondent: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The defendants, standing aggrieved, by concurrently recorded verdicts, respectively, by the learned trial Court, upon, Civil Suit No. 139/1 of 1995, and, latter by the learned First Appellate Court, upon, Civil Appeal No. 40-S/13 of 2003, wherethrough, the plaintiff's suit, vis-a-vis, suit khasra number stood decreed, hence, institute the instant appeal before this Court, and, therethrough hence strive their reversal.

2. Briefly stated the facts of the case are that the deceased plaintiff One Shankru had filed a suit for possession of land and house comprised in Khata No.9/51 min, Khasra No.485/268, measuring 7 biswas, situate in mauja Barog, Pargana Bharoli, Kalan, Tehsil and District Solan, H.P. with the allegations that previously the suit property was owned by the plaintiff, who had transferred the same in the name of his wife Smt. Sundri, who had constructed a house subservient to the need of agriculture with respect to her adjoining land in Khata No.10/52 min and, other land. After the death of Smt. Sundri her estate has devolved upon the plaintiff and mutations No.438 and 525 have been attested. The house constructed over Khasra No.485/268 consisted of two rooms in the basement and two rooms in the upper side adjoining the Kalka Shimla Highway. The defendant No.1 and Shri Inder Sain Sethi desired to purchase the suit property but being non agriculturist could not do so and some wrong documents was got executed which were resiled with by Smt. Sundri, the then owner and per agreement the house over the suit property was given on rent at the rate of Rs.200/- per month to Smt. Shashi Bala, defendant No.1 and, all the documents executed between Smt. Sundri and Shashi Bala and Inder were treated as cancelled and a sum of Rs.15,000/- paid on 20.07.1980 was agreed to be adjusted towards the rent upto August, 1988. The payment was adjusted and the notice terminating the tenancy was served on the defendants for delivery of the vacant possession of the house on

or before 1.10.1994. The defendant No.2 Bhagat Ram is a relative of defendant No.1 in order to put pressure upon Smt. Sundri filed a suit for injunction qua the suit property, on the basis of some fake agreement in which learned District Judge, held the defendant No.2 to be in possession of the suit property and he was liable to be dispossessed in due course of law per judgment dated 13.4.1994, in case No.444/1 of 1989. The agreement was of 1981 whereas there was bar on purchasing of land by non agriculturist by dint of the provisions contained in Section 118 of the H.P. Tenancy and Land Reforms Act. Defendants No.1 and 2 had added 2 rooms more in the said existing construction without the consent of the plaintiff illegally and had no right to remain in occupation of the same and are liable to deliver the vacant and peaceful possession of the house to the plaintiff. Shashi Bala also filed suit No.414/1 of 1988 in the year 1988 against Smt. Sundri for injunction in respect of Khasra No.268/1 to the extent of 2 biswas 9 biswansi out of 7 biswas which suit was decreed partly only with a liberty to recover possession in due process of law and appeal against the judgment was filed whereby the suit was remanded on account of the amendment sought. The defendant No.2 had stated that the defendant No.3 was in possession of the part of the property. The plaintiff after reserving his right to recover mesne profits has filed this suit for possession of the suit property.

3. The defendants contested the suit and filed written statement, wherein they have taken preliminary objections qua maintainability, cause of action, resjudicata, misjoinder4 of defendants No.2 and 3 as parties, valuation, estoppel, acquisition of title by the defendant by way of adverse possession and limitation. estoppel, res judicata etc. On merits, the defendants averred that Smt. Sundri and Shankaru owners of the property had agreed to sell the property in favour of defendants No.1 and 2 by a valid agreement and received consideration. The defendants were owners in possession of the suit property. Smt. Sundri had admitted the receipt of consideration before the Tehsildar. Shri Inder Sain Sethi did not agree to pay rent at the rate of Rs.200/- per month to Smt. Sundri and Shankaru. The documents were also not cancelled and validity of the documents was upheld by Senior Sub Judge, Solan. Sh. Bhagat Ram defendant No.2 was an agriculturist and suit regarding 2 bighas 11 biswas land on the basis of agreement and tatima was decreed by Senior Sub Judge, Solan. The suit against Sh. Bhagat Ram cannot be clubbed with the suit against Smt. Shashi Bala as the cause of action were different and sales took place at different times. The sale appertaining to a house which was not subservient to agriculture and the plaintiff was not entitled to take advantage of H.P. Tenancy and Land Reforms Act. There was no relationship of landlord and tenant between the parties, and, the possession of the defendants was also not unlawful. The suit was hit by Section 11 and Order 2, Rule 2 CPC.

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

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 of the plaintiff is hit by principles of resjudicata? OPD
4. Whether the suit is bad for misjoinder of parties? OPD.
5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.
6. Whether the plaintiff is estopped from filing the suit as alleged? OPD.

7. Whether the defendants have become owners of the land by virtue of adverse possession? OPD.
8. Whether the suit is barred by limitation? OPD.
9. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by, the defendants/appellants herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

6. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. The appeal stands admitted by this Court, on the following substantial questions of law, respectively framed, on, 3.6.2005, and, on 10.12.2018:-

1. Whether bar of provisions of Section 118 of the H.P. Tenancy and Land Reforms Act has not been put to trial in accordance with law and findings are vitiated and whether in the present case property in suit being built up therefore no prior permission from State Government of Himachal Pradesh was required to be obtained?
2. Whether the appellant is entitled to the protection as contained in Section 53-A of Transfer of Property Act as held in 2002(3) SCC Page 676?
3. Whether respondents having set up plea of tenancy against appellant No.1 and in view view of the fact that PW-1 has deposed nothing as to when and between whom the alleged tenancy was created, therefore, in the absence of any agreement for creation of tenancy claim of the respondent was required to be rejected and disbelieved and for want of termination of tenancy suit merit dismissal?
4. Whether the present suit is not maintainable on account of joinder and non joinder of necessary parties and because of different causes of action and the suit in question is not maintainable on account on principle of resjudicata as well as estoppel.?

Substantial questions of Law No.1 and 2 :

7. In, a, previous suit, inter se, the extantly contesting litigants, rather conclusive, and, bindings judgments, and, decrees, stood rendered, vis-a-vis, the suit khasra number(s), hence, bearing similarity, vis-a-vis, the extant suit khasra number, (i) judgments and decrees whereof, stand, borne in Ex.PW1/J, in Ex.PW1/K, and, in Ex.PW1/L, (ii) and, they make unfoldments, vis-a-vis, the agreement, of, sale executed inter se the executants thereof, respectively borne, in, Ex.PD, standing pronounced to be void, (iii) and, upon its attracting, the, statutory bar contemplated in Section 118 of the H.P. Tenancy, and, Land Reforms Act, (iv) whereupon, the afore conclusive pronouncement(s), vis-a-vis, the afore facet, recorded, inter se, the contesting litigants, inevitably constrain, a conclusion from this Court, that, the substantial of law No.1, framed, with respect to the statutory bar encapsulated, in, the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, being not amenable, for, being re-decided, (v) given, the afore conclusion, vis-a-vis, the conclusivity, and, binding effect(s), of, an earlier pronouncement recorded, vis-a-vis, the invalidity of the apposite agreement sale, hence, sparking thereon, rather, the requisite statutory bar of estoppel, and, (vi) given, whereupon, rather the solemn statutory principle

of estoppel, created by the underlying therewith principle, of, constructive res judicata, being rendered both negated, as well, as beinghence deprived, of its, apt legal efficacy.

8. Even though, the substantial question of law appertaining, to acquisition of rights, in the suit property by the contesting litigants, on anvil of mandate, of, Section 53-A, of, the Transfer of Property Act, (i) even if assumingly, they, upon, the earlier verdicts, were, declared to be entitled, for, a, rendition, of, decree of permanent prohibitory injunction, (ii) and, also hence when they rather stand declared, to be, in possession of the suit property, (iii) rather the mere validity, of, the, afore renditions, made, vis-a-vis, the defendants, cannot per se hence also bestow, upon, them, the benefits, of, the afore provisions, rather validities, vis-a-vis, the afore espousal, is to be determined, along with the afore faceted hence conclusive, and, binding pronouncement recorded, in the earlier verdicts, (iv) and, rather, wherethroughs, the afore apposite agreement to sell, vis-a-vis, the suit land, and, borne thereat, in Ex.PD therein, hence stood declared to be nonest, its, infracting the mandate, encapsulated in Section 118 of the H.P. Tenancy, and, Land Reforms Act, (iv) and, the necessary concomitant sequel thereof, is, that the principle embodied in Section 53-A, of, the Transfer of Property Act, though attractable, vis-a-vis, the defendants, upon, theirs holding possession, of, the suit property, (v) yet the afore principle being abridged, with a rider, qua, it operating only, upon, the entire commercial transaction(s) being declared valid, (vi) whereas, with the apposite sale agreement, standing pronounced to be null, and, void, and, further when, in the earlier judgment, the aggrieved therefrom rather, the, plaintiff herein, is reserved, with a right, to, in accordance with law, hence, seek recovery of possession of the suit property, (vii) thereupon, he is entitled to a decree for possession, rather of, the suit property, (viii) given, the agreement to sell, being ingrained with a legal malady, reiteratedly, whereupon, the aggrieved defendants, are, forbidden to stake a claim hence anchored, upon, the mandate borne in Section 53-A, of, the Transfer of Property Act, (ix) especially when any valid anchorage(s) thereon, necessitate(s) qua the apposite agreement, hence, holding legal force. Consequently, substantial questions of Law No.1, and, 2 are hence answered in favour of the respondent/plaintiff, and, against the defendants/appellants.

Substantial question of law No.3 and 4.

9. The learned counsel, appearing for the appellants has contended with much vigour, before this Court, (i) that for want of, a, scribed agreement, hence, creating therethroughs any tenancy, vis-a-vis, a portion, of the suit property, (ii) thereupon, both the learned courts below were interdicted, to record a finding, that, the aggrieved defendants, rather assuming tenancy rights, vis-a-vis, the suit property nor hence, it was amenable, for the learned Courts below, to, through theirs, concurrently recorded verdicts, hence accept the notice borne in Ex.PW1/C, and, Ex.PW1/D, notices whereof, stand, evidently served, upon, the defendants, under, postal receipts, borne in Ex.PW1/E-1 to Ex.PW1/E-3, (iii) besides through postal certificate, borne in Ex.PW 1/E-1 to Ex.PW1/E-3. Since, the afore notices, wherethrough, the tenancy of the aggrieved defendants, hence, stood terminated, rather are evidently proven, to be, served, upon, the latter, (iv) and, when the defendants also permitted exhibition marks being made thereon, besides when the reflections in the jamabandi, appertaining, to the suit land, and, borne in Ex.PW1/B, make clear palpable disclosure, vis-a-vis, the plaintiff/respondent herein standing recorded therein, to be owner, in possession, of the suit property, (v) besides when the earlier conclusive, and, binding verdicts, respectively borne, in Ex.PW1/J to Ex.PW1/L, reserving a right, in the plaintiff/respondent, to recover, through, the processes of law, rather possession of the suit property, (vi) thereupon, merely for absence of recording or execution, of, scribed agreement(s), of tenancy, inter se, the contesting litigants, rather do not forbade, both the

learned courts below, to discard or reject the probative vigour, of, the afore exhibits, (vii) rather reiteratedly when the counsel for the defendants permitted, the embossing of exhibition marks thereon, (viii) and, when hence the recitals borne therein, are obviously construable to be admitted by the defendants, (ix) thereupon, it stands formidably concluded, that dehors, any scribing, of, any tenancy agreement, inter se, the contesting litigants, rather the afore exhibits, abundantly proving, the, coming into being, of, an oral, and, implied tenancy, vis-a-vis, the suit property, and, the returning, of, findings, vis-a-vis, oral, and, implied tenancy hence coming into being, inter se, the contesting litigants, vis-a-vis, the suit property, hence, by both the learned Courts below, rather, not warranting, theirs being disturbed.

10. The learned counsel appearing, for the aggrieved defendants, has made, a vehement submission before this Court, (i) that, the joinder of multifarious causes of action in the extant suit rather being grossly impermissible, (ii) as, all the causes of citation joined in the extant suit, are segregable, and, all the encapsulated causes of action are wholly segregable, and, distinct from each other, (iii) and, when hence all the causes of action, were amenable, for being joined in different suits, whereas, reiteratedly, all being joined in the extant suit, (iv) rather rendered the instant suit, to be, mis-constituted, and, the rendition, hence by both the learned courts below, of, decree(s) of possession, vis-a-vis, the suit khasra numbers, by both the learned courts below, hence, warranting interference. However, the afore submission addressed, before this Court, by the learned counsel appearing, for the aggrieved defendants, is, bereft of any vigour, as the suit khasra numbers, are, all embodied in Khasra No.485/268, measuring 0-7 biswas, and, the afore khasra numbers, carries therewithin, different tracts of land, respectively measuring 3 biswas, 2 biswas, and, 2 biswas, 11 biswansi. (iv) Even though, the afore tracts or portion(s) of lands, borne, in, a, common khasra numbers, are, respectively possessed by all the co-defendants. However, also when, the, respective possession(s) thereof, by, all the co-defendants, may be, through different agreements, hence, executed, inter se, the plaintiff, and, the defendants concerned, (v) yet the preeminent fact, which constrains this Court to conclude, that, thereupon, there being no misjoinder of causes of action nor hence any multifarious causes of action, rather being embodied in the plaint, rather the suit being properly constituted, is, encapsulated in (a) the suit khasra number being common; (b) the afore infirmity, as evident, on a reading of Section 199 of the CPC, provisions whereof stand extracted hereinafter:-

> **"99.No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction-**
>
> No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.
>
> Provided that nothing in this section shall apply to non-joinder of a necessary party.

rather barring the appellate courts, to reverse or substantially vary or remand any lis, (c) reiteratedly on anvil of purported mis-joinder or non-joinder of parties or causes of action, (d) unless, the merits of the case or the jurisdiction of the Court, is, hence, affected. However, since the learned counsel, for the aggrieved defendants/appellant, has not been able, to persuade this Court that, upon, the afore purported mis-joinings, of causes of action, rather the merits of the case, would be direly affected nor has been able to sway this

Court, that thereupon, the jurisdiction of the court hence stands affected, (vi) rather with as aforestated, various tracts of land standing borne in a common suit khasra number, and, when in respect, of the various tracts of land, borne in the common suit khasra number, as, evident, upon, a perusal of, the, jamabandi appertaining therewith, and, as borne, in Ex.PW1/B, rather the plaintiff, is, recorded to be the solitary owner thereof, (vii) whereas, only upon, other persons along with the plaintiff, standing, hence, recorded in, the, jamabandis, as, appertaining to the suit land, as apt co-owners thereof, (viii) thereupon, when the afore, may rather avail, a, ground qua the suit being mis-constituted, hence for his/theirs, non joinders, in the array of co-plaintiffs, rather when, the apposite jamabandis, rather do not, make, the afore upsurgings, and, when, for, wants thereof rather the afore espousal, is, hence barred, (ix) and, when the plaintiff is reserved, through, earlier pronounced verdicts, respectively embodied in Ex.PW1/J to Ex.PW1/L, hence, a right to recover possession, of the suit property, and, when hence the instant suit, is not hit, by, the, principle of res judicata, and, rather the afore principle, is working adversarially, vis-a-vis, the defendants/appellants, (x) and, the thereupon, any, joinder of purported multifarious causes of action, in, the extant suit, are rather amenable, for, being clubbed or joined therein, (xi) more so, when hence, it would enable the court, to efficaciously record a verdict, on merits, qua the contesting espousal(s), and, also without the plaintiff being unnecessarily driven, to institute separate suits purportedly, on anvil of, purported multifarious causes of action, being embodied in the plaint.

11. Be that as it may, even otherwise, the mandate embodied, in Order 1, Rule 3, CPC, provisions whereof stand extracted hereinafter:-

> "3. Who may be joined as defendants. -All persons may be joined in one suit as defendants where-
>
> (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and
>
> (b) if separate suits were brought against such persons, any common question of law or fact would arise."

rather enshrines (a) that the plaintiff being empowered, to join, in the array of co-defendants, all persons against whom, any right to canvass the relief in respect of, or arising out of, the same act or transaction or series of acts or transactions, are, alleged to exist, (b) and, even if when assumingly, the, various acts or series of acts or transactions, as stand embodied in the extant plaint, do per se, hold apparent interconnectivity, (c) thereupon, and, when, upon, separate suits, being reared, against, the co-defendants concerned, would sequel, the, ill legal consequence, of, emanations, of, diverse/conflicting verdicts, despite, common question(s) of fact or law arising, inter se, the contesting litigants, rather, upon, the plaintiff being driven, to institute separate suits, against, the defendants concerned, (d) and, hence, when the mandate, encapsulated in Order 1 Rule 3 of the CPC, is with, a holistic underlying purpose, rather, for avoiding multifariousness, of litigation, and, also for obviating multiplicity(ies) of litigation, and, for avoiding rendition, of, conflicting verdicts, upon, visibly mutual common questions of law, and, with the latter parameter(s) rather being satiated, (d) thereupon, the joining of purported dissimilar or disconjunct causes of action, does not, constrain this Court, to construe, qua the suit being mis-constituted nor this Court would proceeded, to disturb, the concurrent verdicts recorded, by both the learned courts below.

12. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, as well as by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned courts below have not excluded germane and apposite material from consideration. Accordingly, the substantial questions, of law No.3 and 4 are also answered in favour of the respondent and against the appellants.

13. In view of the above discussion, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgments, and, decrees are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Shyam Lal .....Appellant.

Versus

Urmila Devi and others .....Respondents.

FAO No. 368 of 2018 along
with FAO No. 369 and 370 of 2018
Reserved on: 2.7.2019.
Decided on : 12th July, 2019

Motor Vehicles Act 1988 - Sections 14 & 15- Driving licence – Deemed validity – when is applicable ? - Held, if holder of driving licence applies within 30 days of expiry of licence and licence is got renewed within this period, then licence would be deemed to have been renewed from date of expiry – On facts, driving licence expired on 21.5.2003 and accident took place on 26.5.2003- Licence not proved to be fake by insurer – Accident occurred during statutory protected period of 30 days from expiry and it yet remained effective – Tribunal went wrong in applying principle of pay and recover on ground that driver was not holding valid and effective driving licence on date of accident. (Paras 3 & 4)

For the Appellant(s): Mr. Ramesh Negi, Advocate vice Mr. Khub Singh Thakur, Advocate for the appellants in all appeals.
For Respondent No. 1: Mr. C.N. Singh, Advocate in all appeals.
For Respondent No.2: Mr. Jagdish Thakur, Advocate in all appeals.
For Respondent No.3: None.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The learned Motor Accident Claims Tribunal-II, Shimla, H.P., under a common verdict, respectively pronounced, upon, MAC Petition No. 38-S/2 of 2013, MAC Petition No. 37-S/2 of 2013, and, upon, MAC Petition No. 39-S/2 of 2013, on 8.12.2017, hence, therethrough determined respectively, vis-a-vis, the claimants concerned, compensation amounts, respectively borne, in sums, of Rs.45,000/-, Rs.70,079/-, and, Rs.36,000/-, and, thereon levied interest at the rate of 9% per annum, and, it was ordered

to commence from the date of filing of the apposite claim petition, and, upto realization(s) thereof. However, the learned tribunal, upon, making findings adversarial, to the owner of the offending vehicle, vis-a-vis, the issue appertaining, to, the driver of the offending vehicle, at the relevant time, holding a valid and effective driving licence, to drive the offending vehicle concerned, (a) thereafter proceeded to apply, the, principle of pay and recovery, (b) wherethrough, the insurer of the offending vehicle, was mandated, to initially satisfy, the award, (c) and, thereafter liberty stands preserved, vis-a-vis, it hence to recover, the, compensation amounts, in accordance with law, rather, from the owner of the offending vehicle. The owner of the offending vehicle, is hence, aggrieved, by the the common verdict, recorded on, 8.12.2017, by the learned tribunal, respectively upon, MAC Petition No. 38-S/2 of 2013, MAC Petition No. 37-S/2 of 2013, and, upon, MAC Petition No. 39-S/2 of 2013, hence, therefroms, has, reared the instant afore FAOs, before this Court, wherethrough, he, rather strives to cast hence onslaught(s) thereto.

2. The bedrock of the validity, of the afore contested pronouncement, rendered by the learned tribunal concerned, stands rested, upon, Ex.RW2/A, (i) exhibit whereof, comprises a photo copy of the driving licence, held by the driver of the offending vehicle, namely, one Shaukat Ali, (ii) besides therealongwith, hence, a, perusal of a copy of the RC appertaining to the offending vehicle, and, borne in Ex.RW1/A, is, also obviously imperative. Initially, a perusal of the apposite RC, embodied in Ex. RW1/A, unfolds, qua the offending vehicle, standing registered, as a heavy goods vehicle, and, though a perusal of Ex.RW2/A, also carries an echoing, vis-a-vis, the driver of the offending vehicle, hence holding, the, requisite authorization rather to drive, a, transport vehicle, and, duration of the afore authorization, is therein reflected, to commence from 22.5.2010 and, end, on 21.05.2013. However, the ill-fated mishap, involving the offending vehicle, occurred subsequent, to the expiry of the afore authorization, bestowed upon the driver of the offending vehicle, inasmuch, as it occurred, on 26.05.2013, and, uncontrovertedly thereat one Shaukat Ali, the, driver of the offending vehicle, (iii) obviously in the interregnum, since its expiry, and, till the happening of the ill-fated mishap, did not obtain, its renewal from the Motor Licencing Authority concerned. Furthermore, there is no application for renewal of Ex.RW2/A, for therethrough the afore Shaukat Ali, hence ensuring, its, apt renewal, (iv) rather also outside the statutory mandate encapsulated in the proviso, to Section 14 of the Motor Vehicles Act, inasmuch, as the requisite strivings, for renewal of Ex.RW2/A being recoursed either within 30 days, from its expiry or outside 30 days, reiteratedly, no apt, afore statutory strivings, hence, stood recoursed, by the afore Shaukat Ali. The provisions of Section 15 of the Motor Vehicles Act (hereinafter referred to as the Act):-

> "**15 Renewal of driving licences. —**
>
> (1) Any licensing authority may, on application made to it, renew a driving licence issued under the provisions of this Act with effect from the date of its expiry:
>
> Provided that in any case where the application for the renewal of a licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal:
>
> Provided further that where the application is for the renewal of a licence to drive a transport vehicle or where in any other case the applicant has attained the age of forty years, the same shall be accompanied by a medical certificate in the same form and in the same manner as is referred to in sub-section (3) of section 8, and the provisions of sub-section (4) of section 8 shall, so far as may be, apply in relation to every such case as they apply in relation to a learner's licence.

(2) An application for the renewal of a driving licence shall be made in such form and accompanied by such documents as may be prescribed by the Central Government.

(3) Where an application for the renewal of a driving licence is made previous to, or not more than thirty days after the date of its expiry, the fee payable for such renewal shall be such as may be prescribed by the Central Government in this behalf.

(4) Where an application for the renewal of a driving licence is made more than thirty days after the date of its expiry, the fee payable for such renewal shall be such amount as may be prescribed by the Central Government:

Provided that the fee referred to in sub-section (3) may be accepted by the licensing authority in respect of an application for the renewal of a driving licence made under this sub-section if it is satisfied that the applicant was prevented by good and sufficient cause from applying within the time specified in such-section (3):

Provided further that if the application is made more than five years after the driving licence has ceased to be effective, the licensing authority may refuse to renew the driving licence, unless the applicant undergoes and passes to its satisfaction the test of competence to drive referred to in sub-section (3) of section 9.

(5) Where the application for renewal has been rejected, the fee paid shall be refunded to such extent and in such manner as may be prescribed by the Central Government.

(6) Where the authority renewing the driving licence is not the authority which issued the driving licence it shall intimate the fact of renewal to the authority which issued the driving licence."

(a) though enjoin the afore Shaukat Ali, to prefer an application, for renewal of the driving licence, before the RLA concerned, either before its expiry or within 30 days from its expiry, and, upon, his striving hence begetting success, (b) thereupon, the benefit of the first proviso, to Section 15 of the Act, being bestowable upon him, (c) with a further statutory legal corollary, vis-a-vis, his renewal hence operating from the date, of its expiry, (d) and, hence, also covering the period whereat, the relevant mishap rather involving the offending vehicle, hence, happening, (e) besides carrying, the, concomitant effect, qua it being, hence legally facile, for the owner of the offending vehicle, to ensure, the fastening of apposite indemnificatory liability, upon, the insurer thereof. However, as, aforestated with the requisite application, being neither placed on record, nor the RLA concerned, hence, making an order of renewal(s) thereof, (f) thereupon, the afore first proviso to Section 15 of the Act, is prima facie aptly concluded, by the learned tribunal concerned, to, fail to beget its statutory clout, hence, operate vis-a-vis, the hereat driving licence, and, thereafter, it prima facie aptly adopted, the, principle of pay and recover.

3. However, for the reasons to be assigned hereafter, the afore reasoning, as meted, in the impugned award, by the learned tribunal concerned, is, extremely fragile, and, is amenable rather for outright rejection. (a) The learned tribunal, abysmally failing, to notice the apt provisions, borne in Section 14 of the Act, provisions whereof stand extracted hereinafter:-

"14. Currency of licences to drive motor vehicles.—

(1) A learner's licence issued under this Act shall, subject to the other provisions of this Act, be effective for a period of six months from the date of issue of the licence.

(2) A driving licence issued or renewed under this Act shall,—

(a) in the case of a licence to drive a transport vehicle, be effective for a period of three years:

Provided that in the case of licence to drive a transport vehicle carrying goods of dangerous or hazardous nature be effective for a period of one year and renewal thereof shall be subject to the condition that the driver undergoes one day refresher course of the prescribed syllabus; and

(b) in the case of any other licence,—

(i) if the person obtaining the licence, either originally or on renewal thereof, has not attained the age of 3[fifty years] on the date of issue or, as the case may be, renewal thereof,— 3[fifty years] on the date of issue or, as the case may be, renewal thereof,—

(A) be effective for a period of twenty years from the date of such issue or renewal; or

(B) until the date on which such person attains the age of 3[fifty years], 3[fifty years]," whichever is earlier;

[(ii) if the person referred to in sub-clause (i), has attained the age of fifty years on the date of issue or as the case may be, renewal thereof, be effective, on payment of such fee as may be prescribed, for a period of five years from the date of such issue or renewal:]

Provided that every driving licence shall, notwithstanding its expiry under this sub-section continue to be effective for a period of thirty days from such expiry."

A perusal of sub-section (2)(a) thereof, makes, obvious eruptions, (i) vis-a-vis, the statutory authorisation, to drive a transport vehicle, remaining alive for a period of three years, and, the last proviso borne therein, also, makes graphic echoings, vis-a-vis, every driving licence, dehors, its longevity surviving, only upto, the period mandated, in the apposite sub-section, hence, where underneath, the last proviso, rather occurs, inasmuch, as, vis-a-vis, a licence falling, within, the domain of sub-section (2) of Section 14 of the Act, (ii) rather being statutorily protected, to, continue to hold longevity, upto, a period of 30 days, from the date of expiry of the afore driving licence, and, appertaining, to, authorisation to drive a transport vehicle, in category whereof, the, ill fated vehicle hence evidently rather falls.

4. Even though, the learned counsel, appearing for the insurer, has contended, that, with the last proviso, though, making the afore voicings, and, its covering clause (a) of sub-section (2) of Section 14 of the Act, (i) yet the first proviso underneath sub-section (2) (a) rather ousts the play, of the last proviso, (ii) as the vehicle concerned, was engaged, in carrying goods of dangerous or hazardous nature, and, when thereupon, the, clout of clause (a) of sub-section (2) of Section 14, is subsumed, the concomitant effect thereof, is that, the last proviso underneath sub-section (2) rather also loosing its vigour. However, the afore submission, is sparked, by a gross misunderstanding, of, the play of the first proviso, as, occurs hence underneath clause (a) of sub-section (2), of Section 14 of the Act, (iii) as, there exists no evidence, on record, in, tandem with evident statutory fact, as, borne therein, vis-a-vis, the offending vehicle being engaged in carrying goods of dangerous or hazardous nature, (iv) and, thereupon, the operation, and, clout of the last proviso, occurring underneath sub-section (2) of Section 14, rather remains intact, (v) and, when, dehors, the expiry, of, the driving licence, held by the driver, of the offending vehicle, hence, occurring

on 21.5.2013, and, the ill-fated mishap, occurring on 26.5.2013, thereupon, with the ill-fated mishap, happening within a period of 30 days, rather since the expiry of Ex.PW2/A, concomitantly, hence, the apt last statutory proviso, borne in Section 14, becomes rejuvenated, (vi) and, dehors the non renewal, of, the apposite driving licence, by one Shaukat Ali, the phraseology borne therein, vis-a-vis, it yet remaining effective, for a period of 30 days, since its expiry occurring on 21.5.2013, covers, and, clothes, the driving licence, borne in Ex.RW2/A, hence with an aura of validity, (vii) and, thereupon, when the driving licence is not proven, to be fake, and, unauthentic, hence, the learned tribunal was enjoined, not to, bring into play the principle of pay and recovery, rather was enjoined to fasten, the apposite indemnificatory liability, upon, the insurer of the offending vehicle.

5. Be that as it may, the afore interpretation meted, to the apt provisions of Section 14 of the Act, would also not beget any conflict, with the provisions borne in Section 15 of the Act, as Section 15 of the Act, omits to make any voicings, vis-a-vis, the longevity of period, of driving licences, issued, vis-a-vis, transport vehicles, (i) and, when sub-section (2) (a) of Section 14 of the Act, along with its last proviso, with explicity brings hence to the fore, the apt thereto rather, the afore statutory enunciation, and, appertains explicitly, and, specifically, vis-a-vis, a transport vehicle, (ii) reiteratedly hence, there is no disharmony inter se Section 14 of the Act, and, Section 15 of the Act, (iii) rather the specific statutory provisions appertaining, to, hence a transport vehicle, in category, whereof the driving licence of Shaukat Ali rather fell, does obviously, and unflinchingly constrain, a conclusion, qua there being hence a gross overlooking, by the learned tribunal concerned, vis-a-vis, the apt play, of, the provisions appertaining, to the statutory authorisation, or statutory protections' hence bestowed, upon, one Shaukat Ali, vis-a-vis, the longevity, of, the latter's driving licence.

6. For the foregoing reasons, all the afore appeals bearing FAO Nos. 368 of 2018, 369 of 2018, and 370 of 2018, instituted herebefore by the registered owner of the offending vehicle, are allowed, and, the award impugned, before this Court, is, modified in the afore manner. Consequently, the indemnificatory liability, vis-a-vis, the compensation amounts, as stood adjudged by the learned tribunal, vis-a-vis, the claimants concerned, is fastened, upon, the insurer of the offending vehicle. All pending applications also stand disposed of. Records be sent back forthwith.

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

Veena Devi ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWP No. 11879 of 2011.
Reserved on : 5th July, 2019.
Decided on : 12th July, 2019.

Constitution of India, 1950 - Articles 14 & 226 - Annual income certificate – Honorarium paid to home guard volunteer – Held, receipt of daily allowances by home guard volunteer is in the nature of honorarium" and includable for determining his income or income eligibility criteria. (Para 3)

Cases referred:
Reena Devi vs. State of H.P. and others, CWP No. 1778 of 2015-H, decided on 30.10.2015
Reena Devi vs. State of H.P., LPA No. 12 of 2016, decided on 1st August, 2016

For the Petitioner:	Mr. T.S. Chauhan, Advocate.
For Respondents No. 1 to 4:	Mr. Hemant Vaid, Addl. Advocate General with Mr. Yudhveer Singh Thakur, Depputy Advocate General.
For Respondent No.5:	Mr. Inderjeet Singh Narwal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner, is, aggrieved by the order, embodied in Annexure P-7, wherethrough, the Additional District Magistrate, Bilaspur, H.P., hence, upheld the cancellation, vis-a-vis, the income certificate, reflecting, the, family income, of, the husband of respondent No.5 herein to be Rs.40,000/-, hence, by the Tehsildar concerned, (I) and, also upheld the income certificate No.1405, dated 14.5.2007, showing the family income, of, respondent No.5, as Rs.8000/-, and, thereafter recorded a pronouncement, that, with the respondent No.5 herein, obtaining highest marks, in the merit list, as a corollary thereof, he made a direction, for respondent No.5 herein being issued, the, employment letter, for, the post of Aganwari Helper, at Aganwari Centre Parnali.

2. The gravamen, of, the onslaught, as, cast, by the petitioner herein, vis-a-vis, the afore order(s) is entirely rested, upon, an argument qua the income, if any, derived by the husband of respondent No.5 herein, from, his rendering services, as, a Home Guard volunteer, and, embodied, in the income certificate, to be borne, in a sum of Rs.40,000/- (a) being includable, for the relevant purpose, more so, for determining, the, eligibility of respondent No.5 herein.

3. However, the learned counsel for respondent No.5, has, countered the afore submission, and, the edifice of his afore submission is rested, (a) upon, the further factum, vis-a-vis, the allowances, and, honorarium, disbursable to the husband of the respondent No.5 herein rather suffering fluctuations, and, volatility, hence at certain stages, of, rendition of services, by the husband, of, the respondent No.5 herein, as, a Home Guard Volunteer, (b) and, hence, his being not reimbursed, any honorarium, and, allowances, and, thereupon, for ensuring qua the respondent No.5's family hence earning, a, decent livelihood, rather it would be unbefitting, to, compute income, if any, derived by her husband, by his rendering volunteer services, in, the Home Guard Department. The efficacy of the afore submission, is, effaced, by this Court, in a verdict rendered in a case titled as ***Reena Devi vs. State of H.P. and others, CWP No. 1778 of 2015-H, decided on 30.10.2015,*** rather, declaring that with the petitioner's husband's, discharging hence duties, as, Home Guard volunteer, and, his receiving daily allowances, in the nature of honorarium, rather rendering his allowances being includable, for, determining, the, income eligibility criteria, of, the aspirant concerned. Furthermore, the afore verdict, is, also, in concurrence with the apt verdict rendered by the Hon'ble Principal Division Bench, of this Court, in a case titled, as, ***Smt. Reena Devi vs. State of H.P., LPA No. 12 of 2016, decided on 1st August, 2016,*** the relevant paragraph No.4 whereof, stands extracted hereinafter:-

> “4. The apex Court in Civil Appeal No.2759 of 2015 (Arising out of SLP(C) No.12858 2009) ***Grah Rakshak, Home Guards Asso. Versus State of H.P. &***

> ***Ors.***, has held that home guards be paid allowances as well as salary equal to 30 days as is being paid to the police personnel in the State. It is apt to reproduce para 22 of the said judgment herein.
>
> "22. *In view of the discussion made above, no relief can be granted to the appellants either regularization of services or grant of regular appointments hence no interference is called for against the judgments passed by the Himachal Pradesh, Punjab and Delhi High Courts. However, taking into consideration the fact that Home Guards are used during the emergency and for other purposes and at the time of their duty they are empowered with the power of police personnel, we are of the view that the State Government should pay them the duty allowance at such rates, total of which 30 days (a month) comes to minimum of the pay to which the police personnel of State are entitled. It is expected that the State Governments shall pass appropriate orders in terms of aforesaid observation on an early date preferably within three months.""*

also postulate qua it being incumbent, upon, the employer, to pay allowances as well salary, equal to 30 days, as is being paid, to the police personnel in the State, rather also vis-a-vis, rendition of services, by a Home Guard, (i) thereupon, the afore submission, that there are fluctuations, and, volatility(ies), in the income, derived by the husband of respondent No.5 herein, by his rendering services, as a volunteer, as, a Home Guard, hence, for the respondent No.5, earning a decent livelihood, rather, his afore income being discountable, and, also being inconsequential, for, determining, the, relevant income criteria, obviously stands rendered wholly benumbed.

4. For the foregoing reasons, the instant petition is allowed, and, the order impugned before this Court, and, borne in Annexure P-7 is set aside. All pending applications also stands disposed of.

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

Yadvender Singh and another .....Appellants.

Versus

Kirpa Ram and another ....Respondents.

FAO No. 422 of 2018.
Reserved on : 27th May, 2019.
Decided on : 12th July, 2019.

Motor Vehicles Act 1988 – Section 149 (2)(a)(ii) – Motor accident – Claim application – Defences – Validity of driving licence – Onus on whom? – Held, once insured had filed copy of driving licence showing that driver was authorised to drive offending vehicle, onus shifts to insurer to prove its invalidity – In absence of discharge of this onus, liability cannot be fastened on insured / driver of offending vehicle. (Para 2)

For the Appellants: Mr. P. S. Goverdhan, Advocate.
For Respondents No. 2: Mr. Rajvinder Sandhu, Advocate.
Respondent No.1 already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands instituted, by the owner, and, the driver of the offending vehicle whereuponwhom, the indemnificatory liability, was fastened, vis-a-vis, the compensation amount, comprised, in a sum of Rs.40,800/-, and, whereon stood levied interest at the rate of 9% per annum, and, it was ordered to commence from the date of filing of the petition, till realization thereof.

2. The counsels appearing for the contesting parties, do not rear any contest, vis-a-vis, the validity, of, rendition of affirmative findings, upon, issue No.1, appertaining to the relevant mishap, being a sequel of rash and negligent manner, of driving, of, the offending vehicle, by appellant No.2 herein. However, the learned counsel appearing for the appellants, has contended (a) that the returning of findings adversarial, to the registered owner, of the offending vehicle, especially, vis-a-vis, the issue. serialized as issue No.4, being grossly shaky, and, infirm. Apparently, the discharging onus, vis-a-vis, issue No.4, was cast, upon, the insurer of the offending vehicle. The registration certificate, appertaining to the offending vehicle, and, embodied in Ex.R-3, pronounces qua it being registered, hence, as a bus. The owner of the offending vehicle also during the course of his testification, has placed, on record a photo copy, of the driving licence, of appellant No.2, driving licence whereof stands embodied, in Mark-X. A perusal of Mark-x, echoes qua appellant No.2 being also authorised to drive, the, offending bus. However, the learned tribunal, for want of cogent proof being adduced, by the owner of the offending vehicle qua Mark-X, being proven to be issued or it generating from the records, held by the motor licencing authority concerned, proceeded to slight, its probative efficacy, (b) and, also obviously jointly saddled, the indemnificatory liability qua the compensation amount, vis-a-vis, the appellants herein, i.e. the registered owner of the offending vehicle, and, the driver of the offending vehicle. The afore legal misstep, is, uncalled for, (c) reiteratedly, as the learned tribunal remained unmindful, vis-a-vis, discharging onus qua issue No.4, rather being cast, upon, the insurer of the offending vehicle, and, when mark-X, is, the photo copy of the driving licence held, as, by the driver of the offending vehicle, (d) and, when it holds the name and, description of appellant No.2, (e) and, also when it holds the name, and, description of the motor licencing authority concerned, wherefrom, it stood issued, (f) thereupon obviously it facilitated, the insurer of the offending vehicle, respondent No.2 herein, to ensure elicitation(s), of, original thereof, from the records, in respect thereto, as, maintained by the motor licencing authority concerned. Significantly, the afore recourse(s) would ensure, hence, making of an assured conclusion, that hence, the discharging onus cast, upon, the insurer of the offending vehicle, vis-a-vis, issue No.4, rather being adequately and satisfactorily discharged, more so, vis-a-vis, the signatures, and, seals borne therein. Contrarily, patent, and, obvious non recoursing thereto by the insurer of the offending vehicle, obviously could not constrain, the learned tribunal, to conclude, (f) qua given upon the driving licence standing marked as Mark-X, hence, the discharging onus, vis-a-vis, issue No.4, standing come to be discharged, by the insurer, of, the offending vehicle. Consequently, want(s) of afore recourses, rather by the counsel for the insurer, constrain this Court, to conclude qua the insurer acquiescing, vis-a-vis, the validity, and, authenticity of Mark-x, even if it is a mere photo copy, of, the original thereof. Consequently, it is held that the driver of the offending vehicle, was, at the relevant time, holding a valid, and, effective driving licence, to, drive the offending vehicle.

3. For the foregoing reasons, the instant appeal is allowed, and, the impugned award is modified to the afore extent. Consequently, the indemnificatory liability, vis-a-vis,

the compensation amount, is, fastened upon the insurer of the offending vehicle. All pending applications also stand disposed of. Records be sent back forthwith.

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

Oriental Insurance Company Ltd. ..Appellant
Versus
Baldev and others ..Respondents

FAO(MVA) No. 370 of 2017
Decided on: May 24, 2019

Motor Vehicles Act, 1988 - Section 166 – Motor accident – Claim application – Defences – Gratuitous passenger in goods vehicle- Held, on facts, deceased used to collect milk in village and sell it at Chilling Plant – Milk used to be taken to Plant in offending vehicle – Documentary evidence of Chilling Plant corroborating petitioners' case – Plea of deceased being a gratuitous passenger not proved by insurer. (Para 14)

Case referred:
National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157

For the Appellant	:	Dr. Lalit Kumar Sharma, Advocate.
For the Respondents	:	Mr. Vivek Sharma, Advocate, for respondents No.1 to 3.
		Ms. Rubeena Bhatt, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

<u>Sandeep Sharma, Judge</u>:

By way of instant appeal having been filed by the appellant-Oriental Insurance Company Limited (hereinafter, 'appellant-Insurance Company'), challenge has been laid to Award dated 23.5.2017 passed by learned Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushahar, H.P. in MAC Petition No. 36-R/2 of 2016/2015 titled as Baldev and others vs. Oriental Insurance Company Ltd. and another, whereby learned Tribunal below, while allowing the claim petition having been filed by respondents No.1 to 3-claimants held the appellant-Insurance Company liable to pay compensation to the tune of Rs.16,73,000/- to respondents No.1 to 3/claimants, alongwith interest at the rate of 9% per annum from the date of filing of the petition and till the final realisation of the amount. Though the learned Tribunal below held appellant-Insurance Company and respondent No.4 jointly and severally liable, but the appellant-Insurance Company being insurer, has been directed to indemnify the claimants.

2. Briefly stated the facts as emerge from the record are that respondents No.1 to 3 being legal representatives of deceased Om Dutt, filed a petition under S.166 of the Motor Vehicles Act before learned Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushahar, H.P., alleging therein that on 16.9.2014, deceased Om Dutt, while coming alongwith other persons from Rampur after unloading and selling milk in vehicle bearing

registration No. HP-06A-3682, met with an accident, as a consequence of which he suffered serious injuries resulting into his death. Respondents-claimants averred in the petition that the vehicle was being driven by the deceased Driver, Govind Ram. In the aforesaid accident, Om Dutt and other two occupants died on the spot. Since deceased Om Dutt was head of the family and was the only bread earner of the family, respondents-claimants, by way of the claim petition as referred to above, claimed compensation to the tune of Rs.30.00 Lakh.

3. Appellant-Insurance Company resisted the claim petition on the ground that the respondents/claimants have filed the claim petition in collusion with respondent No.4, Gian Dass, owner of vehicle bearing registration No. HP-06A-3682. Appellant-Insurance Company also claimed before the learned Tribunal below that the deceased Driver Govind Ram was not having an effective and valid driving licence and vehicle was being driven in violation of the terms and conditions of the Insurance Policy, as such, appellant-Insurance Company is not liable to indemnify the insured. Apart from above, appellant-Insurance Company also claimed that the deceased Om Dutt was traveling as a gratuitous passenger in the ill-fated vehicle, as such, no compensation is liable to be paid by the appellant-Insurance Company on account of his death in the alleged accident.

4. Respondent No.4 Gian Dass, by way of a separate reply, while placing on record Insurance Policy issued by the appellant-Insurance Company, claimed that the amount claimed by the respondents/claimants is excessive and without any basis.

5. Learned Tribunal below, on the basis of the pleadings adduced on record by the respective parties, framed following issues on 4.1.2016::

"1. Whether Sh. Om Dutt had died in a motor vehicle accident on account of rash and negligent driving of vehicle No.HP-06A-3682 being driven by its Driver? OPP

2. Whether the claimants are entitled for compensation, if so, to what amount and from whom? OPP

3. Whether the deceased at the relevant time was traveling as unauthorized gratuitous passenger in the offending vehicle, as alleged? ..OPR-1

4. Whether the petition has been filed in collusion with respondent No.2, as alleged? ..OPR-1

5. Whether the Driver of the offending vehicle at the relevant time was not holding a valid and effective driving licence, as alleged? OPR-1

6. Whether the offending vehicle at the relevant time was being plied in violation of terms and conditions of the insurance policy, as alleged? OPR-1

7. Relief."

6. Subsequently, learned Tribunal below, vide Award dated 23.5.2017, held the claimants entitled to a sum of Rs. 16,73,000/- alongwith interest at the rate of 9% per annum from the date of petition till realisation of the whole amount. Being aggrieved and dissatisfied with the aforesaid Award passed by the Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushahar, the appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to quash the Award.

7. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned by the learned Tribunal below, this Court is not persuaded to agree with learned counsel for the appellant-Insurance Company that the

Award passed by the learned Tribunal below is not based upon proper appreciation of the facts as well as evidence led on record by the respective parties, rather, this Court finds that the learned Tribunal below has not only minutely and carefully examined the evidence, but has appreciated the same in right perspective, as such, there is no scope, if any, for this Court to interfere with the same.

8. Respondents/claimants by way of cogent and convincing evidence successfully proved on record that on the date of alleged accident, the offending vehicle was being driven in a rash and negligent manner by deceased Driver, Govind Ram.

9. PW-1, Smt. Padma Devi proved on record copy of FIR Ext. PW-1/B and post-mortem report, Ext. PW-1/C, perusal whereof clearly reveals that the accident took place due to rash and negligent driving of the deceased, Govind Ram, who at the relevant time was driving the offending vehicle bearing registration No. HP-06A-3682. Similarly, perusal of post-mortem report clearly reveals that the deceased Om Dutt died on account of injuries caused in the motor vehicle accident.

10. PW-2 Tikkam Ram who happens to be an eye-witness of the alleged accident, testified that on 16.9.2014, he alongwith deceased and Sher Singh had gone to Rampur in the offending vehicle alongwith their milk. Govind Ram was driving the vehicle. They sold their milk at Rampur and when they were returning to their home, vehicle in question met with an accident due to rash and negligent driving of the Driver, in which Sher Singh and the deceased died. In his cross-examination, this witness denied the suggestion put to him that the accident had not taken place due to mistake of the Driver.

11. Interestingly, no evidence in rebuttal, if any, came to be led on record by respondent No. 4 or the appellant-Insurance Company to rebut the aforesaid evidence led on record by the claimants, as such, there appears to be no illegality committed by the learned Tribunal below while returning the findings on the issue of rash and negligent driving by deceased Driver, Govind Ram.

12. Learned counsel for the appellant-Insurance Company, while inviting attention of this Court to the statement of RW-1, Akash K. Verma, a representative of the appellant-Insurance Company, strenuously argued that since it stood duly proved on record that the deceased was traveling in the offending vehicle as a gratuitous passenger, there was no occasion for the learned Tribunal below to entertain the claim petition having been filed by respondents No.1 to 3/claimants.

However, after having carefully examined the evidence led on record by the respective parties qua aforesaid aspect of the matter, this Court is not inclined to agree with the aforesaid contention of learned counsel for the appellant-Insurance Company, because bare perusal of the statement of Akash Kumar, RW-1, nowhere proves the case of the appellant-Insurance Company that the deceased was traveling in the vehicle as a gratuitous passenger, rather, there is overwhelming evidence led on record by the claimants that the vehicle in question was registered as a 'Goods' vehicle and deceased alongwith other persons, had been taking his milk to the Milk Plant regularly in the offending vehicle.

13. RW-2 Tilak Ram, while admitting that he was working as an In-charge at Milk Plant, Kepu, fairly stated before the learned Tribunal below that as per record maintained in the Milk Plant upto 16.9.2014, 342 Litre milk was received in the Milk Plant from the vehicle of Gian Dass (respondent No.4) and thereafter from 17.9.2014, no milk was received and on 18.9.2014 and onwards, milk was received through another vehicle. This witness in his cross-examination admitted that they do not maintain the record of sellers of

the milk individually and separately. This witness also admitted that the Chilling Plant had agreement with Govind Ram, for transportation of Milk.

14. Evidence on record clearly reveals that the deceased used to collect milk and sell the same in Chilling Plant alongwith other persons. Deceased alongwith other persons of the Village had hired the vehicle of Gian Dass, respondent No.4, for Rs.200/- per day. Mere statement of RW-1, Akash Kumar, representative of the appellant-Insurance Company is not sufficient to conclude that the deceased at the time of alleged accident was traveling as a gratuitous passenger. This witness in his cross-examination fairly admitted that he did not witness the accident. Though this witness stated that the Company had appointed Investigator after the accident but report of said Investigator never came to be produced on record. In view of aforesaid discussion, this Court sees no merit in the contention raised by learned counsel for the appellant-Insurance Company that the deceased was traveling in the ill-fated vehicle as a gratuitous passenger, as such, same rightly came to be rejected accordingly.

15. Having carefully perused the amount of compensation awarded by the learned Tribunal below under various heads, this Court finds that the learned Tribunal below. erred while awarding compensation to the tune of Rs.1.00 Lakh on account of loss of consortium to petitioner No.3 and Rs.25,000/- on account of funeral expenses. Similarly, no amount could be awarded on account of loss of love and affection to claimants No.1 and 2. Learned Tribunal below further erred in granting Rs.1.00 Lakh on account of loss of estate as such, there appears to be force in the argument of learned counsel for the appellant-Insurance Company that in view of the judgment rendered by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, learned Tribunal below has wrongly awarded amounts under various other heads i.e. loss of consortium, loss of estate, loss of love and affection and funeral charges and, as such, impugned Award to that extent needs to be modified.

16. At this stage, it would be profitable to reproduce following paragraphs of aforesaid judgment herein below:

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-

"17. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant

where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

17. This court having perused the aforesaid judgment rendered by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others** (supra) is in agreement with learned counsel representing the appellant-Insurance Company that amounts awarded by the learned Tribunal below, on account of loss of consortium, loss of estate, loss of love and affection and funeral charges need to be re-assessed. In view of the law laid down in **Pranay Sethi** (Supra), Rs.40,000/- ought to have been awarded on account of loss of consortium, Rs. 15,000/- each on account of loss of estate and funeral charges and no amount could have been awarded on account of loss of love and affection. So far income of the deceased and loss of dependency are concerned, this Court does not see any irregularity in the amount so assessed by the learned Tribunal below. Similarly, this court finds no illegality in the multiplier applied by the learned Tribunal below, which has rightly been applied as per law.

18. Consequently, in view of aforesaid modification made herein above, respondents No.1 to 3/ claimants are held entitled to following amounts under various heads:

1.	Loss of dependency	**12,48,000**
2.	Loss of consortium to petitioner No. 3	**40,000**
3.	Loss of estate	**15,000**
4.	Funeral charges	**15,000**
	Total	**13,18,000**

19. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld. Apportionment shall be made as under:

Respondent No.1 Rs.4,00,000/-

Respondent No.2 Rs.4,00,000/-

Respondent No.3 Rs.5,18,000/-

The amounts falling to the shares of claimants No.1 and 2 be invested in the Fixed Deposits for a period of five years.

20. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award passed by learned Tribunal below is modified to the above extent only.

All pending miscellaneous applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Oriental Insurance Company Ltd. ....Appellant
Versus
Smt. Manjani Kumari and others ....Respondents

FAO(MVA) No. 369 of 2017
Decided on: May 24, 2019

Motor Vehicles Act, 1988- Section 166– Motor accident– Claim application– Defences– Gratuitous passenger in goods vehicle- Held, on facts, deceased used to collect milk in village and sell it at Chilling Plant– Milk used to be taken to Plant in offending vehicle– Documentary evidence of Chilling Plant corroborating petitioners' case – Plea of deceased being a gratuitous passenger not proved by insurer. (Para 14)

Case referred:
National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157

For the Appellant : Dr. Lalit Kumar Sharma, Advocate.
For the Respondents : Mr. Vivek Sharma, Advocate, for respondents No.1 to 3.
Ms. Rubeena Bhatt, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

<u>Sandeep Sharma, Judge</u>:

By way of instant appeal having been filed by the appellant-Oriental Insurance Company Limited (hereinafter, 'appellant-Insurance Company') challenge has been laid to Award dated 23.5.2017 passed by learned Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushahar, H.P. in MAC Petition No. 37-R/2 of 2016/2015 titled Smt. Manjani Kumari and others vs. Oriental Insurance Company Ltd. and another, whereby learned Tribunal below, while allowing the claim petition having been filed by respondents No.1 to 3-claimants held the appellant-Insurance Company liable to pay compensation to the tune of Rs.19,61,000/- to respondents No.1 to 3/claimants, alongwith interest at the rate of 9% per annum from the date of filing of the petition and till the final realisation of the amount. Though the learned Tribunal below held appellant-Insurance Company and respondent No.4 jointly and severally liable, but the appellant-Insurance Company being insurer, has been directed to indemnify the claimants.

2. Briefly stated the facts as emerge from the record are that respondents No.1 to 3 being legal representatives of deceased Sher Singh, filed a petition under S.166 of the Motor Vehicles Act before learned Motor Accident Claims Tribunal-II, Kinnaur at Rampur

Bushahar, H.P., alleging therein that on 16.9.2014, deceased Sher Singh, while coming alongwith other persons from Rampur after unloading and selling milk, in vehicle bearing registration No. HP-06A-3682, met with an accident, as a consequence of which he suffered serious injuries resulting into his death. Respondents-claimants averred in the petition that the vehicle was being driven by the deceased Driver, Govind Ram. In the aforesaid accident, Sher Singh and other two occupants died on the spot. Since deceased Sher Singh was head of the family and was the only bread earner of the family, respondents-claimants, by way of the claim petition as referred to above, claimed compensation to the tune of Rs.30.00 Lakh.

3. Appellant-Insurance Company resisted the claim petition on the ground that the respondents/claimants have filed the claim petition in collusion with respondent No.4, Gian Dass, owner of vehicle bearing registration No. HP-06A-3682. Appellant-Insurance Company also claimed before the learned Tribunal below that the deceased Driver Govind Ram was not having an effective and valid driving licence and vehicle was being driven in violation of the terms and conditions of the Insurance Policy, as such, appellant-Insurance Company is not liable to indemnify the insured. Apart from above, appellant-Insurance Company also claimed that the deceased Sher Singh was traveling as a gratuitous passenger in the ill-fated vehicle, as such, no compensation is liable to be paid by the appellant-Insurance Company on account of his death in the alleged accident.

4. Respondent No.4 Gian Dass, by way of a separate reply, while placing on record Insurance Policy issued by the appellant-Insurance Company, claimed that the amount claimed by the respondents/claimants is excessive and without any basis.

5. Learned Tribunal below, on the basis of the pleadings adduced on record by the respective parties, framed following issues on 4.1.2016::

> "1. Whether Sh. Sher Singh had died in a motor vehicle accident on account of rash and negligent driving of vehicle No.HP-06A-3682 being driven by its Driver? OPP
>
> 2. Whether the claimants are entitled for compensation, if so, to what amount and from whom? OPP
>
> 3. Whether the deceased at the relevant time was traveling as unauthorized gratuitous passenger in the offending vehicle, as alleged? ..OPR-1
>
> 4. Whether the petition has been filed in collusion with respondent No.2, as alleged? ..OPR-1
>
> 5. Whether the Driver of the offending vehicle at the relevant time was not holding a valid and effective driving licence, as alleged? OPR-1
>
> 6. Whether the offending vehicle at the relevant time was being plied in violation of terms and conditions of the insurance policy, as alleged? OPR-1
>
> 7. Relief."

6. Subsequently, learned Tribunal below, vide Award dated 23.5.2017, held the claimants entitled to a sum of Rs. 19,61,000/- alongwith interest at the rate of 9% per annum from the date of petition till realisation of the whole amount. Being aggrieved and dissatisfied with the aforesaid Award passed by the Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushahar, the appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to quash the Award.

7. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned by the learned Tribunal below, this Court is not persuaded to agree with learned counsel for the appellant-Insurance Company that the Award passed by the learned Tribunal below is not based upon proper appreciation of the facts as well as evidence led on record by the respective parties, rather, this Court finds that the learned Tribunal below has not only minutely and carefully examined the evidence, but has appreciated the same in right perspective, as such, there is no scope, if any, for this Court to interfere with the same.

8. Respondents/claimants by way of cogent and convincing evidence successfully proved on record that on the date of alleged accident, the offending vehicle was being driven in a rash and negligent manner by deceased Driver, Govind Ram.

9. PW-1, Smt. Manjini Devi proved on record copy of FIR Ext. PW-1/B and post-mortem report, Ext. PW-1/C, perusal whereof clearly reveals that the accident took place due to rash and negligent driving of the deceased, Govind Ram, who at the relevant time was driving the offending vehicle bearing registration No. HP-06A-3682. Similarly, perusal of post-mortem report clearly reveals that the deceased Sher Singh died on account of injuries caused in the motor vehicle accident.

10. PW-2 Tikkam Ram who happens to be an eye-witness of the alleged accident, testified that on 16.9.2014, he alongwith deceased and Sher Singh had gone to Rampur in the offending vehicle alongwith their milk. Govind Ram was driving the vehicle. They sold their milk at Rampur and when they were returning to their home, vehicle in question met with an accident due to rash and negligent driving of the Driver, in which Sher Singh and the deceased died. In his cross-examination, this witness denied the suggestion put to him that the accident had not taken place due to mistake of the Driver.

11. Interestingly, no evidence in rebuttal, if any, came to be led on record by respondent No. 4 or the appellant-Insurance Company to rebut the aforesaid evidence led on record by the claimants, as such, there appears to be no illegality committed by the learned Tribunal below while returning the findings on the issue of rash and negligent driving by deceased Driver, Govind Ram.

12. Learned counsel for the appellant-Insurance Company, while inviting attention of this Court to the statement of RW-1, Akash K. Verma, a representative of the appellant-Insurance Company, strenuously argued that since it stood duly proved on record that the deceased was traveling in the offending vehicle as a gratuitous passenger, there was no occasion for the learned Tribunal below to entertain the claim petition having been filed by respondents No.1 to 3/claimants.

However, after having carefully examined the evidence led on record by the respective parties qua aforesaid aspect of the matter, this Court is not inclined to agree with the aforesaid contention of learned counsel for the appellant-Insurance Company, because bare perusal of the statement of Akash Kumar, RW-1, nowhere proves the case of the appellant-Insurance Company that the deceased was traveling in the vehicle as a gratuitous passenger, rather, there is overwhelming evidence led on record by the claimants that the vehicle in question was registered as a 'Goods' vehicle and deceased alongwith other persons, had been taking his milk to the Milk Plant regularly in the offending vehicle.

13. RW-2 Tilak Ram, while admitting that he was working as an In-charge at Milk Plant, Kepu, fairly stated before the learned Tribunal below that as per record maintained in the Milk Plant upto 16.9.2014, 342 Litre milk was received in the Milk Plant from the vehicle of Gian Dass (respondent No.4) and thereafter from 17.9.2014, no milk was

received and on 18.9.2014 and onwards, milk was received through another vehicle. This witness in his cross-examination admitted that they do not maintain the record of sellers of the milk individually and separately. This witness also admitted that the Chilling Plant had agreement with Govind Ram, for transportation of Milk.

14. Evidence on record clearly reveals that the deceased used to collect milk and sell the same in Chilling Plant alongwith other persons. Deceased alongwith other persons of the Village had hired the vehicle of Gian Dass, respondent No.4, for Rs.200/- per day. Mere statement of RW-1, Akash Kumar, representative of the appellant-Insurance Company is not sufficient to conclude that the deceased at the time of alleged accident was traveling as a gratuitous passenger. This witness in his cross-examination fairly admitted that he did not witness the accident. Though this witness stated that the Company had appointed Investigator after the accident but report of said Investigator never came to be produced on record. In view of aforesaid discussion, this Court sees no merit in the contention raised by learned counsel for the appellant-Insurance Company that the deceased was traveling in the ill-fated vehicle as a gratuitous passenger, as such, same rightly came to be rejected accordingly.

15. Having carefully perused the amount of compensation awarded by the learned Tribunal below under various heads, this Court finds that the learned Tribunal below. erred while awarding compensation to the tune of Rs.1.00 Lakh on account of loss of consortium to petitioner No.1 and Rs.25,000/- on account of funeral expenses. Similarly, no amount could be awarded on account of loss of love and affection to claimants No.2 and 3. Learned Tribunal below further erred in granting Rs.1.00 Lakh on account of loss of estate as such, there appears to be force in the argument of learned counsel for the appellant-Insurance Company that in view of the judgment rendered by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, learned Tribunal below has wrongly awarded amounts under various other heads i.e. loss of consortium, loss of estate, loss of love and affection and funeral charges and, as such, impugned Award to that extent needs to be modified.

16. At this stage, it would be profitable to reproduce following paragraphs of aforesaid judgment herein below:

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of

consortium. We are inclined to think so, for what it states in that regard. We quote:-

"17. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

17. This court having perused the aforesaid judgment rendered by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others** (supra) is in agreement with learned counsel representing the appellant-Insurance Company that amounts awarded by the learned Tribunal below, on account of loss of consortium, loss of estate, loss of love and affection and funeral charges need to be re-assessed. In view of the law laid down in **Pranay Sethi** (Supra), Rs.40,000/- ought to have been awarded on account of loss of consortium, Rs. 15,000/- each on account of loss of estate and funeral charges and no amount could have been awarded on account of loss of love and affection. So far income of the deceased and loss of dependency are concerned, this Court does not see any irregularity in the amount so assessed by the learned Tribunal below. Similarly, this court finds no illegality in the multiplier applied by the learned Tribunal below, which has rightly been applied as per law.

18. Consequently, in view of aforesaid modification made herein above, respondents No.1 to 3/ claimants are held entitled to following amounts under various heads:

1.	Loss of dependency	**15,36,000**
2.	Loss of consortium to petitioner No. 1	**40,000**
3.	Loss of estate	**15,000**
4.	Funeral charges	**15,000**
	Total	**16,06,000**

19. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld. Apportionment shall be made as under:

Respondent No.1	Rs.6,06,000/-
Respondent No.2	Rs.5,00,000/-
Respondent No.3	Rs.5,00,000/-

The amounts falling to the shares of respondent No.3 be invested in the Fixed Deposits for a period of five years.

20. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award passed by learned Tribunal below is modified to the above extent only.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

The Executive Officer, Municipal Council, Dalhousie ...Petitioner
Versus
Shri Anil Kumar and another ...Respondents

CWP's No. 9814, 9815, 9816, 9817
and 9986 of 2012
Decided on: May 29, 2019

Industrial Disputes Act, 1947–Sections 25 F & 25 G – Retrenchment – Validity– Held, where disengagement of workmen is in violation of section 25 F & 25 G of Act, award of Labour Court directing continuity with all consequential benefits from date of illegal disengagement is just and proper– It cannot be interfered with in exercise of writ jurisdiction– On facts, retrenchment of workmen without paying retrenchment compensation at time of serving notices, held to be illegal (Paras 2 & 10)
Constitution of India, 1950– Articles 226/227– Error of fact– Writ jurisdiction– Availability– Held, error of fact however grave cannot be corrected by writ court. (Para 13)

Case referred:
National Iron and Steel Company Ltd. vs. State of West Bengal, (1967) II LLJ 23 (SC)

For the petitioner : Mr. Adarsh K. Vashista, Advocate.
For the Respondents : Mr. Shyam Singh Chauhan, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Since similar question of facts and law are involved in these petitions, as such, same were tagged together and are being disposed of by this common judgment. However, for the sake of clarity, facts of CWP No. 9814 of 2012 are being discussed herein, which are almost similar in all the petitions.

2. By way of CWP No. 9814 of 2012, challenge has been laid to Award dated 21.1.2012 passed by learned Industrial Tribunal-cum-Labour Court, Dharamshala in Ref. No. 192/2010, holding retrenchment of the respondent-workman (hereinafter, 'workman') invalid, consequently holding the workman entitled to continuity and seniority from the date of illegal disengagement.

3. Facts, as emerge from the record are that the appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter, 'Act') to the learned Tribunal below, for determination:

> "Whether termination of the services of Sh. Anil Kumar S/o Shri Karam Chand, by The Executive Officer, Municipal Council, Dalhousie, Distt. Chamba, H.P. w.e.f. 10.7.2002 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of back wages, service benefits and amount of compensation the above aggrieved workman is entitled to?"

4. In the statement of claim made before learned Tribunal below, workman alleged that he was engaged as a Helper on daily wages in April, 1998. He continued as such, till his disengagement on 10.7.2002. As per workman, petitioner vide notice dated 10.7.2002 dispensed with his services with effect from 10.7.2002 without giving him any retrenchment compensation, as such, his termination being in violation of the provisions of Section 25F of the Act *ibid*, deserves to be quashed and set aside. Workman further alleged that after his disengagement, persons junior to him were retained and as such, there is violation of provisions of S.25G of the Act. Record reveals that prior to raising dispute before appropriate Government, workman had approached Himachal Pradesh Administrative Tribunal, by way of an Original Application, which was disposed of with a direction that the workman would be considered for reengagement as per availability of work and funds. Subsequently, the workman raised an industrial dispute before the competent Authority, who, exercising power under Section 10(1), made aforesaid reference to learned Tribunal below.

5. Record reveals that the petitioner though was served on 5.3.2011, but despite service, none put appearance and as such, it was proceeded against ex parte. Learned Tribunal below, in the totality of evidence led on record by the workman held his termination bad in law and directed the petitioner to reengage him forthwith by giving benefit of seniority and continuity from the date of his illegal disengagement. Learned Tribunal below held the workman not entitled to back wages. Since workman failed to lay challenge, if any, to the aforesaid Award, same has attained finality qua him.

6. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning given by learned Tribunal below, while passing impugned award, this Court is not persuaded to agree with Mr. Adarsh K. Vashista, learned counsel for the petitioner-Council that impugned award is not based upon proper appreciation of the evidence and law, rather, this Court finds from the careful perusal of the material adduced on record by the workman that learned Tribunal below rightly held the termination of the workman illegal and in violation of provisions of the Act. Workman, while appearing as PW-1 reiterated the pleas raised by him in his claim. He deposed that he worked with the petitioner-Council with effect from 30.4.1998 to 9.7.2002 and had completed 240 days in the calendar year prior to his illegal retrenchment. He also stated that his services were disengaged orally without any notice and persons junior to him were retained by the petitioner. Aforesaid version put forth by the workman remained unrebutted because none appeared on behalf of the petitioner. It is ample clear from the statement of claim made by workman, that his services were disengaged without complying with the provisions contained under S.25F of the Act, whereby prior notice was required to be issued to the workman. Hence, learned Tribunal below rightly held action of the petitioner to be violative of provisions of S.25F of the Act *ibid*.

7. Record also reveals that the workman, in his statement of claim, himself admitted that the workman had issued notice dated 10.7.2002 to disengage him with effect from 9.7.2002, wherein he was further directed to collect retrenchment compensation, if any, on 15.7.2002, meaning thereby that no retrenchment compensation, if any was paid to the workman at the time of termination of his services.

8. As per S.25F(b) of the Act, a workman is required to be paid retrenchment compensation equivalent to 15 days of average pay of every completed year of continuous service or in part thereof in excess of six months at the time of retrenchment. It is clear from the plain reading of aforesaid provision that requirement prescribed under sub-sections (a) and (b) is condition precedent to retrenchment and failure, if any, to comply with the same, would render the retrenchment invalid and inoperative.

9. Hon'ble Apex Court in **National Iron and Steel Company Ltd.** vs. **State of West Bengal** (1967) II LLJ 23 (SC) has dealt with similar situation wherein, employer while issuing notice dated 15.11.1958 under S.25F of the Act *ibid* directed the workman to collect retrenchment compensation on November 20 or thereafter. The Hon'ble Apex Court held that manifestly the provisions of S.25F had not been complied and as such, termination in violation of the same deserves to be quashed and set aside.

10. In the case at hand, though there is nothing to rebut the testimony of the workman, who claimed that no notice ever came to be issued under S.25F before his illegal retrenchment, but even if it is presumed and accepted that prior notice was issued, this Court cannot be lose sight of the fact that since no retrenchment compensation as envisaged under S.25F(b) of the Act *ibid* was paid alongwith the notice, termination of the services of workman cannot be held in accordance with law.

11. Though having carefully examined/analyzed the evidence, this Court finds no force in the argument of Mr. Adarsh K. Vashista, learned counsel for the petitioner that there is no proper appreciation of the evidence, but, otherwise also, this Court has limited scope to re-appreciate the evidence.

12. In this regard, it would be apt to take notice of judgment rendered by Hon'ble Apex Court in case **Bhuvnesh Kumar Dwivedi** vs. **M/s Hindalco Industries Ltd.** wherein it has been that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment clearly suggests that error of law which is apparent on the face of record can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of certiorari can be issued, if it is shown that while recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

> "16. ....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are

> passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

13. Aforesaid exposition of law though clearly reveals that there is no complete bar for a writ Court to examine the correctness and genuineness of the Award passed by the Tribunal below but at the same time, an error of fact cannot be corrected by a writ Court, however grave it may appear to be.

14. Having carefully perused the evidence led on record by the workman vis-à-vis reasoning assigned by learned Tribunal below, while answering reference made to it, this Court finds no illegality or infirmity in impugned award, which deserves to be upheld.

15. Accordingly, all the petitions are dismissed. Awards passed by learned Tribunal below, impugned by way of the instant petitions, are upheld.

All pending miscellaneous applications in all the petitions also stand disposed of. Interim directions, if any, are vacated.

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

State of Himachal Pradesh …Appellant
Versus
Budhi Singh …Respondent

Cr. Appeal No. 333 of 2009
Decided on: May 30, 2019

Punjab Excise Act, 1914 (as applicable to state of H.P)–Section 61 (1) (a)– Recovery of country liquor without licence – Proof – Trial court acquitting accused of possessing 180 bottles of country liquor in his shop without licence– Appeal against– Held, shop of accused from where recovery effected situated in middle of Bazar, but no witnesses from that area were associated at time of search– Panch witness 'RP' not supported case during trial regarding search and recovery– Case of prosecution doubtful – Appeal dismissed- Acquittal upheld. (Paras 4 to 6 & 10)

Cases referred:
State of HP vs. Jagjit Singh, Latest HLJ 2008 (HP) 919
Surender Singh. vs. State of H.P., Latest HLJ 2013 (2) 865

For the appellant: Ms. Ritta Goswami, Additional Advocate General with Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General.
For the respondent: Mr. Vivek Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant appeal, challenge has been laid to judgment dated 1.11.2008 passed by learned Judicial Magistrate 1st Class, Jawali, District Kangra, Himachal Pradesh in Criminal Case No. 89-III/2006, whereby learned Court below held the respondent-accused (hereafter, 'accused') not guilty of the offences punishable under Section 61(1)(a) of the Punjab Excise Act, 1914, as applicable to the State of Himachal Pradesh (hereafter, 'Act'), in case FIR No. 156/05 and accordingly, acquitted him.

2. Having heard learned Additional Advocate General and perused the evidence, be it ocular or documentary, led on record by the prosecution vis-à-vis reasoning assigned by the learned Court below while acquitting the accused, this Court is not persuaded to agree with Ms. Ritta Goswami, learned Additional Advocate General that the learned Court below has failed to appreciate the evidence in its right perspective, rather, this Court finds that the prosecution has miserably failed to prove its case beyond reasonable doubt, as such, learned Court below rightly acquitted the accused of the charge framed against him under S.61(1)(a) of the Act. As per story of the prosecution, Police party headed by H.D. Pushap Arun alongwith other Police officials was on patrolling duty on 21.9.2005 at Jagnoli, where after having received secret information, they raided the shop of the accused and allegedly recovered 180 bottles of country liquor mark "Lal Quila". After completion of codal formalities, Police sent *Rukka* Ext. PW-3/B to the Police Station for lodging FIR. Accordingly, on the basis of aforesaid *Rukka*, Ext. PW-3/B, FIR, Ext. PW-4/A came to be registered against the accused. After completion of investigation, Police presented *Challan* in the competent Court of law, who being satisfied that prima facie case exists against the accused, charged him with offence punishable under S.61(1)(a) of the Act, to which he pleaded not guilty and claimed trial.

3. Prosecution examined as many as six witnesses to prove its case but careful perusal of the depositions made by these witnesses nowhere suggest that the prosecution was able to prove its case beyond all reasonable doubt. Accused, while getting his statement recorded under S.313 CrPC, denied the case of the prosecution in toto, though he led no evidence in his defence. As has been noticed herein above, as per own case of the Police, after having received secret information, they raided the shop of the accused, which was situated in the middle of the Bazaar, but, interestingly, in the case in hand, Police party failed to associate witnesses, if any, from the bazaar, rather, they associated person namely Ram Pal, PW-2, who nowhere supported the case of the prosecution. PW-2 denied the case of the prosecution in toto, as such, was declared hostile, but even cross-examination conducted upon this witness, nowhere proves the case of the prosecution.

4. Apart from PW-2, all witnesses are police officials, as such, not much reliance can be placed upon their version, especially in view of statement of PW-2, who has specifically denied that raid, if any, was conducted in his presence and 180 bottles of country liquor mark "Lal Quila" were recovered from the exclusive and conscious possession of the accused.

5. True it is that the version put forth by the official witnesses cannot be brushed aside merely on account of non-association of the independent witnesses but, in the case at hand, PW-2, Ram Pal, independent witness associated at the time of raid, seriously disputed the factum with regard to raid and recovery, if any, made thereafter by the patrolling party, as such, story put forth by the other police witnesses has become highly improbable and doubtful.

6. Leaving everything aside, it is not understood that what prevented the Police from associating independent witnesses from the locality, especially when the shop in question was situate in the thickly populated area.

7. There is another aspect of the matter that though the police allegedly took into possession 180 bottles of country liquor mark "Lal Quila", but sent only three bottles for chemical examination, as is evident from Ext. PW-3/D. Moreover, PW-5, H.C. Ashok Kumar has also admitted the factum with regard to sending of only three bottles out of 180 bottles, for chemical examination. Since only three bottles out of 180 bottles came to be sent for chemical analysis/examination, recovery, if any, of three bottles is proved in accordance with law. There is no report, if any, qua the contents of remaining 177 bottles, as such, there is nothing to suggest that the remaining 177 bottles also contained liquor.

8. In this regard reliance is placed upon the judgment passed by our own High Court in "**Surender Singh**. V. **State of H.P**.", Latest HLJ 2013 (2) 865, which reads as under:-

> "26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes

actually contained liquor. The samples cannot be said to be representative in character.

27. In similar circumstances, this Court in Mahajan versus State of Himachal Pradesh, 2003 Cr.L.J. 1346; State of H.P. versus Ramesh Chand, Latest HLJ 2007 (2) 1017; Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shim. LC 208; and State of Himachal Pradesh versus Kuldeep Singh & others, 2010(2) Him.L.R. 825, acquitted the accused, as prosecution could not prove, beyond reasonable doubt, as to what was actually there in the remaining boxes.

28. As per version of PW-1, outside the boxes 'Sirmour No.1' was printed which version stands denied by PW-7. In the instant case, there is nothing on record to show that the remaining boxes were in fact containing liquor. Quantity of the remaining bottles of the boxes from which samples were drawn has also not been proved to be liquor. These aspects have not been considered by the Courts below. The cumulative effect is that the prosecution has failed to prove the charge against the accused, beyond reasonable doubt and as such judgments of the Courts below are not sustainable in law."

9. Reliance is also placed on the judgment passed by this Court **State of HP** v. **Jagjit Singh,** Latest HLJ 2008 (HP) 919, wherein this Court has observed in paras 6 and 7 as under:-

"6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.

7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."

10. In view of the aforesaid discussion and law laid down by this Court, recovery if any, from the accused can be said to be of three bottles only and as such, on this count, entire recovery is vitiated which renders the whole story of the prosecution unreliable and untrustworthy.

11. Consequently, in view of detailed discussion made herein above, this Court sees no reason to differ with the judgment of acquittal recorded by the learned Court below, which appears to be based upon correct appreciation of evidence adduced on record.

12. Accordingly, the present appeal is dismissed. Judgment passed by the learned trial Court is upheld. Bail bonds, if any, furnished by the accused are discharged.

13. Case property be disposed of in accordance with law.

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

Smt. Soma Devi ……Petitioner
Versus
The State of H.P. and others …..Respondents

CWP No. 1650 of 2017
Decided on: May 31, 2019

Building and other Construction Act, 1996– Section 12– Registration of beneficiary, whether can be provisional? - Held, there is no stipulation under Act which provides for provisional registration of beneficiary– Once petitioner admittedly is registered as beneficiary, benefits accruing under Act cannot be denied to her on ground that such registration was provisional.(Para 11)

For the petitioner: Mr. B.C. Sharma, Advocate.
For the respondents: Mr. Ashwani Sharma and Mr. Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By the medium of extant petition, the petitioner has prayed for the following main relief(s):

"(i) release the amount of Cheque No. 005594, dated 31-10-2014, i.e. Rs.21,000/-, i.e. Rupees 21,000/-, sanctioned in favour of the p. vide Annexure P-1.

(ii) issue identity card to the petitioner against her registration No. BOCW/LO/KNG/06/4637.

(iii) release all the benefits to the petitioner accruing under the Himachal Pradesh Building and Other Construction Workers Welfare Fund, The Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 and the rules framed there under, in future."

2. Central Government, with a view to regulate the employment and conditions of services of the Building and Other Construction Workers and with a view to provide for their safety, health and welfare measures and several other matter, connected therewith or incidental thereto, enacted "the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter, 'Act') and this Act came into force on the first day of March, 1996. S.12 of the Act *ibid* provides for registration of building workers as beneficiaries, which is reproduced herein below:

"12. Registration of building workers as beneficiaries.-

(1) Every building worker who has completed eighteen years of age, but has not completed sixty years of age, and who has been engaged in any building or other construction work for not less than ninety days

during the preceding twelve months shall be eligible for registration as beneficiary under this Act.

(2) An application for registration shall be made in such form, as may be prescribed, to the officer authorized by the Board in this behalf.

(3) Every application under sub-section (2) shall be accompanied by such documents together with such fee not exceeding fifty rupees as may be prescribed.

(4) If the officer authorized by the Board under sub-section (2) is satisfied that the applicant has complied with the provisions of this Act and the rules made thereunder, he shall register the name of the building workers as a beneficiary under this Act;

Provided that an application for registration shall not be rejected without giving the applicant an opportunity of being heard.

(5) Any person aggrieved by the decision under sub-section (4) may, within thirty days from the date of such decision, prefer an appeal to the Secretary of the Board or any other officer specified by the Board in this behalf and the decision of the Secretary or such other officer on such appeal shall be final:

Provided that the Secretary or any other officer specified by the Board in this behalf may entertain the appeal after the expiry of the said period of thirty days if he is satisfied that the building worker was prevented by sufficient cause from filing the appeal in time.

(6) The secretary of the Board shall cause to maintain such registers as may be prescribed."

3. In terms of aforesaid provision of law, every building worker who has completed eighteen years of age, but has not completed sixty years of age, and who has been engaged in any building or other construction work for not less than ninety days during the preceding twelve months shall be eligible for registration as a beneficiary under this Act and an application for registration shall be made in such form, as may be prescribed, to the officer authorized by the Board in this behalf. If the officer authorized by the Board under sub-section (2) is satisfied that the applicant has complied with the provisions of this Act and the rules made thereunder, he shall register the name of the building worker as a 'beneficiary' under this Act. It has been specifically provided that an application for registration shall not be rejected without giving the applicant an opportunity of being heard.

4. Chapter V of the Act provides for constitution of a State Welfare Board. S.18 casts a duty upon the State Government to constitute Construction Workers' (Welfare Board). S. 18(3) provides that the Board shall consist of a chairperson, a person to be nominated by the Central Government and such number of other members, not exceeding fifteen, as may be appointed to it by the State Government. Similarly, S. 24 of the Act *ibid* provides for "Building and Other Construction Workers' Welfare Fund and its Application. Under S.23, it is provided that the Central Government may, after due appropriation made by Parliament by law in this behalf, make to a Board grants and loans of such sums of money as the Government may consider necessary to enable it to distribute to the beneficiaries strictly for the purposes as defined under the Act.

5. In the case at hand, petitioner who is undisputedly a building worker, applied for her registration with the respondent No.3 in the month of February, 2014 enclosing therewith requisite documents. It is also not in dispute that respondent No.3, after

examination of documents adduced on record by the petitioner, registered her name vide Registration No. BOCW/LO/KNG/06/4637 dated 25.3.2014 as a building worker beneficiary, however at that time, petitioner was not given identity card subsequent to her aforesaid registration. The petitioner, on account of marriage of her son applied to respondent No.3 for help. Respondent No.2, sanctioned a sum of Rs.21,000/- in favour of the petitioner vide Cheque No. 005594 dated 31.10.2014 vide letter No. BOCW/Acctts./marriage assistance(247)/Sml/2013-4203, dated 3.11.2014 (Annexure P-4), but interestingly, aforesaid amount never came to be released in favour of the petitioner despite her visiting the office of respondent N.3 repeatedly. Since despite repeated requests having been made by the petitioner, respondents failed to pay the amount as referred to above, petitioner was compelled to approach this Court in the instant proceedings.

6. Respondents No.1 to 3 by way of reply-affidavit, while fairly acknowledging the factum with regard to application having been made by the petitioner for registration as a beneficiary under the Act, have stated that since the petitioner's form was not complete in all respects, she was advised to furnish complete details. Respondents further stated that the petitioner failed to do the needful within stipulated time, as such, her case could not be considered. Respondents have further stated that the application submitted by the petitioner was not complete in all respects, as the signature of the employer, his full name and complete address of the establishment in Form No. 27 were not given, hence, petitioner was registered provisionally on 25.3.2014 as a beneficiary vide aforesaid registration number with the following remark, "*Subject to the condition to obtain signature of employer on form No. 27 alongwith full name and address of establishment in which the worker has worked or working*".

7. Respondents have further stated that despite ample opportunity given to the General Secretary of Trade Union, though whom application of petitioner and other similarly situate persons were submitted, no heed was paid to the repeated reminders sent by respondents, as such, no fault can be found with the respondents and the present petition deserves to be dismissed. It has been further stated in the reply that the claim application for marriage of the petitioner's son was submitted by the petitioner in the office of respondent No.3 on 9.6.2014, after rejection of her application form, but inadvertently her claim was sent to respondent No.2 as a consequence of which, cheque amounting to Rs.21,000/- was ordered to be issued in her favour by oversight.

8. Mr. B.C. Sharma, learned counsel for the petitioner, while inviting attention of this Court Notification dated 2.1.2015, published in Rajpatra of Himachal Pradesh, contended that there was no requirement for the petitioner to submit her application through Contractor of the building in which she was working as a building worker because, as per amended provision i.e. Rule 266 of the HP Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2008, building worker intending to get his/her name registered as a beneficiary under the Act can also enclose certificate issued by Bhawan Evam Anya Sanirman *Karmkar Sangh* or Gram Panchayat or Executive Officer of the urban local body concerned. While referring to documents placed on record alongwith rejoinder filed to the reply of the respondents, learned counsel for the petitioner contended that bare perusal of application filed by petitioner praying therein for registration reveals that she had furnished complete details with regard to work in which she was employed as a building worker. He further contended that bare perusal of annexures P-6 and P-8, clearly suggests that the petitioner also submitted certificate issued by *Karmkar Sangh* and Gram Panchayat concerned in support of her claim, as such, there is no force in the arguments of Mr. Ashwani Sharma, learned Additional Advocate General that

since incomplete form was submitted, name of the petitioner could not be registered as beneficiary under the Act.

9. Having heard learned counsel for the parties and perused the material available on record, this court finds that application of the petitioner for registration as building worker for having benefit under the Act could not be rejected by the respondents on the ground that she had not furnished complete details with regard to employer/establishment with whom she has rendered her services as a building worker because as has been taken note herein above, Department of Labour Employment, vide Notification dated 31.12.2014, amended Rule 266 of the Himachal Pradesh Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2008, whereby in the absence of certificate or wage slips from the employer or contractor or copy of muster roll or attendance rolls, certificate issued by *Karmkar Sangh* and Gram Panchayat concerned can also be furnished by applicant intending to get his/her name registered under the Act.

10. In the case at hand, undisputedly the petitioner in her application annexure P-4, has categorically stated that she rendered her services as a building/construction worker during construction work of bridge at Gaggal Khadd, Kangra with effect from 1.4.2013 to 31.3.2014. *Kamgar Sangh* by way of certificate dated 15.2.2014, Annexure P-6, has categorically certified that the petitioner is a Member of *Bhawan Evam and Annya Sannirman Kamgar Sangh*, registered under Registration No. 1899 and she is working as a labourer for the last five years regularly. Gram Panchayat, Gaggal vide Annexure P-8, has also certified that the petitioner has been working as a building worker with effect from 1.4.2012 to 28.2.2015 and has completed more than 90 days with effect from 1.4.2013 to 31.3.2014 i.e. 100 days. Petitioner has categorically stated that aforesaid documents placed on record by her alongwith rejoinder have been supplied to her under Right to Information Act by the office of respondent No.2, as such, respondents cannot be allowed to say that the petitioner, while applying under the Act has failed to place on record documents as per Form 27.

11. In the case at hand, respondents have admitted the factum with regard to petitioner being registered as a beneficiary under the Act but the stand taken in the reply that registration was provisional, is highly untenable because there is no provision under the Act which provides for provisional registration. As has been noticed herein above, Act came to be enacted with the sole purpose to regulate the employment and conditions of service of Building and Other Construction Workers and to provide for their safety, health and welfare measures. In the case at hand, respondents sanctioned Rs.21,000/- in favour of petitioner for the purpose of marriage of her son but subsequently made her run from pillar to post to have that money that too on very flimsy grounds. Since application form filed by petitioner was complete in all respects, action of the respondents in not registering her name, issuing identity card and thereafter not releasing the benefit under the Act *ibid*, cannot be said to be justifiable and deserves to be set aside.

12. Consequently, present writ petition is allowed. Respondents No.2 and 3 are directed to issue identity card to the petitioner against her registration No. BOCW/LO/KNG/06/4637 and release a sum of Rs.21,000/- sanctioned in her favour i.e. Annexure P-1, expeditiously, preferably within three weeks.

13. The petition is disposed of in aforesaid terms, alongwith all pending applications, if any.

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

Sobharam ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 989 of 2019
Decided on June 17, 2019

Code Criminal Procedure, 1973– Section 439- Bail– Grant of– Principles– Held, object of bail is neither punitive nor preventative– Freedom of individual cannot be curtailed for an indefinite period– Gravity of offence alone cannot be a decisive ground to deny bail– Rather competing factors are required to be balanced.(Para 7)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner Mr. Bhupinder Singh Ahuja, Advocate.
For the respondent Mr. Sanjeev Sood, Additional Advocate General with Mr. Sunny Dhatwalia, Assistant Advocate General. ASI Kulmesh Singh, I/O, Police Station Padhar, Mandi (HP).

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Sequel to order dated 29.5.2019, ASI Kulmesh Singh has come present with the record. Mr. Sanjeev Sood, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

2. Mr. Sanjeev Sood, learned Additional Advocate General, on instructions of the Investigating Officer, fairly states that pursuant to order dated 29.5.2019, the bail petitioner has joined the investigation and is fully cooperating. Mr. Sood, learned Additional Advocate General further states that at this stage nothing is required to be recovered from the bail petitioner, as such, his custodial interrogation is not required and he can be ordered to be enlarged on bail, subject to the condition that he shall make himself available for investigation as well as trial, as and when called by the investigating agency. Mr. Sood, fairly admits that the co-accused Rati Ram has been already released on anticipatory bail granted by this Court vide judgment dated 11.6.2018 passed in CrMP(M) No. 697 of 2018.

3. Close scrutiny of the record/status report reveals that FIR No. 51, dated 1.5.2018 under S.18 of the Narcotic Drugs & Psychotropic Substances Act, came to be lodged against the bail petitioner at Police Station Padhar, Mandi, on the basis of a secret information received by the Police to the effect that the bail petitioner is involved in illegal cultivation of prohibited substance i.e. Opium. Allegedly, the Police recovered 2000 plants of Opium illegally cultivated by the bail petitioner in his fields. As per record, Police, after having drawn samples, destroyed the illegal cultivation of Poppy plants, however, report of

the FSL clearly suggests that the plants allegedly confiscated by the investigating agency are samples of Poppy plants and fall within the definition of prohibited substance as defined under the Act *ibid*.

4. Considering the fact that the land, whereupon cultivation of Opium and Poppy plants was being allegedly done, is a joint land and in possession of many persons coupled with the fact that guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution by leading cogent and convincing evidence, this court finds no reason to keep the bail petitioner behind the bars during trial. Moreover, rigours of S.37 of the Act *ibid* are not applicable in the facts and circumstances of the present case, as such, prayer for grant of bail, especially in the offence allegedly committed under S.18 of the Act *ibid*, deserves to be accepted at this stage.

5. By now it is well settled that freedom of an individual is of utmost importance and same cannot be curtailed for an indefinite period, as such, this court sees no reason to keep the bail petitioner behind the bars for an indefinite period, especially for the reasons stated herein above.

6. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
>
> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be

a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

7. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

8. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the

punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

9. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

10. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

11. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 29.5.2019 is made absolute subject to petitioner furnishing fresh bail bonds in the sum of Rs.50,000/- (Rs. Fifty Thousand) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of

hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

12. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

13. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Naveeta ...Petitioner
Versus
Bhagwan Singh ...Respondent

CMPMO No. 486 of 2018
Decided on June 18, 2019

Indian Evidence Act, 1872 –Section 112- **Code of Civil Procedure, 1908 –** Section 151 – Paternity dispute – DNA examination – Permissibility – Held, courts with a view to ascertain truth should be furnished with best available scientific evidence and courts must not be left to bank upon presumptions unless science has no answer to facts in issue – However, court must apply test of 'eminent need' while considering application for DNA examination, which will depend upon facts and circumstances of each case. (Paras 12 & 13)
Indian Evidence Act, 1872 (Act)- Section 112- **Code of Civil Procedure, 1908–** Section 151– Paternity dispute– DNA examination– Rejection of application– Petition against– Held, on facts, child (plaintiff) has already attained majority – Her case is that she was born out of physical relations between her mother and defendant without having contracted marriage – Presumption of Section of 112 of Act thus was not attracted – Plaintiff otherwise could not have proved her paternity except by DNA examination – Rejection of her prayer by trial court improper – Petition allowed. (Para 13)
Indian Evidence Act, 1872 - Section 112 - **Code of Civil Procedure, 1908 –** Section 151 – Paternity dispute – DNA examination – 'Eminent need' for DNA examination - Inference as to – Held, test of eminent need for DNA examination is whether it is not possible to reach the truth without use of such test. (Para 13)

Cases referred:
Bhabani Prasad Jena vs. Orissa State Commission for Women, (2010) 8 SCC 633
Dipanwita Roy vs. Ronobroto Roy, (2015) 1 SCC 365
Goutam Kundu vs. State of W.B., (1993) 3 SCC 418
Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik, (2014) 2 SCC 576
Narayan Dutt Tiwari vs. Rohit Shekhar, (2012) 12 SCC 554

For the petitioner	Mr. Sunil Mohan Goel, Advocate.
For the respondent	Mr. G.S. Rathour, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under Art. 227 of the Constitution of India, challenge has been laid to order dated 9.8.2018, passed by learned Civil Judge (Senior Division), Court No. VII, Shimla, Himachal Pradesh in CMA No. 1262 of 2018 in Civil Suit No. 75-1 of 2016, titled Naveeta vs. Bhagwan Singh, whereby an application filed by the petitioner-plaintiff (hereinafter, 'plaintiff') under S.151 CPC, praying therein for DNA profiling of the respondent-defendant (hereinafter, 'defendant'), came to be dismissed.

2. For having a bird's eye view, facts in brief, as emerge from the record are that the plaintiff filed a suit for declaration in the court of learned Civil Judge (Senior Division), Shimla, to the effect that she (plaintiff) be declared legal and lawful daughter of defendant namely Bhagwan Singh, born from relationship of defendant with Smt. Sneh Prabha, mother of the plaintiff. Plaintiff also prayed that she be held entitled for other consequential reliefs which may flow after the declaration that the plaintiff is legal and lawful daughter of the defendant. In the written statement (Annexure P-2), defendant has specifically denied the claim of the plaintiff that she is his (defendant's) daughter born out of alleged relationship with Smt. Sneh Prabha. Though the pleadings in the case are complete, issues are yet to be framed, however, during the pendency of the suit, plaintiff filed an application (Annexure P-3) under S.151 CPC, praying therein for DNA profiling of the defendant. In the application, Annexure P-3, plaintiff claimed that since the defendant has not accepted her claim that she is his daughter, DNA profiling of the defendant may be ordered to arrive at a just and proper decision. However, the fact remains that the learned trial Court, vide order dated 9.8.2018, dismissed the aforesaid application preferred by the plaintiff being not maintainable at this stage. If the impugned order is read in its entirety, it reveals that the learned trial Court found no "eminent need" for DNA profiling of the defendant, especially when evidence is yet to be led on record by the plaintiff in support of her averments made in the plaint (Annexure P-1).

3. I have heard learned counsel for the parties and perused the material available on record.

4. Before adverting to the factual matrix of the case, this court deems it appropriate to take note of the legal pronouncements made by the Hon'ble Apex Court from time to time, on the issue at hand.

5. Hon'ble Apex Court in **Goutam Kundu** v. **State of W.B.** (1993) 3 SCC 418, while specifically dealing with the prayer made for DNA profiling, held that it is a rebuttable presumption of law, that a child born during the lawful wedlock is legitimate, and that access occurred between the parties. This presumption can only be displaced by a strong

preponderance of evidence and not by a mere balance of probabilities. While interpreting S.112 of the Indian Evidence Act, Hon'ble Apex Court held that effect of this section is this: there is a presumption and a very strong one though a rebuttable one. Conclusive proof means as laid down under section 4 of the Evidence Act.

6. In the totality of facts and circumstances before Hon'ble Apex Court, their Lordships laid down following parameters for considering prayer, if any, for DNA profiling:-

> "26. From the above discussion it emerges:-
>
> (1) that courts in India cannot order blood test as matter of course;
>
> (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
>
> (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.
>
> (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
>
> (5) No one can be compelled to give sample of blood for analysis."

7. Subsequently, Hon'ble Apex Court in **Bhabani Prasad Jena** v. **Orissa State Commission for Women**, (2010) 8 SCC 633, held that where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools, which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Following paragraphs of the aforesaid judgment may be usefully extracted herein below:

> "21. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.
>
> 22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the

test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test.

23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu[1] and Sharda[2]. In Goutam Kundu[1], it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda[2] while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course."

8. Close scrutiny of aforesaid judgment passed by Hon'ble Apex Court clearly reveals that the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA profiling/test is eminently needed. DNA testing in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner. Whenever such a request is made, the court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test.

9. In **Narayan Dutt Tiwari** v. **Rohit Shekhar** (2012) 12 SCC 554, Hon'ble Apex Court again held that even the Constitution of India casts a duty upon every citizen of India to develop scientific temper and the spirit of inquiry and reform and to strive towards excellence, to reach higher levels of achievement. While specifically dealing with the case relating to prayer for DNA profiling, Hon'ble Apex Court observed in the aforesaid judgment that when modern tools of adjudication are at hand, it is not understood why courts refuse to step out of their dogmas and insist upon the long route to be followed at the cost of misery to the litigants. Following paragraphs of the judgment (supra) are relevant in the context of this case:

"38. Even the Constitution of India, while laying down the fundamental duties, by Articles 51-A(h) and (j) declares it to be the duty of every citizen of India to develop a scientific temper and the spirit of inquiry and reform and to strive towards excellence, to reach higher levels of achievement. What we wonder is that when modern tools of adjudication are at hand, must the courts refuse to step out of their dogmas and insist upon the long route to be followed at the cost of misery to the litigants. The answer obviously has to be no. The courts are for doing justice, by adjudicating rival claims and unearthing, the truth and not for following age-old practices and procedures, when new, better methods are available.

56. Recently in Maria Margarida Sequeira Fernades v. Erasmo Jack de Sequeira it was reiterated that the truth is the guiding star and the quest in the judicial process and the voyage of trial. The trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimised was noticed. We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA

testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak "adverse inference".

10. In case **Nandlal Wasudeo Badwaik** v. **Lata Nandlal Badwaik** (2014) 2 SCC 576, Hon'ble Apex Court reiterated that interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. Following paragraphs of the judgment (supra) are relevant in the case at hand:

"17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

11. In case **Dipanwita Roy** v. **Ronobroto Roy** (2015) 1 SCC 365, Hon'ble Apex Court, while reiterating its earlier judgments rendered in **Bhabani Prasad Jena** and **Nandlal Wasudeo Badwaik** (supra), reiterated that depending upon facts and circumstances, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. Most importantly, in the aforesaid judgment, Hon'ble Apex Court observed that if direction to hold such a test could be avoided, it should be avoided because legitimacy of a child should not be put to peril. It would be apt to reproduce following paragraph of the aforesaid judgment herein below:

"17. The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and

categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so."

12. Careful perusal of the aforesaid pronouncements made by Hon'ble Apex Court from time to time though reveal that the matter pertaining to use of DNA testing being extremely delicate and sensitive aspect, should not be resorted to unless it is eminently required. In the earlier pronouncements, Hon'ble Apex Court observed that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child, but, in the subsequent judgments, Hon'ble Apex Court has categorically held that the courts with a view to ascertain the truth should be furnished with best available scientific evidence and courts may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In **Nandlal Wasudeo Badwaik** (supra), Hon'ble Apex Court held that, "*we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice*."

13. Test of "eminent need" is definitely required to be applied by the Court while considering application, if any, for DNA profiling but such test would certainly depend upon facts and circumstances of each case. In the case at hand, plaintiff, who claims to be daughter of defendant, has filed suit for declaration that she be declared daughter of defendant. Once factum with regard to her being daughter of defendant has been specifically denied by the defendant in his written statement, plaintiff is left with no other option but to pray for DNA profiling of the defendant. In **Bhabani Prasad** (supra), no doubt, Hon'ble Apex Court has held that while considering prayer for DNA profiling, courts are required to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test, but, in the case at hand, where child (plaintiff) has admittedly achieved majority and wants to ascertain her paternity, prayer having been made by her for DNA profiling ought not have been denied, while applying principle of "eminent need". S.112 of the Indian Evidence Act provides that, "*the fact that any person was born during the continuance of a valid marriage between the mother and any man, or*

within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten." But, in the case at hand, since the defendant has specifically denied the factum of his being father of the plaintiff, as such, aforesaid presumption is not applicable to the facts of the present case, simply for the reason that the case as set out by the plaintiff is that she was born out of physical relation between defendant and her mother without having contracted marriage. Otherwise also valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak adverse inference.

14. In any eventuality, in case, the plaintiff is able to prove her case through DNA profiling, she should not be compelled to prove her case by conventional methods including oral and documentary evidence, especially when scientific test in this regard is available. No prejudice whatsoever would be caused to the defendant in case prayer made in the application is allowed, rather, result of the test would help court to adjudicate the controversy at hand in a most effective manner.

15. Consequently, in view of above discussion, the petition is allowed. Order dated 9.8.2018 passed by learned Civil Judge (Senior Division), Court No. VII, Shimla, Himachal Pradesh in CMA No. 1262 of 2018 in Civil Suit No. 75-1 of 2016, titled Naveeta vs. Bhagwan Singh is set aside. Application of the plaintiff is allowed. Learned Court below is directed to take further recourse in accordance with law, for getting the DNA profiling done. Parties to appear before the learned Court below on **22.7.2019**. Learned counsel for the parties undertake to ensure presence of the parties on the aforesaid day before the learned Court below.

Pending applications, if any, are also disposed of.

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

Daljit Singh and another ...Petitioners

Versus

State of Himachal Pradesh ...Respondent

CrMMO No. 321 of 2019
Decided on: June 20, 2019

Code of Criminal Procedure, 1973- Section- 482– Inherent powers– Exercise of– Quashing of FIR– Rape case– Permissibility– Held, no doubt power conferred by Section 482 of Act is not to be exercised in cases involving heinous and serious offences but on facts, dispute interse parties more a family dispute– Wife got FIR of rape registered against husband under apprehension that he might not return home from abroad where he had gone in connection with some work– There appears to be no offence– Petition allowed - FIR quashed. (Para 10)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497

Gian Singh vs. State of Punjab and anr., (2012) 10 SCC 303

Narinder Singh and others vs. State of Punjab and another, (2014)6 SCC 466
Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others vs. State of Gujarat and Another, Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016

For the petitioners: Mr. Dheeraj K. Vashisht, Advocate.
For the respondent: Mr. Sanjeev Sood and Mr. Ashwani Sharma, Additional Advocates General with Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, prayer has been made on behalf of the petitioners, who happen to be husband-wife, for quashing of FIR No. 11, dated 6.8.2018, under Ss. 376 and 506 IPC, registered at Women Police Station, Una, Himachal Pradesh as well as consequential proceedings pending in the court of learned Additional Sessions Judge-II, Una, Himachal Pradesh.

2. FIR in question came to be lodged at the behest of petitioner No.2, Shivani Chauhan on 6.8.2018, who alleged that on 9.3.2018, petitioner No.1 allured her on the pretext of marriage and subsequently on 14.3.2018 solemnised marriage with her at Chandigarh in a Temple. It also emerges from the FIR that after solemnizing marriage, petitioners filed a joint petition before Punjab and Haryana High Court, for protection. Punjab and Haryana High Court disposed of the petition with a direction to the SSP, Hoshiarpur to ensure safety of lives and liberty of the petitioners.

3. FIR lodged at the behest of petitioner No.2, further reveals that she kept on living with petitioner No.1 in her matrimonial house at Mukerian but since petitioner No.2 went abroad on 4.4.2018 and certain differences cropped up between the petitioners, petitioner No.2 lodged the FIR in question, alleging therein that she was compelled/forced to solemnise marriage, against her wishes, by petitioner No.1, who after solemnization of marriage, repeatedly sexually assaulted her against her wishes. Averments contained in the petition as well as documents annexed therewith reveal that with the intervention of the elders of the family, both the petitioners have now resolved to settle their dispute amicably *inter se* them and as such, petitioner No.2, who is complainant, does not wish to continue with the proceedings initiated at her behest. Though perusal of compromise, Annexure P-3, reveals that both the petitioners have been residing with each other as husband-wife at Village Nangal Bihala, Tehsil Mukerian, Punjab, i.e. matrimonial house of petitioner No.2, happily, but this court solely with a view to ascertain the genuineness and correctness of the compromise placed on record caused presence of petitioner No.2 in the court, who has come present alongwith petitioner No.1 and her father, Shri Ajay Kumar. Petitioner No. 2 on oath stated before this Court that she, of her own volition, without there being any external pressure, has entered into compromise. She further stated that the FIR in question came to be lodged at her behest on account of some misunderstanding, as such, she, in terms of agreement arrived *inter se* parties, intends to withdraw the FIR. Petitioner No.2 further stated that she shall have no objection in case FIR No. 11 dated 6.8.2018 as well as consequential proceedings pending before learned Court below are ordered to be quashed and set aside. Her statement is taken on record.

4. Mr. Ashwani Sharma, learned Additional Advocate General, having heard statement of the petitioner No.2 fairly stated that in view of amicable settlement arrived *inter*

se parties, no fruitful purpose will be served in case FIR lodged at the behest of petitioner No.2 is allowed to sustain.

5. Having heard learned counsel for the parties and perused the material available on record, especially the contents of the FIR, this Court has no hesitation to conclude that both the petitioners prior to lodging of FIR in question had solemnized marriage and thereafter apprehending threat to their life had approached Punjab and Haryana High Court by way of a joint petition, seeking protection.

6. Close scrutiny of FIR itself reveals that petitioner No.2, who happened to be complainant, after solemnization of marriage with petitioner No.1, resided at her matrimonial house for quite considerable time with her husband and when petitioner No.1 went abroad, petitioner No.2 apprehended that he would not come back, as such, lodged the FIR. Even averments contained in the compromise (Annexure P-3) which have been further substantiated by petitioner No.2, while making statement on oath before this court, clearly reveal that the parties have settled their dispute amicably and it appears that they are living happily as husband-wife.

7. The question which now needs consideration is whether FIR lodged under S.376 IPC can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

8. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at

> the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

10. In the case at hand, the dispute is more of a family dispute, which is between husband and wife, due to some misunderstanding. Petitioner No. 2 (wife) being under the apprehension that her husband, petitioner No.1, who had gone abroad in connection with work, would not come back, lodged FIR in question against petitioner No. 1. Otherwise there appears to be no offence committed by petitioner No. 1 against petitioner No. 2, who is his wife and as such, neither the offence in question is of mental depravity nor against the society.

11. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
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> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

12. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder**

Singh's case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

> "13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:
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>> "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."
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> 14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:
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>> "... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"
>>
>> "…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"
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> 15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:
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>> (i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;
>>
>> (ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the

power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

13. Though, in the case at hand, FIR stands registered against petitioner No.1 under Ss. 376 and 506 IPC but, as has been noticed herein above, petitioner No.2-complainant is legally wedded wife of petitioner No.1 and FIR in question came to be lodged on account of misunderstanding /mis-apprehension, as such, in very strict terms, it cannot be said that offence, if any, under S.376 IPC ever came to be committed by petitioner No.1. Since petitioners are happily married and they have decided to resolve their dispute amicably, no fruitful purpose would be served in case proceedings initiated at the behest of the petitioner No.2 are allowed to continue. Moreover, the complainant has compromised the matter and she is no longer interested in carrying on with the criminal proceedings against the accused. Otherwise also, possibility of conviction in the case is bleak and remote, since

complainant herself is not interested in carrying on with the criminal proceedings initiated at her behest.

14. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 11, dated 6.8.2018, under Ss. 376 and 506 IPC registered at Women Police Station, Una, Himachal Pradesh as well as consequential proceedings pending in the court of learned Additional Sessions Judge-II, Una, Himachal Pradesh are quashed and set aside. Petitioner No.1, is acquitted of the offences levelled against him in the aforesaid FIR.

15. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Nisha Verma and another ...Petitioners
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 753 of 2019
Decided on June 20, 2019

Code Criminal Procedure, 1973– Section 439-Bail– Grant of– Principles– Held, object of bail is neither punitive nor preventative– Freedom of individual cannot be curtailed for an indefinite period – Gravity of offence alone cannot be a decisive ground to deny bail– Rather competing factors are required to be balanced.(Para 8)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation (2012)1 SCC 49

For the petitioners: Mr. Surinder Saklani, Advocate.
For the respondent: Mr. Sanjeev Sood, Additional Advocate General with Mr. Sunny Dhatwalia, Assistant Advocate General.
ASI Pyare Lal, I/O, Police Station Arki, District Solan, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present bail petition filed under S.438 CrPC, prayer has been made on behalf of the petitioners for grant of anticipatory bail in FIR No. 29, dated 23.3.2017 registered at Police Station Arki, Solan, Himachal Pradesh under Ss. 3 and 7 of the Essential Commodities Act, and Ss. 420, 468, 471 read with S.120B IPC.

2. Sequel to order dated 27.5.2019, ASI Pyare Lal has come present with the record. Mr. Sanjeev Sood, learned Additional Advocate General has also placed on record

status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned..

3. Mr. Ashwani Sharma, learned Additional Advocate General, on instructions from the Investigating Officer, fairly states that pursuant to order dated 1.5.2019, both the petitioners have joined the investigation and they are fully cooperating. Mr. Sharma, learned Additional Advocate General, further informs that the investigation is almost complete and at this stage, nothing is required to be recovered from the bail petitioners, as such, in case, this court intends to enlarge them on bail, they may be directed to make themselves available for investigation/trial, as and when asked by the Investigating Officer.

4. Having heard learned counsel for the parties and perused the material available on record, this court finds that FIR in question came to be lodged against the bail petitioners at the behest of Shri Shyam Bhatia, Inspector, Food, Civil Supplies and Consumer Affairs, Arki, Solan, who alleged that on 1.3.2017, fair price shop of the bail petitioner, Prem Chand was inspected by him, but the petitioner No.1, in whose favour fair price shop has been allotted, failed to make the record available. As per complainant, both the bail petitioners subsequently fabricated the record and also sold controlled essential items to the persons, other than the ration card holders. On the basis of aforesaid complaint having been made by the complainant, case under Ss. 3 and 7 of the Essential Commodities Act and Ss. 420, 468, 471 read with S.120B IPC came to be registered against the bail petitioners.

5. It is not in dispute that the investigation in the case is complete and nothing is required to be recovered from the bail petitioner, as such, this Court sees no reason for the custodial interrogation of the bail petitioners, who otherwise also have made themselves available for investigation.

6. Otherwise also, guilt if any, of the petitioners is yet to be proved by the investigating agency in accordance with law, by leading cogent and convincing evidence, as such, their freedom cannot be curtailed for an indefinite period during trial. By now it is well settled that freedom of an individual is of utmost importance and same cannot be curtailed for an indefinite period, as such, this court sees no reason to keep the bail petitioners behind the bars for an indefinite period, especially for the reasons stated herein above. Both the petitioners are local residents of District Solan, and there is no likelihood of their fleeing from the justice.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of

these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

8. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that

> punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

9. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

10. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

11. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioners have carved out a case for themselves and as such, present petition is allowed. Order dated 1.5.2019 is made absolute subject to petitioners furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) each with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

(a). They shall make themselves available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c). They shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d). They shall not leave the territory of India without the prior permission of the Court.

(e). They shall surrender passport, if any, held by them.

13. It is clarified that if the petitioners misuse the liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

State of H.P. …Appellant

Versus

Sh. Raj Kumar …Respondent

Cr. Appeal No. 301 of 2009
Decided on: June 20, 2019

Indian Evidence Act, 1872- Section 3– Appreciation of evidence– Interested witness– Evidentiary value– Held, statements of interested witnesses cannot be brushed aside solely on ground of non-association of independent witnesses – But where complainant and accused parties are inimical, version put forth by interested witnesses cannot relied upon in absence of corroborative evidence.(Para 11)

Case referred:
C. Magesh and others vs. State of Karnataka, (2010) 5 SCC 645

For the appellant: Mr. Ashwani Sharma, Additional Advocate General.
For the respondent: Mr. Jyotirmay Bhatt, Advocate vice Mr. Avneesh Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

Instant appeal having been filed by the appellant-State, lays challenge to the judgment dated 31.10.2008 passed by the learned Chief Judicial Magistrate, Kinnaur District at Reckong Peo, HP in Police *Challan* No. 43-2 of 2006, whereby learned Court below held respondent-accused (hereinafter, 'accused'), not guilty of having committed offence punishable under Ss. 323, 451 and 506 IPC.

2. In nutshell, story of the prosecution as emerges from the record, is that on 22.6.2006, at about 7 am in Village Pangi, accused came to the roof of the house of Sartal Singh PW-1 (complainant) and gave beatings to him with *Danda* and at that time the accused was under the influence of liquor. Accused is stated to have caused injuries to the complainant, PW-1 on the thumb of his left hand. Matter was reported to the police. Police visited the spot and referred the injured for medical treatment. Investigation was completed and *Challan* presented in the competent Court of law for the commission of offences punishable under Ss. 323, 45 and 506 IPC. Learned trial Court, on being satisfied that prima facie case exists against the accused, charged him under the aforesaid provisions, to which the accused pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case, examined as many as seven witnesses, whereas, accused in his statement recorded under S.313 CrPC denied the case of the prosecution in toto. However, accused did not lead any evidence in his defence. Learned trial Court, on the basis of evidence adduced on record by the prosecution, held that prosecution was not able to prove the guilt of the accused beyond reasonable doubt and accordingly acquitted him. In the aforesaid background, appellant-State has approached this Court in the instant proceedings praying therein for conviction of the accused after setting aside impugned judgment of acquittal.

4. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by the learned trial Court in the impugned judgment of acquittal, this court finds no force in the arguments of Mr. Ashwani Sharma, learned Additional Advocate General that the learned Court below, while acquitting accused

failed to appreciate the evidence in its right perspective, rather, this Court has no hesitation to conclude that the prosecution miserably failed to prove beyond reasonable doubt that on the day of alleged incident, accused gave beatings, if any, to the complainant, as a consequence of which, he suffered injuries.

5. PW-1 Sartal Singh deposed that on 22.6.2006 at about 7 am, accused under the influence of liquor, came to the roof of his house and gave beatings to him with *Danda*, causing injuries to the thumb of his left hand. On hearing his cries, Krishan Kumar, his brother and Byas Devi, came to the spot and saved him from the clutches of accused. In his cross-examination, he admitted that he and accused are brothers and there are 10-15 houses situate near the house of the complainant.

6. PW-2 Krishan Kumar and PW-3 Byas Devi, though supported the case of the complainant and stated in their examination-in-chief that the accused gave beatings to the complainant with *Danda*, but if cross-examination conducted on these witnesses is read juxtaposing each other, it certainly compels this Court to draw an inference that there are material contradictions and inconsistencies in their statements, as such, same could not be pressed into service by the learned Court below, while recording guilt, if any, of the accused.

7. PW-2 Krishan Kumar stated that on 21.6.2006, he was present in the house and on the next day at about 7 am, accused after coming to their roof called them “dogs” and “Thieves” and dared them to come out from the house and gave beatings with *Danda* to Sartal Singh. PW-3 Byas Devi stated that on hearing shouts of the accused Raj Kumar, they came out and saw that accused was giving beatings to her husband Sartal Singh. Complainant Sartal Singh and PW-2 Krishan Kumar are real brothers, who are living in common marriage with Byas Devi.

8. PW-4 Ashok Kumar is an independent witness, who was declared hostile by the prosecution. However, cross-examination conducted on this witness nowhere suggests that the prosecution was able to extract something advantageous to its case.

9. PW-5 Labh Chand stated that on 21.6.2006, he was called by Sartal Singh, who informed that the accused dismantled his house causing cracks in his house. He visited the house of Sartal Singh and noticed some cracks on the plaster of walls in the house. This witness further stated that the accused was not present on the spot. In his cross-examination, this witness admitted that the common wall of the house was found intact and no damage was caused to the house. Most importantly, this witness in cross-examination stated that parents of accused filed a case against Byas Devi (PW-3), who is common wife of Sartal Singh and Krishan Kumar.

10. PW-7, Dr. Rakesh Kumar medically examined the injured and found injuries on his person as per MLC Ext. PW-7/A. However, in his cross-examination, this witness admitted that the injuries mentioned in the MLC can be caused by fall.

11. It is not understood that when it has specifically come in the evidence especially in the statements of witnesses that there are 10-15 houses situate near the house of complainant, why prosecution failed to associate independent witnesses, more specifically when incident is of morning time i.e. 7 am. In the case at hand, all the material prosecution witnesses are related to each other as such, version put forth by them is required to be taken into consideration with utmost caution, while determining guilt, if any, of the accused. No doubt, statements, if any, made by interested witnesses cannot be brushed aside solely on the ground of non-association of independent witnesses, but, in the case at hand, where it stands duly proved that that the accused and complainant are inimical to each other and they are closely related also, version put forth by interested witnesses cannot be relied in the

absence of any corroborative evidence, if any, led on record by the prosecution in the shape of independent witnesses. Leaving everything aside, statements of material prosecution witnesses clearly reveal that there are material contradictions and inconsistencies.

12. Close scrutiny of statements of the material prosecution witnesses compels this court to conclude that no reliance, if any, could be placed by the learned Court below on the statements made by prosecution witnesses, being contradictory and inconsistent with each other, as such, learned Court below rightly did not place reliance upon the same, while ascertaining guilt, if any, of the accused.

13. By now it is well settled that in a criminal trial evidence of eye-witnessrequires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
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> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

14. Though, the medical evidence led on record by the prosecution, suggests that the complainant suffered injury on his thumb but there is no positive evidence adduced on record by the prosecution to connect accused with the alleged beatings, if any, given on the person of the complainant, as such, mere placing of MLC Ext. PW-7/A may not be sufficient to prove the guilt of the accused.

15. This Court also finds that all the witnesses associated by the Police in support of its case are interested witnesses, as such, version put forth by the complainant and prosecution witnesses is required to be scrutinized with utmost care and the same

cannot be made basis for conviction especially when no cogent and convincing evidence has been led on record in support of the versions put forth by the complainant and other prosecution witnesses, most of whom are interested witnesses.

16. In view of above, this Court finds no reason to interfere with judgment passed by the learned trial Court, which is accordingly upheld. In result, appeal fails and is accordingly dismissed. Bail bonds furnished by accused are discharged. Pending applications, if any, are disposed of.

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

State of H.P. …Appellant

Versus

Jai Chand …Respondent

Cr. Appeal No. 342 of 2009

Decided on: June 21, 2019

Indian Penal Code,1860– Sections 279 & 304-A – Rash and negligent driving etc–Proof– Appeal against acquittal – Held- Driver of offending vehicle fled away immediately after occurrence of accident – Witnesses never told investigating officer that they could identify driver of offending vehicle – Identification parade never got conducted by investigating officer– Owner of vehicle denying having employed accused as driver on his truck – Identification of accused as driver by witnesses during trial not of much significance – No mis - appreciation of evidence on part of trial court – Acquittal upheld – Appeal dismissed. (Paras 10, 12 & 14)

Cases referred:

Braham Dass vs. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406

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

State of Himachal Pradesh vs. Dilwar Singh, 2017(3) Him. L.R. 1938

State of H.P. vs. Manpreet Singh, 2008 (HP) 538

State of Karnataka vs. Satish, 1998 (8) SCC 493

State of Punjab vs. Saurabh Bakshi, 2015 (5) SCC 182

For the appellant: Mr. Ashwani Sharma, Additional Advocate General.

For the respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

Instant criminal appeal having been filed by the appellant-State, lays challenge to the judgment dated 31.3.2009 passed by learned Judicial Magistrate 1st Class, Court No. 2, Palampur, District Kangra, Himachal Pradesh in Criminal Case No. 366-11/2004/2002, whereby learned Court below held respondent-accused (hereinafter, 'accused'), not guilty of having committed offences punishable under Ss. 279 and 304-A IPC and Ss. 191, 192-A and 196 of the Motor Vehicles Act and accordingly acquitted him.

2. In nutshell, case of the prosecution as emerges from the record is that on 31.1.1999, at about 3.45 pm, at place 78 Miles (Aberi), accused was driving truck bearing registration No. HPK-1073. It is alleged that on the date of alleged accident, complainant Manoj Kumar alongwith his cousin Satish Kumar was going to Aberi to purchase vegetables. It is alleged that the accused was driving the vehicle in question on public way in a rash and negligent manner and hit the same against Satish Kumar, who came beneath the front tyre of the vehicle. Statement of PW-5 Manoj Kumar (complainant)(Ext. PW-5/A) was got recorded and on the basis of same, FIR (Ext. PW-1/A) was registered under the aforesaid provisions of law at Police Station Palampur. After completion of investigation, Police presented *Challan* in the court of learned Judicial Magistrate 1st Class-II, Palampur, District Kangra, Himachal Pradesh, who, being satisfied that prima facie case exists against the accused, served notice of accusation upon him for the commission of aforesaid offences, to which the accused pleaded not guilty and claimed trial.

3. Prosecution, with a view to prove its case against the accused, examined as many as eight witnesses, whereas, accused in his statement recorded under S.313 CrPC, denied the case of the prosecution *in toto* and claimed that at the time of alleged incident, he was not driving the truck in question and he has been falsely implicated. However, the fact remains that he did not lead any evidence in his defence.

4. Having heard learned counsel for the parties and perused the material available on record, this court finds no illegality, infirmity or irregularity in the impugned judgment of acquittal passed by learned trial Court, because, admittedly, in the case at hand, prosecution has not been able to prove beyond reasonable doubt that on the date of alleged incident, accused was driving the truck in question. Apart from above, it clearly emerges from the record that the Investigating Officer, PW-7, never conducted identification parade, if any, after lodging of complaint and it is only during trial that the complainant PW-5 Manoj Kumar as well as PW-3 Ashwani Kumar identified the accused in the court. Apart from above, there is no specific evidence led on record with regard to rash and negligent driving on the part of accused, who at the time of alleged incident, was allegedly driving the offending vehicle.

5. PW-5 Manoj Kumar, deposed that he alongwith deceased was going to Aberi to purchase vegetables on 31.1.1999. He deposed that the offending vehicle came in a high speed from Aberi side and truck driver suddenly turned the truck. He deposed that on seeing truck, he jumped for his safety but his cousin was run over by front tyre of the truck. He stated that truck was being driven by accused, who was present in the court and accused as well as cleaner fled away from the spot. He further deposed that the people gathered on the spot and pulled Satish Kumar out. In his cross-examination, this witness admitted that the Police did not get the identification parade conducted from him and further admitted that he identified the accused in the court, as he thought that he would be the driver. He further admitted that he had not got written the name of the truck driver in his statement, Ext. PW-5/A. This witness also admitted that he had not given any statement to the Police that he identified the driver and could recognize him.

6. PW-3 Ashwani Kumar was working at 78 Miles on the relevant date and time. This witness deposed that his younger brother as well as deceased Satish Kumar were walking on the side of the road. He deposed that the offending truck struck against wall and then front tyre of the truck ran over deceased Satish Kumar. He stated that he pulled out Satish Kumar from beneath the truck and took him to the hospital, where he died. This witness stated that the accident occurred on account of rash and negligent driving on the part of accused. It has also come in his evidence that accused is driver of the truck. In his

cross-examination, he admitted that he did not witness the accident himself, rather he was told by PW-5 Manoj Kumar that driver of the truck had fled away.

7. PW-4 Randhir Singh runs a shop at 78 Miles. This witness deposed that on the relevant date, time and place, truck bearing registration No. HPK-1073 came from Baijnath side and suddenly turned towards right side and struck with the wall on the right side. He deposed that one boy was shouting that his brother had come beneath the truck. He also deposed that the truck driver and cleaner fled away from the spot.

8 PW-8, Dulo Ram is the owner of the offending truck. This witness deposed that he had given papers of the truck to the Police. He further deposed that he had employed one driver, who was from Nurpur and his name was Jai Mal son of Mangat Ram. He stated that the log book was taken at that time by the Police. He stated that he does not know the accused. This witness deposed that on the day of accident, Jai Mal son of Mangat Ram, resident of Nurpur was the driver, who was employed only 3-4 months back. During cross-examination he admitted that the document, Ext. PW-8/A was not written by him nor number of vehicle was written on the same.

9. PW-7 HC Nardev Singh is the Investigating Officer. He deposed that on 31.1.1999, he got recorded statement of complainant, PW-5 Manoj Kumar under S.154 CrPC, on the basis of which formal FIR, Ext. PW-1/A came to be registered. He stated that it has come in the investigation that accident took place due to rash and negligent driving on the part of the accused. In his cross-examination, this witness admitted that Manoj Kumar had not disclosed anything regarding identity of the truck driver.

10. Thus, the statements having been made by material prosecution witnesses, if read in entirety, certainly compel this court to draw an inference that there are material contradictions and inconsistencies, as such, not much reliance could be placed upon the same by the learned trial Court, while ascertaining guilt, if any of the accused. If statement of PW-5, complainant, is read juxtaposing statements of other prosecution witnesses, it completely demolishes the case of prosecution, because, it has nowhere come in the statement of PW-5 that, on first instance, truck driver or accused struck the vehicle against the wall, rather, this witness deposed that truck from Aberi side came in high speed and he, after seeing truck, jumped for safety, whereas Satish Kumar was run over by the offending truck. On the other hand, PW-3 Ashwani Kumar and PW-4 Randhir Singh have stated that, at the first instance, truck struck against wall. Similarly, if statements of these witnesses are read, they certainly suggest that no identification parade was ever got conducted by the Investigating Officer, after lodging of the FIR. Similarly, statement of PW-5 itself suggests that he, at no point of time, disclosed the particulars, if any, with regard to identify of the accused. This witness categorically admitted in his cross-examination that no identification parade was got conducted by the Investigating Officer and he identified the accused in the court only, after four months.

11. Version of PW-3 otherwise could not be taken into consideration because as per own statement of the aforesaid witness, accident did not take place in his presence, rather, he was told by PW-5 Manoj Kumar that the truck being driven by accused had crushed deceased Satish Kumar, whereafter, both, truck driver and cleaner fled away. Interestingly, in the case at hand, record reveals that after the alleged accident, Police got vehicle mechanically examined from the mechanic, who reported that there was no defect in the vehicle, but this person was never examined as a witness by the prosecution.

12. PW-7, Investigating Officer, in his statement admitted that PW-5 Manoj Kumar did not give statement with regard to identity of the accused. PW-5 Manoj Kumar, in

his cross-examination categorically denied the suggestion put to him that he was deposing falsely in the court to the effect that the accused was the driver of the vehicle, but it stands duly proved on record that after lodging of complaint, no identification parade was got conducted, rather, for the first time, PW-5 identified the accused in the court. It has specifically come in the cross-examination of the PW-5 that he did not disclose the age, height and colour etc. of the driver of the vehicle. Prosecution has placed strong reliance upon Ext. PW-8/A, abstract of log book, which contains signatures of Jai Chand, but careful perusal of same depicts that it is upto 20.7.1998, whereas, accident had taken place on 31.1.1999, as such, no reliance could be placed upon the same to determine the guilt, if any, of the accused.

13. PW-8 Dulo Ram in his statement stated that he had employed one driver, who was from Nurpur and his name was Jai Mal son of Mangat Ram. It has come in his statement that on the date of alleged incident, Jai Mal son of Mangat Ram resident of Nurpur was driver in the aforesaid vehicle.

14. Though, the omission on the part of Investigating Officer to conduct identification parade of accused immediately after alleged accident is sufficient to conclude that the prosecution was unable to prove its case beyond reasonable doubt against the accused, but even otherwise, there is no specific evidence led on record by investigating agency that on the date of alleged accident, offending vehicle was being driven in a rash and negligent manner by the accused. Mere statements, if any, of prosecution witnesses are not sufficient to conclude rash and negligent driving on the part of accused, rather prosecution in this regard was under obligation to prove rash and negligent driving by leading specific evidence in this regard. Needless to say, rashness/negligence cannot be presumed rather onus in this regard is heavy upon the prosecution.

15. By now, it is well settled that specific evidence is required to be adduced on record by the prosecution to prove rash and negligent driving, if any, on the part of the accused. Mere allegations are not sufficient to hold accused guilty of having committed offence punishable under Section 279 IPC.

16. In the instant case, this Court was unable to lay its hand to specific evidence, if any, led on record by the prosecution suggestive of the fact that the vehicle at that relevant time was being driven rashly and negligently that too at high speed. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in **Braham Dass** v. **State of Himachal Pradesh,** (2009) 3 SCC (Cri) 406, which reads as under:

> "6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for the respondent on the other hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.
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> 8. Section 279 deals with rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279IPC is

not negligence. Similarly in Section 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."

17. The Hon'ble Apex Court in case titled **State of Karnataka** v. **Satish**, 1998 (8) SCC 493, has also observed as under:

"1. Truck No. MYE3236 being driven by the respondent turned turtle while crossing a "nalla" on 25111982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was chargesheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338and 304A IPC and sentenced to various terms of imprisonment. The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.

2. We have examined the record and heard learned counsel for the parties.

3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.

4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that

> immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.
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> 5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

18. Careful perusal of aforesaid judgment clearly suggests that there cannot be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur*.

19. Reliance is also placed on judgment this Court in **State of H.P.** Vs. **Manpreet Singh**, 2008 (HP) 538, relevant para whereof is as under:

> "4. Legally, in a case of rash and negligent act, if the prosecution is able to prove the essential ingredients of the offence, the onus to disprove it shifts upon the respondent to show that he had taken due care and caution to avoid the accident. It is an admitted fact that said Shri Daya Ram had died in the accident caused by the respondent but still it is incumbent upon the prosecution to prove that it was the rash and negligent act of driving to conclude the rash and negligent driving of the respondent. In other words, it must be proved that the rash or negligent act of the accused was causa causans and not causa sin qua non (cause of the proximate cause). There must be some nexus between the death of a person with rash or negligent act ofthe accused. According to Rupinder Parkash (PW4) deceased was hit by the motor cycle which was in a high speed but the speed is not criteria to hold the act as rash or negligent. The respondent in his statement under Section 313 of the Code of Criminal Procedure has explained that on seeing the deceased, he had blown the horn and he (deceased) stopped on the road. As soon as he reached near him, he immediately tried to cross the road and got hit. His version has been duly corroborated by Hardeep Singh (DW1) who was a pillion rider with him. Ajay Kumar (PW1) has admitted this version that the respondent had blown the horn and Daya Ram on hearing it, had stopped for a while. In these circumstances, if a person suddenly crosses the road, without taking note of the approaching vehicle and its driver may not be in a position to save the accident, it will not be possible to hold the Driver guilty of the offence. In the instant case, the deceased knowing fully well at least the approaching vehicle stopped on hearing the horn while crossing the road but when the motor cycle reached near him, he darted before it and the

> accident took place. Thus in my opinion the prosecution could not prove the offence charged against the respondent beyond reasonable doubt that the respondent was driving the vehicle rashly or negligently. Therefore, in these circumstances, the learned trial Court had rightly acquitted the respondent of the charges framed against him. As such, no interference in the impugned judgment of acquittal is called for. Accordingly the appeal is dismissed. The respondent is discharged of his bail bounds entered upon by him at any stage of the trial."

20. This Court is also fully conscious of judgment of Hon'ble Apex Court in ***State of Punjab*** *versus* ***Saurabh Bakshi 2015 (5) SCC 182,*** wherein it has been held that no leniency should be shown to reckless drivers. The Hon'ble Apex Court has observed as follows:-

> "25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

21. There cannot be any disagreement with the concern expressed by the Hon'ble Apex Court in the aforesaid judgment with regard to carelessness /recklessness of the drivers especially under the influence of alcohol. But in the instant case, as has been discussed above, prosecution was not able to prove beyond reasonable doubt that the ill fated vehicle was being driven by accused rashly and negligently, rather, version put forth by prosecution appears to be untrustworthy in view of material contradictions in the statements of the alleged eye witnesses, and as such, this Court sees no application of aforesaid law laid down by the Apex Court in the instant case.

22. This court in **State of Himachal Pradesh** vs. **Dilwar Singh** 2017(3) Him. L.R. 1938, has held as under:

> "11. After having carefully perused statements of PW-4 and PW-7, conclusion can be safely drawn by this Court that even PW-6 and PW-8, had no occasion to witness the accident with their eyes, rather, they came at the spot after noise made by PW-7. It is not understood when PW-6 and PW-8 had not witnessed the accident, with their eyes, how they could chase offending vehicle allegedly being driven by respondent, because, at the relevant time, none of the prosecution witnesses have stated that they had disclosed registration number of offending vehicle to PW-6 and PW-8. Even PW-1 and PW-5 nowhere stated that PW-6 and PW-8 were informed by them with regard to accident especially about registration number of offending vehicle, as such, story put forth by the prosecution does not appear to be trustworthy.
>
> 12. At the cost of repetition, it may be stated that it has nowhere come in the statement of any of the prosecution witnesses, who had an occasion to see the accident with their eyes, that immediately after accident, they informed PW-6 and PW-8 with regard to registration number of offending vehicle as well as accused, as such, story of accused being apprehended by PW-6 and PW-8, is not worth lending

any credence, because, admittedly, they had no prior knowledge with regard to involvement of offending vehicle as well as accused in the accident.

13. Leaving everything aside, this Court was unable to find anything in the statements of prosecution witnesses, from where it could be inferred that vehicle was being driven rashly and negligently that too at high speed, by the respondent, as such, this Court sees substantial force in the defence taken by the accused in his statement recorded under Section 313 CrPC that he had not struck vehicle against Shri Milkhi Ram and Kurpal Ram.

14. Evidence discussed herein above is sufficient to hold that in given facts and circumstances, two views are possible in the present case and as such present, accused is entitled to the benefit of doubt. In the present case, prosecution story does not appear to be plausible/ trustworthy and as such same cannot be relied upon. In this regard, I may refer to the judgment passed by the Hon'ble Apex Court reported in State of UP versus Ghambhir Singh, AIR 2005 (92) SCC 2440, where Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> "6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, he evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred.""

23. Thus, in view of the above judgment, if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred. In the case at hand, when identity of the accused as driver of the offending vehicle at the time of accident has not been established, he deserves to be extended benefit of doubt.

24. Close scrutiny of statements of the material prosecution witnesses compels this court to conclude that no reliance, if any, could be placed by the learned Court below on the statements made by prosecution witnesses, being contradictory and inconsistent with each other, as such, learned Court below rightly did not place reliance upon the same, while ascertaining guilt, if any, of the accused.

25. By now it is well settled that in a criminal trial evidence of eye-witnessrequires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies

and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
>
>> "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

26. This Court also finds that all the witnesses associated by the Police in support of its case are interested witnesses, as such, version put forth by the complainant and prosecution witnesses is required to be scrutinized with utmost care and the same cannot be made basis for conviction especially when no cogent and convincing evidence has been led on record in support of the versions put forth by the complainant and other prosecution witnesses, most of whom are interested witnesses.

27. In view of above, this Court finds no reason to interfere with judgment passed by the learned trial Court, which is accordingly upheld. In result, appeal fails and is accordingly dismissed. Bail bonds furnished by accused are discharged. Pending applications, if any, are disposed of.

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

Mohan Singh …Petitioner
Versus
State of Himachal Pradesh …Respondent

Cr. MP (M) No. 1030 of 2019

Decided on June 24, 2019

Code of Criminal Procedure, 1973- Section 439–Regular bail– Grant of- Rape case– Held, object of bail is neither punitive nor preventative – Freedom of individual cannot be curtailed for an indefinite period– Gravity of offence alone cannot be a decisive ground to deny bail– Rather competing factors are required to be balanced- Accused 70 years old father in law of prosecutrix– No reason given for delayed filing of FIR– Nothing incriminatory material is to be recovered from him –Petition allowed– Bail granted. (Paras 5, 6 & 8)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs.Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner	Mr. Ajay Kochar, Mr. Karan Singh Kanwar and Mr. Vivek Sharma, Advocates.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General. ASI Manoj Kumar, I/O Women Police Station, Nahan, District Sirmaur, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Sequel to order dated 10.6.2019, ASI Manoj Kumar, has come present with the record. Mr. Sudhir Bhatnagar, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

2. Close scrutiny of the record/status report reveals that on 17.5.2019, victim-prosecutrix (name not disclosed), lodged a complaint at Women Police Station, Nahan alleging therein that her marriage was solemnised with the person namely Satnam Singh, in the year 2012. She further alleged that prior to her marriage, it was never disclosed that her husband was a drug addict. In the year 2014, one daughter was born from their wedlock. She alleged that prior to the birth of the daughter, bail petitioner, who happened to be her father-in-law, used to behave in an indecent manner and on one day, he touched her breasts and waist. Allegedly, in the year 2017, when husband of the victim-prosecutrix had gone to Chandigarh for some treatment, bail petitioner sexually assaulted her against her wishes. Bail petitioner, allegedly threatened the victim-prosecutrix with dire consequences in case she revealed anything with regard to aforesaid incident to any of the family members. Victim-prosecutrix further alleged in the complaint that after aforesaid incident, bail petitioner used to sexually assault her against her wishes as and when she was found alone at her residence. Allegedly in March, 2019, bail petitioner, at place Bhup Pur, again sexually assaulted the victim-prosecutrix against her wishes. She further alleged that on 18.4.2019, she was thrown out with her daughter from her matrimonial house by the bail petitioner and other family members. On the basis of aforesaid complaint having been made by the victim-prosecutrix, a formal FIR, i.e. FIR No. 19, dated 17.5.2019 came to be lodged against

the bail petitioner under Ss.376, 506 and 406 IPC with the Women Police Station, Nahan, District Sirmaur, Himachal Pradesh. Since 19.5.2019, bail petitioner is behind the bars.

3. Mr. Ajay Kochar, learned counsel for the bail petitioner, while referring to the record/status report vehemently argued that no case, much less a case under Ss.376, 506 and 406 IPC is made out against the bail petitioner, who is 70 years old. While referring to the initial complaint as well as statement made by victim-prosecutrix under S.154 CrPC, Mr. Kochar made a serious attempt to persuade this court to agree with his contention that since there is no plausible explanation rendered on record with regard to delay in lodging FIR, not much reliance could be placed upon the statement of victim-prosecutrix, who in fact, has concocted entire story with a view to grab the property. He further contended that since the factum with regard to illicit relationship of victim-prosecutrix with a person namely Manpreet, came to the fore, victim-prosecutrix has falsely implicated the bail petitioner. Lastly, Mr. Kochar contended that since the investigation in the case is complete and nothing is required to be recovered from the bail petitioner, bail petitioner deserves to be enlarged on bail.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly acknowledging the factum with regard to completion of investigation, contended that keeping in view the gravity of the offence alleged to have been committed by the bail petitioner, he does not deserve to be enlarged on bail. Mr. Bhatnagar, learned Additional Advocate General further contended that though there is some delay in lodging FIR, but this court cannot lose sight of the fact that being a lady, it is always difficult to make such allegations public. He further contended that in the event of petitioner being enlarged on bail, there is every possibility of his influencing the witnesses and tampering the evidence and as such, prayer made in the instant application may be rejected.

5. Having heard learned counsel for the parties and perused the record/status report, this court finds that allegedly the victim-prosecutrix was thrown out of her matrimonial house on 18.4.2019, but, interestingly, the FIR in question came to be lodged on 17.5.2019 i.e. after one month and there is no plausible explanation rendered on record for the delay. Leaving everything aside, allegations contained in the complaint suggest that first incidence of sexual assault allegedly occurred in the year 2017, but, it is not understood that why the victim-prosecutrix kept mum for almost two years because, there is nothing on record that during this period, victim-prosecutrix made any attempt to lodge complaint, if any, with the police or her relatives. Version put forth by the victim-prosecutrix that her husband despite having known aforesaid fact, failed to act, appears to be highly improbable. As per victim-prosecutrix, bail petitioner sexually assaulted her against her wishes a number of times in the year 2017 and thereafter in March, 2019, but as has been taken note here-in-above, victim-prosecutrix, who is a married lady having one daughter, cannot be expected to remain silent for such a considerable time. Bail petitioner is 70 years of age. Son of the bail petitioner, who happens to be husband of the victim-prosecutrix, is present in the court. He has refuted all the allegations made by the victim-prosecutrix.

6. Though aforesaid aspect of the matter is to be considered by the learned trial Court in the totality of the evidence collected on record by prosecution, but having perused record, coupled with the conduct of the victim-prosecutrix, this court sees no reason to let the bail petitioner incarcerate in jail, for an indefinite period during trial. Guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution, as such, it would not be appropriate to curtail the freedom of bail petitioner for an indefinite period, especially when nothing remains to be recovered from him. Apprehension expressed by learned Additional Advocate General that in event of bail petitioner being enlarged, he may

tamper with the evidence, can be best met by putting bail petitioner to stringent conditions, as has been fairly admitted by learned counsel for the bail petitioner.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
>
> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for

> this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

8. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

9. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

10. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the

courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

11. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rs. Two Lakh) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

13. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Kamil Khan ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1131 of 2019
Decided on June 25, 2019

Code of Criminal Procedure, 1973– Section 438– Pre-arrest bail– Grant of- Circumstances– Petitioner, accused of carrying khair wood in a truck without permit seeking pre-arrest bail– Prosecution resisting his application on ground that he was involved in similar offences in past also– Held, accused not caught at spot while carrying khair wood– He is implicated in the case on statement of co-accused that khair wood was brought from depot of accused– In previous cases guilt of accused yet to be established- Mere pendency of case cannot be a ground to deny bail– Investigation is complete– Conditional pre-arrest bail granted – Petition allowed. (Paras 4 & 5)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner: Mr.Deepak Kaushal, Advocate.
For the respondent: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.
ASI Hardev Singh, I/O, Police Station Majra, Sirmaur, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Sequel to order dated 18.6.2019, whereby the bail petitioner was ordered to be enlarged on bail, in the event of his arrest in FIR No. 80 of 2019, dated 13.6.2019, under

Ss. 379 and 34 IPC and Ss. 41 and 42 of the Indian Forest Act, registered at Police Station, Majra, Tehsil Paonta Sahib, District Sirmaur, Himachal Pradesh, ASI Hardev Singh has come present with the record. Mr. Sanjeev Sood, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

2. Perusal of the record reveals that on 12.6.2019, Police after having received a secret information, apprehended truck bearing registration No. HP 71-1431 carrying *Khair* wood from Dhaula Kuan to Paonta. Driver of the truck though made an attempt to flee from the spot, but he was apprehended by the Police officials and subsequently, he disclosed his name as Ram Pal. Since driver and other occupants of the truck in question failed to produce a valid permit for carrying the *Khair* wood, Police took into possession the truck as well as *Khair* wood loaded in the same. After informing Forest Department, Police registered a case under Ss. 379 and 34 IPC and Ss. 41 and 42 of the Indian Forest Act at Police Station Majra, District Sirmaur, Himachal Pradesh. Since driver and other occupants of truck during investigation disclosed that the *Khair* wood being transported in the vehicle was purchased from the bail petitioner, who is a government contractor, his name was included in the FIR.

3. Mr. Sanjeev Sood, learned Additional Advocate General, while fairly admitting that the petitioner has joined the investigation in terms of order dated 18..6.2019, contended that though the investigation in the case is complete and nothing is required to be recovered from the bail petitioner but taking note of the previous record of the bail petitioner, there is every likelihood of the bail petitioner fleeing from justice or tampering with the evidence in the event of his being enlarged on bail, as such, prayer for grant of bail may be rejected. Mr. Sood, learned Additional Advocate General further contended that though no recovery is to be effected from the bail petitioner, but till date, demarcation of the land from where wood has been extracted, is yet to be carried out.

4. Having heard learned counsel for the parties and perused the material available on record, this court finds that the bail petitioner never came to be apprehended by the Police with the *Khair* wood being transported by other co-accused in Truck bearing registration No. HP-71-1431 and it is only on the statements of the persons apprehended on the spot to the effect that they have brought this *Khair* wood from the Depot being run by the bail petitioner, name of bail petitioner also came to be included in the FIR as an accused. Though, the case of the investigating agency is that the timber allegedly recovered from the vehicle in question belongs to bail petitioner and same has been cut from government land/forest, but interestingly, this Court was unable to lay its hand to any document placed on record with regard to alleged cutting of *Khair* wood, if any, from the Government/forest land. Demarcation is yet to be carried out by the investigating agency to establish on record that the *Khair* wood allegedly being smuggled in the vehicle in question was cut from the Government land/forest. Though aforesaid aspects of the matter are to be considered and decided by the learned trial Court in the totality of evidence collected on record by the investigating agency but, having taken note of the fact that bail petitioner has already joined the investigation and nothing is required to be recovered from him, this court sees no reason for his custodial interrogation. Though, in the status report, it has been stated that the bail petitioner had been indulging in such activities in the past also, but guilt, if any, of the bail petitioner in those cases is yet to be established and as such, mere pendency of case, if any, cannot be a ground at this stage for non-grant of bail.

5. Guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution, as such, it would not be appropriate to curtail the freedom of bail petitioner for an indefinite period, especially when nothing remains to be recovered from

him. Apprehension expressed by learned Additional Advocate General that in event of bail petitioner being enlarged, he may tamper with the evidence, can be best met by putting bail petitioner to stringent conditions, as has been fairly admitted by learned counsel for the bail petitioner.

6. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to Police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

7. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

8. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

9. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while

dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

10. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

11. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 31.5.2019 is made absolute, subject to bail petitioner furnishing fresh bail bonds in the sum of Rs.20,000/- (Rs. Twenty Thousand) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

12. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

13. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Rakesh Kumar @ Ricky ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1054 of 2019
Decided on June 25, 2019

Code Criminal Procedure, 1973– Section 438- Pre-arrest bail– Grant of– Principles– Held, object of bail is neither punitive nor preventative– Freedom of Individual cannot be curtailed for an indefinite period– Gravity of offence alone cannot be a decisive ground to deny bail– Rather competing factors are required to be balanced- Petitioner, brother-in-Law of deceased was residing separately at a distance of 90 kms from place of incident– He was not present on date of incident in the house– Investigation is complete- Only report of FSL is awaited– Petitioner joined investigation and his custody is not required for further investigation– Conditional pre-arrest bail granted. (Paras 3, 6, 7 & 13)

Cases referred:

Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation (2012)1 SCC 49

For the petitioner Mr.Raman Sethi, Advocate.
For the respondent Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.
ASI Satish Kumar, I/O Police Station, Dehra, District Kangra, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Sequel to order dated 11.6.2019, ASI Satish Kumar has come present with the record. Mr. Sudhir Bhatnagar, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

2. Close scrutiny of the record/status report suggests that on 7.6.2019, complainant Shubham Patial got recorded his statement under S.154 CrPC alleging therein that the marriage of his elder sister (deceased Yogita) was solemnised two years back with Sahil Kashyap son of Shri Vijay Kashyap resident of Village Harmitan, Post Office Nehran Pukhar, Tehsil Dehra, Kangra, Himachal Pradesh as per Hindu rites. He alleged that though relations *inter se* his deceased sister and her in-laws remained good for some time after marriage, but subsequently his brother-in-law, and sister-in-law and mother-in-law of the deceased started torturing his sister for dowry. He also alleged that the deceased disclosed aforesaid factum to their mother a number of times. He alleged that on 7.6.2019, neither his brother-in-law, nor any of his family members gave any information with regard to alleged suicide committed by his deceased sister.

3. On the basis of aforesaid statement, FIR No. 77 dated 7.6.2019, was registered against bail petitioner and his family members under Ss. 304B and 498A IPC at Police Station, Dehra. As per status report/record, person namely Sahil (husband of deceased), Shikha (sister-in-law of deceased) and Sushila (mother-in-law of deceased) are behind bars since 8.6.2019, whereas, bail petitioner, who lives separately at Palampur is on anticipatory bail. Investigation in the case is complete, because as per record, only report of the RFSL is awaited and it is also not in dispute that nothing is required to be recovered from the bail petitioner.

4. Mr. Raman Sethi, learned counsel for the bail petitioner, while referring to the record/status report, strenuously argued that no case, much less case under Ss.304B and 498A IPC is made out against the bail petitioner, because there is no specific allegation made with regard to demand of dowry, if any, made by the bail petitioner during life time of the deceased, Yogita. He further contended that bail petitioner is an employee of Punjab National Bank Metlife and on the date of alleged incident, he was not present on the spot, rather, he reached the spot after having received information from family members with regard to alleged suicide committed by deceased Yogita. Lastly, Mr. Sethi contended that since bail petitioner has already joined the investigation and nothing is required to be recovered from him, prayer for grant of bail may be accepted. Mr. Sethi stated that since bail petitioner is a local resident of Kangra, there is no likelihood of his fleeing from justice.

5. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting factum with regard to completion of investigation, contended that though pursuant to order dated 11.6.2019, bail petitioner has joined the investigation but it has specifically come in the statement of the mother and brother of deceased that the bail petitioner also used to ask for dowry/money from the deceased, as such, it would be too early to conclude that no case, if any is made out under S.498A IPC.

6. Having heard learned counsel for the parties and perused the material available on record, this court finds that the there is no material available on record suggestive of the fact that on the date of alleged incident, bail petitioner was present on the spot, rather, as per own case of the prosecution, bail petitioner being an employee of PNB

Metlife, resides at Palampur. Alleged incident happened at Harmittan, which at a distance of 90 kms from Palampur. Though record reveals that brother and mother of deceased have alleged that bail petitioner also used to ask for money for sending his brother (Sohail) abroad, but such allegations are yet to be proved by investigating agency by leading cogent and convincing evidence on record. Since bail petitioner has already joined the investigation and is fully cooperating with the investigating agency, this court sees no reason to send him for custodial interrogation, especially when investigation is complete and nothing is required to be recovered from the bail petitioner.

7. Guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution, as such, it would not be appropriate to curtail the freedom of bail petitioner for an indefinite period, especially when nothing remains to be recovered from him. Apprehension expressed by learned Additional Advocate General that in event of bail petitioner being enlarged, he may tamper with the evidence, can be best met by putting bail petitioner to stringent conditions, as has been fairly admitted by learned counsel for the bail petitioner.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding

> due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
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> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to Police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

9. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail

should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

11. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

13. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 11.6.2019 is made absolute, subject to the bail petitioner furnishing fresh bail bonds in the sum of Rs.2,00,000/- (Rs. 2 Lakh) with

one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

14. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Tara Chand ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 836 of 2019
Decided on June 26, 2019

Code of Criminal Procedure, 1973– Section 438-Pre-arrest bail– Grant of– Accused seeking pre-arrest bail in case registered against him for illicit felling – State resisting bail on ground that accused not revealing names of accomplices who helped him in illicit felling- Held– No eyewitness seeing accused cutting trees in forest– No explanation as how police officials came to know of illicit felling of trees by accused– No reason assigned as why complaint was not filed earlier when commission of offence by accused had come to the notice of forest officials- Bail granted subject to conditions. (Paras 2, 3 & 5)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner	Mr.Lakshay Thakur, Advocate.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General. ASI Sahab Singh, Police Station, Karsog, Mandi, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner namely Tara Chand, has approached this Court in the instant proceedings filed under S.438 CrPC, for grant of pre-arrest bail in FIR No. 75, dated 10.5.2019 under S.379 IPC and Ss. 32 and 33 of the Indian Forest Act, registered at Police Station, Karsog, Mandi, Himachal Pradesh. Investigating Officer of the case namely ASI Sahab Singh has come present with the record. Mr. Sudhir Bhatnagar, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

2. Close scrutiny of the record reveals that on 10.5.2019, complainant Shri Chatur Singh, Forest Guard, Beat Kotkosh, Forest Division Richhgi lodged a complaint with the Police Station Karsog alleging therein that on 8.5.2019, he alongwith officials of the Forest Department had gone to the Forest Beat D-234, where they found stump of a pine tree (*Kail*). Complainant further alleged that after inquiry from the locals, bail petitioner was found to have felled the tree, who admitted the same. On the basis of aforesaid complaint, a formal FIR, as detailed herein above, was registered against the bail petitioner.

3. Learned Additional Advocate General, on the instructions of the Investigating Officer, fairly stated that though pursuant to orders dated 13.5.2019 and 12.6.2019 passed by this Court, bail petitioner has joined the investigation but he is not disclosing names of his accomplices, who helped him in felling the tree from the forest. Learned Additional Advocate General further stated that since timber/log has not been recovered, Investigating Officer is finding it difficult to proceed further with the investigation.

4. Mr. Lakshay Thakur, learned counsel for the bail petitioner stated that pursuant to orders passed by this Court, bail petitioner has joined the investigation by making himself available for the same, but since he has been falsely implicated, there is no occasion for him to get the recovery of the timber/log effected. He further stated that the bail petitioner has been falsely implicated by Forest officials, who themselves have cut the tree.

5. Having heard learned counsel for the parties and perused the material available on record, this Court finds that though there is allegation that the bail petitioner has cut a Pine tree (*Kail*) from the government Forest, but there is no eye witness of the alleged incident. Moreover, it is not understood that when factum with regard to illegal felling of tree had come to the notice of the Forest officials on 8.5.2019, why they failed to lodge the complaint on the same day because, admittedly, in the case at hand, complaint came to be lodged on 10.5.2019. Though aforesaid aspects of the matter are to be considered and decided by the learned trial Court in the totality of evidence collected on record by the investigating agency, but having perused the record, this Court sees no reason for custodial interrogation of the bail petitioner, who otherwise has joined the investigation.

6. Guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution, as such, it would not be appropriate to curtail the freedom of bail

petitioner for an indefinite period. Apprehension expressed by learned Additional Advocate General that in event of bail petitioner being enlarged, he may tamper with the evidence, can be best met by putting bail petitioner to stringent conditions, as has been fairly admitted by learned counsel for the bail petitioner.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to Police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

8. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

9. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

10. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while

dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

11. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 13.5.2019 is made absolute, subject to the bail petitioner furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court/Investigating Officer concerned, besides the following conditions:

(a). He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c). He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d). He shall not leave the territory of India without the prior permission of the Court.

(e). He shall surrender passport, if any, held by him.

13. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Smt. Sujata Behera …Petitioner
Versus
State of Himachal Pradesh …Respondent

Cr. MP (M) No. 1164 of 2019
Decided on June 28, 2019

Code of Criminal Procedure, 1973–Section 438– Pre-arrest bail– Grant of-Circumstances– Petitioner accused of cheating, criminal breach of trust etc., praying for pre-arrest bail– Held, accused already having joined investigation– Fully cooperated with investigating officer– Nothing more is required to be recovered from her– Investigation is complete– Petition allowed– Pre-arrest bail granted subject to conditions. (Para 3)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner Mr.Virender Singh Kanwar, Advocate.
For the respondent Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.438 CrPC, prayer has been made on behalf of the bail petitioner, Smt. Sujata Behera for grant of pre-arrest bail in FIR No. 154 of

2019, under Ss. 406, 420B and 120B IPC registered at Police Station Paonta Sahib, District Sirmaur, Himachal Pradesh.

2. Mr. Kunal Thakur, learned Deputy Advocate General, states that though the Investigating Officer is not present on account of some miscommunication, but he has been telephonically informed that pursuant to order dated 21.6.2019, bail petitioner has joined investigation and she is fully cooperating. Mr. Thakur, learned Deputy Advocate General further states that custodial interrogation of the bail petitioner is not required at this stage and in case, this Court intends to enlarge her on bail, she may be directed to make herself available for investigation/trial as and when directed.

3. Since bail petitioner has already joined the investigation and is fully cooperating with the investigating agency, this court sees no reason to send the bail petitioner for custodial interrogation, especially when investigation is complete and nothing is required to be recovered from the bail petitioner.

4. Guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution, as such, it would not be appropriate to curtail the freedom of bail petitioner for an indefinite period, especially when nothing remains to be recovered from her. Apprehension expressed by learned Additional Advocate General that in event of bail petitioner being enlarged, she may tamper with the evidence, can be best met by putting bail petitioner to stringent conditions, as has been fairly admitted by learned counsel for the bail petitioner.

5. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
>
> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence

witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to Police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

6. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive

> content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

7. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

8. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

9. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

10. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 21.6.2019 is made absolute, subject to the bail petitioner furnishing fresh bail bonds in the sum of Rs.20,000/- (Rs. Twenty Thousand) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides the following conditions:

(a) She shall make herself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). She shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c). She shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) She shall not leave the territory of India without the prior permission of the Court.

(e) She shall surrender passport, if any, held by her.

11. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon her, the investigating agency shall be free to move this Court for cancellation of the bail.

12. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Prince Kumar ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 805 of 2019
Decided on July 1, 2019

Code of Criminal Procedure, 1973– Section 439– **Protection of Children from Sexual offence Act, 2012**– Section 4– Regular bail– Entitlement– On facts, held, victim knew accused for the last one year– Earlier also, she had joined his company– Stating in her statement that accused did not do anything wrong with her and she did not want any action against him– Victim though minor, her conduct cannot be ignored altogether– No other reason to put accused behind bars for indefinite period– Petition allowed– Accused released on conditional bail. (Paras 3 & 4)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner: Mr. B.L. Soni, Advocate.
For the respondent : Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.
ASI Gurbax Singh, Police Station, Dehra, Kangra, Himachal Pradesh

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.439 CrPC, prayer has been made on behalf of the petitioner for grant of regular bail in case FIR No. 12, dated 18.1.2019, under Ss. 376 and 120B IPC and S.4 of the Protection of Children from Sexual Offences Act, registered at Police Station, Dehra, District Kangra, Himachal Pradesh.

2. Though, ASI Gurbax Singh has come present, but he states that since the file relating to the investigation is lying with the District Attorney concerned, he was unable to bring the record of the case. Mr. Sudhir Bhatnagar, learned Additional Advocate General has, however, filed the status report, perusal whereof reveals that on 18.1.2019, victim-prosecutrix (name withheld), got her statement recorded under S.154 CrPC, alleging therein that the bail petitioner, who hails from her village, called her over the telephone and asked to meet him at Hazipur Bus Stop. On 18.1.2019, victim-prosecutrix met the bail petitioner, who was waiting for her and thereafter bail petitioner forced the victim-prosecutrix to come to Himachal for sight-seeing. Allegedly the bail petitioner took victim-prosecutrix to Chintpurni, District Una on his Scooty bearing registration No. PB-07BJ-5043 As per victim-prosecutrix, bail petitioner took her to Hotel Dawat, against her wishes, where they consumed food in a room. It is further alleged that the bail petitioner sexually assaulted the victim-prosecutrix twice against her wishes in a room of the hotel. Victim-prosecutrix, in her aforesaid statement further alleged that she requested the bail petitioner to let her go to her house but, in the meantime, Police came at the spot. On the basis of the aforesaid statement having been made by the victim-prosecutrix, a formal FIR, as detailed herein above came to be lodge against the present bail petitioner and, since then, he is behind the bars.

3. Having heard learned counsel for the parties and perused the material available on record, this court finds that the statement under S.154 CrPC came to be made by the victim-prosecutrix when both, bail petitioner and victim-prosecutrix, were apprehended by the Police at Hotel Dawat, near Chintpurni, District Una, Himachal Pradesh. Victim-prosecutrix, in her statement made under S.164 CrPC, before the Additional Chief Judicial Magistrate, Dehra, has categorically stated that she knew the bail petitioner for the last one year and earlier also, she had gone with him to Chintpurni. She has specifically stated in her statement that the bail petitioner has not done anything wrong with her and as such, she does not want any action to be taken against the bail petitioner.

4. True it is, that as per record, age of the victim-prosecutrix is sixteen years and consent, if any, is immaterial but, having taken note of the aforesaid glaring aspects of the matter, especially the conduct of the victim-prosecutrix, this court sees no reason to let the bail petitioner incarcerate in jail, for an indefinite period during trial. Though aforesaid aspects of the matter are to be decided by the learned trial Court, on the basis of evidence collected on record by the prosecution, but having carefully gone through the complaint as well as statement made by the victim-prosecutrix under S.164 CrPC, this court is of the view that there is no evidence worth the name, available on record, that the bail petitioner taking undue advantage of the innocence of the victim-prosecutrix, sexually assaulted her against her wishes, rather, as per own statement of the victim-prosecutrix, she having known the bail petitioner, joined his company of her own volition. Leaving everything aside, guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the investigating agency by leading cogent and convincing evidence on record, as such, this court sees no impediment in accepting the prayer made in the instant application.

5. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a

> factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
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> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

6. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

7. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his

trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

8. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

9. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

10. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

(a). He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c). He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d). He shall not leave the territory of India without the prior permission of the Court.

(e). He shall surrender passport, if any, held by him.

It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

11. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Vijay Kumar …Petitioner.

Versus

Deputy Commissioner, Mandi and others. …Respondents.

CMPMO No. 84 of 2019
Decided on : 1.7.2019

Constitution of India, 1950 – Articles 14 & 226 – Appointment as TGT on basis of being from a BPL family **–** Such enlistment in BPL category being pursuant to resolution of panchayat – Challenge to enlistment –Period of limitation – Held – Scheme framed in 2013 provides period of one month for laying challenge to enlistment in BPL family before initial Authority (SDO Civil) as well as Appellate Authority (Deputy Commissioner) – Period of one month cannot be relaxed or whittled down.(Para 3)

For the Petitioner: Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.

For the Respondents: Mr. Desh Raj Thakur, Additional Advocate General for respondents No.1 and 2.
Mr. Digvijay Singh, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The petitioner was selected to the post of TGT, on anvil, of his belonging, to, a BPL family. The enlistment, of the petitioner in the BPL family, was made in pursuance,to a resolution passed by the Gram Panchayat concerned. However, the enlistment of the petitioner in the BPL family, was, challenged by one Geeta Devi, and, the said challenge was subsequently abandoned, and, thereafter the apposite challenge was carried forward by one Kanhiya Lal Sharma, on, the apposite permission being granted. The Sub Divisional Officer (Civil), Sarkaghat, upon, the afore challenge, being made, by one Geeta Devi hence, through, Annexure P-2 made a direction to the Gram Panchayat concerned, to, reconsider the inclusion/deletion of the petitioner, in the list of BPL families. The order made under Annexure P-2, was challenged by one Kanhiya Lal Sharma before the Deputy Commissioner, Mandi, and, through Annexure P-4 the latter made an order of remand, upon, the Sub Divisional Officer(Civil), Sarkaghat, for enabling the latter, to, after rehearing the contesting litigants, make a fresh decision in accordance with law. Subsequent thereto the remanding authority, under, Annexure P-5, upheld the challenge, vis-a-vis, the the enlistment, of the petitioner in the BPL family. The order made, under Annexure P-5 was challenged by the petitioner before the Deputy Commissioner, Mandi, and thereon the impugned order was rendered.

2. The learned counsel for the petitioner, has contended with much vigor before this Court, that, the guidelines appertaining, vis-a-vis, the challenge, to, the apposite enlistment in the BPL families, in Clause (v) thereof, prescribing rather a period of one month for a challenge being cast, (a) whereas apparently the afore challenge, being made beyond the period, of one month, (b) therefore, all the challenges made by one Geeta Devi, vis-a-vis, the entitlement, of the petitioner, for, enlistment in the BPL family, being, grossly time barred, and, with no compatible clause, being borne in the relevant guidelines, appertaining to condonation, of, period of delay, thereupon, all the orders were made, on a time barred motion, and, hence they are amenable for being scuttled.

3. However, the vigor of the afore submission, is, tentatively eroded by the Deputy Commissioner, Mandi, in order borne in Annexure P-4, making allusion to certain instructions issued, on 8.4.2011 wherethrough, no period of time is prescribed for a challenge, being made to the relevant/apposite enlistment of the persons concerned. Since the afore instructions, were, issued in the year 2011, and, the challenges were made subsequent thereto, hence the challenges cannot be construed, to be suffering, from any aura of invalidity. However in making the afore submission the learned counsel for the respondent, has remained, grossly unmindful to the fact, that, the relevant guidelines, alluded to by the learned counsel for the petitioner, (a) and theirs rather carrying the afore clause, prescribing a rigid period of one month, for a challenge being reared both, before the initial authority, and, before the appellate authority concerned, rather hence subsequent thereto, standing brought into force, in the year 2013 and (b) when thereafter no notification has been placed, on record by the respondents concerned, qua, the afore period of limitation, standing both whittled down or relaxed, under, a notification alike the one issued, in, the year 2011, (c) thereupon, the challenge made, to the making of Annexure P-2 by one Kanhiya Lal Sharma, before the Deputy Commissioner, Mandi, and also a challenge made on 5.4.2013 hence, are, obviously challenged beyond the period of one month, or, are outside the period of limitation prescribed in the governing thereto guidelines, as, embodied in Annexure P-7. Conspicuously when it came into force, in the year 2013. Consequently, the order impugned is declared, to be bad, in law, and, is quashed, and, set aside accordingly, and, consequent effect, thereof is that the impugned decision also looses its validity, rather, validity is acquired by Annexure P-2, and, hence the Gram Sabha

concerned is directed, to, in consonance with paragraph 9 of the verdict borne in Annexure P-2, hence within four weeks, make a fresh decision, vis-a-vis, the inclusion and deletion of the petitioner herein, in, the BPL family concerned.

In view of the above, the present petition stands disposed of, alongwith all pending applications.

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

State of H.P. …Appellant
Versus
Baishakhi Ram …Respondent

Cr. Appeal No. 524 of 2009
Decided on: July 2, 2019

Indian Penal Code, 1860 – Sections 279, 337 & 338 – Rash and negligent driving – Proof – Held – Onus is always upon prosecution to prove beyond reasonable doubt that vehicle was being driven rashly and negligently – No presumption of rashness or negligence can be drawn by applying principle of res ipsa loquitur. (Para 20)

Cases referred:
Braham Dass vs. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406
C. Magesh and others vs.State of Karnataka, (2010) 5 SCC 645
State of Himachal Pradesh vs. Dilwar Singh, 2017(3) Him. L.R. 1938
State of H.P. vs. Manpreet Singh, 2008 (HP) 538
State of Karnataka vs. Satish, 1998 (8) SCC 493
State of Punjab vs. Saurabh Bakshi, 2015 (5) SCC 182

For the appellant: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.
For the respondent: Mr. Abhishek Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

Instant criminal appeal under S.378 CrPC, having been filed by the appellant-State, lays challenge to judgment dated 23.6.2009 passed by learned Additional Sessions Judge (Fast Track Court), Dharamshala, District Kangra, Himachal Pradesh in Crl. Appeal No. 24-P/2007, reversing judgment of conviction dated 26.10.2007 passed in Cr. Case No. 232-II/04/2K by the learned Judicial Magistrate 1st Class, Court No. II, Palampur, District Kangra, Himachal Pradesh, whereby learned trial Court, while holding the respondent-accused (hereinafter, 'accused') guilty of having committed offences punishable under Ss. 279, 337 and 338 IPC, convicted and sentenced him as under:-

Section	Sentence	In default of payment of fine
279 IPC	Simple imprisonment for two	Simple imprisonment for ten

	months and fine of Rs.500/-	days
337 IPC	Do	Do
338 IPC	Do	Do

2. Precisely, the facts as emerges from the record are that the complainant, Phullan Devi, got her statement recorded under S.154 CrPC, alleging therein that on 4.5.1999, at about 7 pm, at Village Kandbari, accused while driving Tempo bearing registration No. HP-37-5837, in a rash and negligent manner on a public highway, crushed the foot of her granddaughter, Babita, who was standing on the roadside. As per complainant, she alongwith her granddaughter Babita had gone to fetch water from *Bowli*. Accused, who was driving the offending vehicle, lost control over the same and struck the Tempo against her minor granddaughter, as a consequence of which, her leg was crushed. In the said accident, Babita sustained simple and grievous injuries. On the basis of aforesaid statement under S.154 CrPC, a formal FIR, Ext. PW-7/A came to be lodged against the accused. After completion of investigation, Police presented *Challan* before Judicial Magistrate 1st Class, Court No.II, Palampur, who on being satisfied that a prima facie case exists against the accused, put notice of accusation to the accused for the commission of the offences punishable under Ss. 279, 337 and 338 IPC, to which the accused pleaded not guilty and claimed trial.

3. Prosecution, with a view to prove its case against the accused, examined as many as seven witnesses, whereas, accused in his statement recorded under S.313 CrPC, denied the case of the prosecution *in toto* and claimed that at the time of alleged incident, he was not driving the vehicle in question. He further denied that he was driving the offending vehicle in a rash and negligent manner, on the relevant date, time and place. However, he did not lead any evidence in his defence.

4. Vide judgment dated 26.10.2007, learned trial Court held accused guilty of having committed offences punishable under the aforesaid provisions of law. Being aggrieved and dissatisfied with the impugned judgment of conviction passed by learned trial Court, accused filed an appeal before the learned Additional Sessions Judge (Fast Track Court), Kangra at Dharamshala, who vide judgment dated 23.6.2009, set aside the judgment of conviction passed by learned trial Court, consequently acquitting the accused. In the aforesaid backdrop, appellant-State has approached this Court in the instant proceedings, praying therein to set aside the impugned judgment of acquittal passed by learned first appellate Court and restoring the judgment of conviction passed by the learned trial Court.

5. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by the learned first appellate Court in the impugned judgment of acquittal, while reversing judgment of conviction passed by learned trial Court, this court finds no illegality or infirmity in the judgment passed by learned Additional Sessions Judge, rather, perusal of the same clearly reveals that it is based upon proper appreciation of the evidence. After having gone through the evidence led on record by the prosecution, be it ocular or documentary, this court is not persuaded to agree with Mr. Sudhir Bhatnagar, learned Additional Advocate General that learned Additional Sessions Judge (Fast Track Court), while recording the findings that the prosecution was not able to prove the identity of the accused, has fallen in error, because bare perusal of the statements having been made by material prosecution witnesses nowhere suggests that the identification parade of accused ever came to be conducted prior to putting up *Challan* in the competent Court of law. Leaving everything aside, if statement of PW-2 Phullan Devi, who happened to be the complainant, is perused in its entirety, it itself creates serious doubt with regard to presence of the accused on the spot as well as his driving of offending

vehicle. In her statement recorded under S.154 CrPC, complainant stated that at the time of accident, she was fetching water from the *Bowli,* whereas her granddaughter Babita was standing on the roadside and suddenly one Tempo came at a high speed and crushed leg of her granddaughter, Babita. She further alleged that thereafter alarm was raised by the persons present on the spot and Tempo was intercepted. Most importantly, in her statement recorded under S.154 CrPC, complainant Phullan Devi specifically stated that she did not know the driver, however, he (driver) was a resident of her village. If aforesaid version of Phullan Devi is examined in light of her subsequent statement given in the court, as PW-2, it completely belies the story of the prosecution. Phullan Devi, while deposing as PW-2, stated that the vehicle bearing Registration No. HP-37-5837 was being driven by the accused, Baishakhi Ram present in the court, but, she was unable to explain how she came to know about the name of the accused. In her cross-examination, she admitted that she is resident of Village Kandbari but she admitted that the accused is the resident of Village Sapedu. In her cross-examination, complainant stated that her Village and the Village of accused are two different Villages and they fall in two different Panchayats. In her statement under S.154 CrPC, she had stated that the driver was resident of her village and she did not know his name, whereas, in the court, she named the accused and stated him to be a resident of other Village, Sapedu.

6. PW-1 Thola Ram deposed that in his presence, accused came driving one Tempo, which subsequently hit one girl namely Babita, who had come to the *Bowli* alongwith her grandmother but, in his cross-examination, this witness admitted that after the accident, driver of the Tempo had fled away from the spot and second driver had come.

7. PW-3 Jai Kishan, who happened to be the father of the injured girl, stated that he reached the spot after having heard noise of the accident. He further deposed that he saw that the Tempo bearing registration No. HP-37-5837 had crushed the foot of his daughter, Babita. This witness further stated that he took the injured in the same Tempo to the Hospital. He further stated that the accident took place due to rash and negligent driving of the accused. The statement having been made by this witness may not be relevant because he had no occasion to witness the alleged accident with his own eyes, rather, as per his own version, he reached the spot after having heard noise of the accident.

8. If the statements of the material prosecution witnesses, PW-1 to PW-3 are read in conjunction and juxtaposing each other, same create doubt with regard to correctness of the story put forth by the prosecution. As has been pointed out, complainant, Phullan Devi (PW-2), who was the first person to see the accident, was not aware with regard to the name of the accused, because, in her statement made under S.154 CrPC, she categorically stated that though the accused belonged to her village, but she did not know his name, whereas, in her statement made before the Court, she identified the accused present in the court and stated that his name was Baishakhi Ram. Aforesaid version put forth by this witness is in total contradiction with the version put forth by PW-1 Thola Ram, who categorically stated that the driver of the offending vehicle fled away from the spot after the accident and second driver had come. PW-3 Jai Kishan, who had no occasion to see the accident with his own eyes, nowhere stated that the accused was driving the offending vehicle, in which he took his daughter to the hospital. It has only come in his statement that his daughter was taken to the hospital in Tempo bearing registration No. HP-37-5837, but he nowhere stated that at that time, vehicle was being driven by accused.

9. Leaving everything aside, all these material prosecution witnesses have admitted that during investigation no identification parade of accused was got conducted by the police as such, learned Additional Sessions Judge, while reversing the judgment of

conviction passed by learned trial Court, rightly held that the identify of the accused is highly doubtful.

10. Prosecution also examined owner of the vehicle Desh Raj (PW-5), who categorically stated that the accused Baishakhi Ram was not his driver. Though this witness was declared hostile, but careful perusal of the cross-examination conducted on this witness, nowhere suggests that the prosecution was able to extract anything advantageous to its case. This witness in his cross-examination stated that the log book of the vehicle was not taken into possession by the Police. He further stated in his cross-examination that the accused never remained his driver and on the date of accident, accused was not driving his vehicle.

11. Aforesaid version put forth by this material prosecution witness came to be disbelieved by the learned trial Court on the ground that this witness has deposed falsely. Learned Additional Sessions Judge, has rightly recorded that no cogent and convincing reasoning has been assigned by the learned trial Court for disbelieving the version put forth by PW-5, Desh Raj, who happened to be the owner of the offending vehicle.

12. PW-4 Subhash Chand deposed that he was driver of Tempo bearing registration No. HP-37-5837 and on 4.5.1999, he was on leave and owner of the Tempo had engaged some other person as a driver in the Tempo. He stated that he does not know, who was the driving the Tempo on the relevant day, when the alleged accident took place. This witness was declared hostile. In his cross-examination done by the learned A.P.P., this witness denied that his statement was recorded by the Police. He denied that the owner Desh Raj had employed the accused as a driver in the Tempo. He admitted that when marriage party of his brother was going, he heard the noise that foot of the child has been crushed by the Tempo.

13. PW-7 SI Om Prakash, Investigating Officer of the case deposed that on 4.5.1999, he received an information from the SDH, Palampur that some accident had taken place and accordingly he recorded statement of PW-2 Phullan Devi under S.154 CrPC. During cross-examination, this witness admitted that the complainant had not disclosed to him name of the accused but self stated that the accused Baisakhi Ram was got identified, which version is in total contradiction to the statements of other witnesses i.e. PW-2, PW-3 and PW-4. In his cross-examination, this witness further stated that the name of the accused was supplied by the witnesses. He stated that he has not taken into possession log book of the vehicle, meaning thereby, no effective steps were ever taken by the Investigating Officer to identity the accused, who allegedly at the relevant time, was driving the vehicle in question. No doubt, MLC, X-ray Films and discharge slip of the injured Exts. PX1 to PX4, reveal that Babita received simple as well as grievous injuries but, that may not be sufficient to bring home the guilt of the accused, especially when prosecution has not been able to connect the accused with the commission of the offences alleged to have been committed by him.

14. Close scrutiny of statements of the material prosecution witnesses compels this court to conclude that no reliance, if any, could be placed by the learned Court below on the same, being contradictory and inconsistent with each other, as such, learned Court below rightly did not place reliance upon the same, while ascertaining guilt, if any, of the accused.

15. By now it is well settled that in a criminal trial evidence of eye-witnessrequires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence

rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses therebysatisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
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> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

16. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses

17. Apart from above, this court finds that there is no specific evidence led on record by the prosecution to prove rash and negligent driving, if any, on the part of the accused. While holding accused guilty under S.279 IPC, it is incumbent upon the prosecution to prove rash and negligent driving. By now, it is well settled that rashness cannot be presumed, rather, onus is heavy upon the prosecution to prove rash and negligent driving. In the case at hand, if the statements made by material prosecution witnesses**,** are read in their entirety, same clearly suggest that none of the prosecution witnesses have specifically stated anything with regard to rash and negligent driving. High speed alone cannot be the sole criteria to determine rashness and negligence.

18. In the instant case, this Court was unable to lay its hand to specific evidence, if any, led on record by the prosecution suggestive of the fact that the vehicle at that relevant time was being driven rashly and negligently. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in **Braham Dass** v. **State of Himachal Pradesh,** (2009) 3 SCC (Cri) 406, which reads as under:

> "6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for the respondent on the other

hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.

8. Section 279 deals with rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279IPC is not negligence. Similarly in Section 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."

19. The Hon'ble Apex Court in case titled **State of Karnataka** v. **Satish**, 1998 (8) SCC 493, has also observed as under:

"1. Truck No. MYE3236 being driven by the respondent turned turtle while crossing a "nalla" on 25111982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was chargesheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338and 304A IPC and sentenced to various terms of imprisonment. The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.

2. We have examined the record and heard learned counsel for the parties.

3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.

4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a

> criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.
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> 5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

20. Careful perusal of aforesaid judgment clearly suggests that there cannot be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur*.

21. Reliance is also placed on judgment this Court in **State of H.P.** Vs. **Manpreet Singh**, 2008 (HP) 538, relevant para whereof is as under:

> "4. Legally, in a case of rash and negligent act, if the prosecution is able to prove the essential ingredients of the offence, the onus to disprove it shifts upon the respondent to show that he had taken due care and caution to avoid the accident. It is an admitted fact that said Shri Daya Ram had died in the accident caused by the respondent but still it is incumbent upon the prosecution to prove that it was the rash and negligent act of driving to conclude the rash and negligent driving of the respondent. In other words, it must be proved that the rash or negligent act of the accused was causa causans and not causa sin qua non (cause of the proximate cause). There must be some nexus between the death of a person with rash or negligent act ofthe accused. According to Rupinder Parkash (PW4) deceased was hit by the motor cycle which was in a high speed but the speed is not criteria to hold the act as rash or negligent. The respondent in his statement under Section 313 of the Code of Criminal Procedure has explained that on seeing the deceased, he had blown the horn and he (deceased) stopped on the road. As soon as he reached near him, he immediately tried to cross the road and got hit. His version has been duly corroborated by Hardeep Singh (DW1) who was a pillion rider with him.

> Ajay Kumar (PW1) has admitted this version that the respondent had blown the horn and Daya Ram on hearing it, had stopped for a while. In these circumstances, if a person suddenly crosses the road, without taking note of the approaching vehicle and its driver may not be in a position to save the accident, it will not be possible to hold the Driver guilty of the offence. In the instant case, the deceased knowing fully well at least the approaching vehicle stopped on hearing the horn while crossing the road but when the motor cycle reached near him, he darted before it and the accident took place. Thus in my opinion the prosecution could not prove the offence charged against the respondent beyond reasonable doubt that the respondent was driving the vehicle rashly or negligently. Therefore, in these circumstances, the learned trial Court had rightly acquitted the respondent of the charges framed against him. As such, no interference in the impugned judgment of acquittal is called for. Accordingly the appeal is dismissed. The respondent is discharged of his bail bounds entered upon by him at any stage of the trial."

22. This Court is also fully conscious of judgment of Hon'ble Apex Court in ***State of Punjab*** *versus* ***Saurabh Bakshi 2015 (5) SCC 182,*** wherein it has been held that no leniency should be shown to reckless drivers. The Hon'ble Apex Court has observed as follows:-

> "25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

23. There can not be any disagreement with the concern expressed by the Hon'ble Apex Court in the aforesaid judgment with regard to carelessness /recklessness of the drivers especially under the influence of alcohol. But in the instant case, as has been discussed above, prosecution is not able to prove beyond reasonable doubt that the ill fated vehicle was being driven by accused rashly and negligently, rather, version put forth by prosecution appears to be untrustworthy in view of material contradictions in the statements of the alleged eye witnesses, and as such, this Court sees no application of aforesaid law laid down by the Apex Court in the instant case.

24. This court in **State of Himachal Pradesh** vs. **Dilwar Singh** 2017(3) Him. L.R. 1938, has held as under:

> "11. After having carefully perused statements of PW-4 and PW-7, conclusion can be safely drawn by this Court that even PW-6 and PW-8, had no occasion to witness the accident with their eyes, rather, they came at the spot after noise made by PW-7. It is not understood when PW-6 and PW-8 had not witnessed the accident, with their eyes, how they could chase offending vehicle allegedly being driven by respondent, because, at the relevant time, none of the prosecution witnesses have stated that they had disclosed registration number of offending vehicle to PW-6 and PW-8. Even PW-1 and PW-5 nowhere stated that PW-6 and PW-8 were informed by them with

regard to accident especially about registration number of offending vehicle, as such, story put forth by the prosecution does not appear to be trustworthy.

12. At the cost of repetition, it may be stated that it has nowhere come in the statement of any of the prosecution witnesses, who had an occasion to see the accident with their eyes, that immediately after accident, they informed PW-6 and PW-8 with regard to registration number of offending vehicle as well as accused, as such, story of accused being apprehended by PW-6 and PW-8, is not worth lending any credence, because, admittedly, they had no prior knowledge with regard to involvement of offending vehicle as well as accused in the accident.

13. Leaving everything aside, this Court was unable to find anything in the statements of prosecution witnesses, from where it could be inferred that vehicle was being driven rashly and negligently that too at high speed, by the respondent, as such, this Court sees substantial force in the defence taken by the accused in his statement recorded under Section 313 CrPC that he had not struck vehicle against Shri Milkhi Ram and Kurpal Ram.

14. Evidence discussed herein above is sufficient to hold that in given facts and circumstances, two views are possible in the present case and as such present, accused is entitled to the benefit of doubt. In the present case, prosecution story does not appear to be plausible/ trustworthy and as such same cannot be relied upon. In this regard, I may refer to the judgment passed by the Hon'ble Apex Court reported in **State of UP** versus **Ghambhir Singh**, AIR 2005 (92) SCC 2440, where Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> "6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, he evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred.""

25. Thus, in view of the above judgment, if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred. In the case at hand, when identity of the accused as driver of the offending vehicle at the time of accident has not been established, he deserves to be extended benefit of doubt.

26. In view of above, this Court finds no reason to interfere with judgment dated 23.6.2009 passed by learned Additional Sessions Judge (Fast Track Court), Dharamshala, District Kangra, Himachal Pradesh in Crl. Appeal No. 24-P/2007, which is accordingly

upheld. In result, the appeal fails and is accordingly dismissed. Bail bonds, if any, furnished by accused are discharged. Pending applications, if any, are disposed of.

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

Prem Singh ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1154 of 2019
Decided on July 4, 2019

Code of Criminal Procedure, 1973- Section 439– Regular bail- Grant of– Prosecution alleging accused involved in theft of Charcoal drums belonging to complainant, a Government contractor and resisting bail on ground of accused being involved in theft case previously also– Held, drums were recovered from isolated place where locked vehicle of co-accused was parked– Accused arrested on next day of offence– Investigation is complete- Guilt of accused in previous case yet to be established– Application allowed– Accused ordered to be released on conditional bail. (Paras 5 to 7 & 13)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner: Mr. Ajay Shandil, Advocate.
For the respondent: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.
HC Jasbeer Singh, No. 79, I/O PP Kuthar, Police Station, Kasauli, District Solan, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.439 CrPC, prayer has been made on behalf of the petitioner for grant of regular bail in case FIR No. 28, dated 14.5.2019, under Ss. 379 and 34 IPC registered at Police Station, Kasauli, District Solan, Himachal Pradesh.

2. Sequel to order dated 20.6.2019, HC Jasbeer Singh has come present with the record. Mr. Kunal Thakur, learned Deputy Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Record made available to this Court reveals that on 30.5.2019, complainant Sanjay Garg, Contractor registered with HP PWD, lodged a complaint that his eleven drums of Charcoal have been stolen by some person from his tarring plant at Jepla. He further

alleged that subsequently ten drums of Charcoal came to be recovered near Pick-up bearing registration No. HP-62-3303 at place Badlag. On the basis of aforesaid complaint having been made by the complainant, a formal FIR as detailed herein above, came to be lodged against the bail petitioner and co-accused Shiv Kumar, under S.379 read with S.34 IPC at Police Station Kasauli. Record further reveals that prior to lodging of aforesaid complaint by the complainant, Police had laid a *Naka* near Badlag-Chandi bifurcation and made an attempt to stop the Pick-up bearing registration No. HP-62-3303, but the driver of the said vehicle crashed the *Naka* and ran away with the vehicle as well as drums of Charcoal. Ultimately the Police party found the aforesaid vehicle parked at an isolated place on the link road at Chorang. Although driver and other occupant of the vehicle, unloaded the drums of Charcoal and fled away from the spot after locking the vehicle in question. On 14.5.2019, Police arrested both the accused and since then they are behind the bars.

4. Mr. Kunal Thakur, learned Deputy Advocate General, on instructions of the Investigating Officer, fairly states that the investigation in the case is complete and no recovery is to be made from the bail petitioner. Learned Deputy Advocate General further states that the co-accused Shiv Kumar already stands enlarged on bail. While opposing prayer made in the present petition for grant of bail, Mr. Thakur, learned Deputy Advocate General contends that the present bail petitioner is a habitual offender because within a period of six months, second case under S.379 IPC has been registered against him, as such, he does not deserve to be shown any leniency.

5. Having heard learned counsel for the parties and perused the material available on record, this court finds that ten drums of Charcoal came to be recovered from an isolated place near Link Road at Chorang. Though the vehicle in question was found parked near the Drums allegedly stolen by the accused, but it is not in dispute that the bail petitioner as well as co-accused were not apprehended from the spot, rather, they came to be arrested subsequently. Whether ten drums of Charcoal were stolen by the bail petitioner or not, is a question of trial and guilt, if any, of the bail petitioner is yet to be proved by the prosecution by leading cogent and convincing evidence. Vehicle allegedly used for carrying stolen drums of Charcoal belongs to another co-accused, Shiv Kumar, who stands already enlarged on bail.

6. Though aforesaid aspects of the matter are to be decided by the learned trial Court in the totality of evidence adduced before it by the prosecution, but taking note of the aforesaid glaring aspects as well as fair statement made by the learned Deputy Advocate General that the investigation is complete and nothing is required to be recovered from the bail petitioner, this court sees no reason to curtail the freedom of the bail petitioner for an indefinite period during trial.

7. No doubt, record/status report reveals that prior to case at hand, one case was registered against the bail petitioner under S.379 IPC, but guilt, if any, of the bail petitioner is yet to be proved in that case. Moreover, there is nothing on record suggestive of the fact that the investigating agency had moved the court for cancellation of bail granted to the present bail petitioner in earlier case, as such, this court sees no impediment in accepting the prayer made in the instant application.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
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> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

9. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The

object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

11 In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has

> to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

13. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

14. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Anil Kumar …Petitioner
Versus
State of Himachal Pradesh …Respondent

Cr. MP (M) No. 1161 of 2019
Decided on July 5, 2019

Code of Criminal Procedure, 1973- Section 439– Regular bail– Grant ofin a gang rape case– Prosecution objecting to grant of bail on ground of severity of offences– Held, on facts, victim herself accepted offer of one of the accused to have liquor and food with him in his house– All consumed liquor there together– Wife of accused also present in house– Highly improbable that wife of accused would sit outside room for hours together where victim was being raped– Prosecution story highly doubtful– Investigation is complete– Nothing is to be recovered from accused and there is no material suggesting that he would tamper with evidence if released on bail– Petition allowed– Accused ordered to be released on regular bail subject to conditions. (Paras 3, 4, 6 & 7)

Cases referred:
Manoranjana Sinh alias Gupta vs.CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner	Mr. Rajiv Rai, Advocate.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General. SI Jeet Ram, Station House Officer, Police Station, Sangrah, Sirmaur, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner, Anil Kumar, who is behind the bars since 27.3.2019, has approached this court in the instant proceedings filed under S.439 CrPC, seeking therein regular bail in FIR No. 29, dated 27.3.2019 under Ss. 376D, 342, 323 and 506 IPC, registered at Police Station Sangrah, Sirmaur, Himachal Pradesh.

2. Sequel to order dated 21.6.2019, SI Jeet Ram has come present with the record. Mr. Kunal Thakur, learned Deputy Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Perusal of record/status report reveals that on 27.3.2019, victim-prosecutrix (name withheld) lodged a complaint at Police Station Sangrah, District Sirmaur, Himachal Pradesh, alleging therein that on 25.3.2019, while she was going to cut grass at 2.30-3.00 pm, accused Anil, invited her to his house offering her grass and wine. It is further alleged that the victim-prosecutrix, on the askance of accused went to his house, where his wife and another accused namely Ashok Kumar were present. Wife of Anil Kumar provided food to victim-prosecutrix and thereafter all the persons present therein consumed liquor. It is alleged that wife of Anil Kumar, went to bring *Biri* from the nearby shop. In the meantime, bail petitioner incited co-accused Ashok Kumar to forcibly commit sexual assault upon the victim-prosecutrix. As per version of the victim-prosecutrix, bail petitioner forcibly unclothed her and pushed Ashok Kumar over her, who subsequently sexually assaulted the victim-prosecutrix against her wishes. It is also alleged that the bail petitioner and co-accused kept victim-prosecutrix in wrongful confinement for 3-4 hours. In the evening, accused allowed victim-prosecutrix to go to her house, who thereafter did not disclose incident to her family members on the same day, but, on the next day, she disclosed entire incident to her sister-in-law. FIR, as taken note herein above, came to be lodged against bail petitioner on 27.3.2019 and since then, he is behind the bars.

4. Mr. Kunal Thakur, learned Deputy Advocate General, while fairly admitting the factum with regard to filing of *Challan* in the competent Court of law, contends that keeping in view the gravity of the offence alleged to have been committed by bail petitioner, he does not deserve any leniency, as such, prayer having been made on his behalf deserves to be rejected.

5. Mr. Rajiv Rai, learned counsel for the bail petitioner, while referring to the record, contends that no offence much less offence under S.376 IPC is made out against the bail petitioner, because, own statement of victim-prosecutrix clearly reveals that she, of her own volition, without there being any external pressure, joined the company of accused. He further contends that the story put forth by the victim-prosecutrix cannot be believed being highly improbable, because, as per her own statement, at the time of alleged incident, wife of the accused Anil Kumar (bail petitioner) was also present. Mr. Rai further states that there is nothing in the statement of the victim-prosecutrix that she made any attempt to raise hue and cry at the time of alleged incident, as such, story put forth by the prosecution is highly unbelievable.

6. Having heard learned counsel for the parties and perused the material available on record, especially statement of victim-prosecutrix recorded under S.164 CrPC, this court finds force in the argument of Mr. Rai that the story put forth by the prosecution is highly improbable. As per own statement of the victim-prosecutrix, she, on the askance of the bail petitioner, went to his house and thereafter consumed liquor and food with the persons present in the room. As per statement of victim-prosecutrix, wife of accused/bail petitioner Anil Kumar was also present on the spot but in the subsequent narration of events, there is no mention, if any, of wife of accused/bail petitioner, who had allegedly gone to fetch *Biri*. Interestingly, as per the statement of victim-prosecutrix made under S.164 CrPC, wife of the bail petitioner, after fetching *Biri* kept on sitting outside the room, where allegedly victim-prosecutrix was being raped by bail petitioner. Prosecution story though is yet to be proved on the basis of evidence collected on record by the investigating agency, but having perused the story put forth by the victim-prosecutrix, same appears to be untrustworthy. It cannot be accepted that a lady, whose husband is with some other lady in a room, would sit idle outside the same room, that too for 3-4 hours. Moreover, close scrutiny of the statement of victim-prosecutrix under S.164 CrPC, certainly compels this

court to infer that the victim-prosecutrix, of her own volition, had come to the house of bail petitioner, that too accepting offer to have liquor alongwith the accused.

7. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court in the totality of evidence collected on record by the investigating agency, but having noticed aforesaid glaring aspects of the matter, this court sees no reason to let the bail petitioner incarcerate in jail, for an indefinite period, especially when nothing is required to be recovered from him. Further, there is nothing to suggest that the bail petitioner, in the event of his being enlarged on bail, may tamper with the evidence or dissuade witnesses from deposing against him or flee from justice, as such, prayer made for grant of regular bail can be accepted.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent

status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

9. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

11. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496,has laid down the following principles to be kept in mind, while deciding petition for bail:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing, if released on bail;
- (v) character, behaviour, means, position and standing of the accused;
- (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail.

13. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

> (a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

14. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Sh. Jai Singh ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1229 of 2019
Decided on July 5, 2019

Code of Criminal Procedure, 1973–Section 438– Pre-arrest bail– Grant of- Circumstances– Accused involved in illicit transit of Khair wood in trucks in excess of what was permitted under transit permit seeking pre-arrest bail– State contesting petition on ground that accused was involved in commission of serious offences and demarcation of land from where Khair trees were cut, yet to be conducted– Held, on facts, custody of accused not required by investigating agency– Nothing is to be recovered from him- There is no allegation that in case of his release on bail, he will flee away or tamper with prosecution evidence– Petition allowed– Conditional bail granted. (Paras 3 to 6)

Cases referred:

Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner Mr. Suneet Goel, Advocate.
For the respondent Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.

ASI Rajpal, I/O, Police Station, Majra, Sirmaur, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.438 CrPC, bail petitioner namely Jai Singh, has approached this court for grant of pre-arrest bail in FIR No. 95, dated 26.6.2019, under Ss. 379/34 IPC and Ss. 41 and 42 of the Indian Forest Act, registered at Police Station, Majra, District Sirmaur, Himachal Pradesh.

2. Sequel to order dated 28.6.2019, whereby bail petitioner was ordered to be enlarged in the event of his arrest in the aforesaid FIR, subject to furnishing personal bonds in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of the arresting officer, ASI Rajpal has come present with the record. Mr. Sanjeev Sood, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Perusal of record/status report reveals that on 25.6.2019, Police having received an information that Trucks bearing registration Nos. HP71-2093 and NL02N-6711, carrying *Khair* wood are coming from Dhaula Kuan to Paonta Sahib, stopped the aforesaid trucks by laying a *Naka* on NH07 and recovered 2093 logs of *Khair* from Trucks bearing registration Nos. HP71-2093 and NL02N-6711. Though permits were produced by the occupants of vehicles, bearing Nos. 798 and 799, but on suspicion, police party contacted DFO concerned. On next day, the wood was got inspected and it was found that the *Khair* wood loaded in both the trucks exceeded the volume permitted in the permits and only a few of the logs were hammered. Accordingly, FIR, as detailed above, came to be registered against the bail petitioner, who in fact owned the Depot from where the *Khair* wood was loaded

4. Mr. Sanjeev Sood, learned Additional Advocate General, while fairly admitting that no recovery is to be made from the bail petitioner, contended that keeping in view the gravity of the offence alleged to have been committed by bail petitioner, he does not deserve any leniency, as such, prayer having been made on his behalf deserves to be rejected. Mr. Sood, learned Additional Advocate General further contended that demarcation of the land from where wood was cut, is yet to be carried out. Mr. Sood further raised an apprehension that in the event of bail petitioner being enlarged on bail, he may tamper with prosecution evidence or may dissuade the witnesses from deposing him, as such, prayed for rejection of the prayer for grant of bail. However, Mr. Sood stated that in case this court intends to grant bail to the bail petitioner, he may be imposed strict conditions so as to ensure presence of the bail petitioner during investigation and trial.

5. Having heard learned counsel for the parties and perused the material available on record, this court finds that no recovery is to be effected from the bail petitioner and as such his custodial interrogation is not required and further, no fruitful purpose will be served by keeping the bail petitioner behind the bars for an indefinite period, especially when his guilt has not been proved.

6. Though, the question with regard to involvement of the bail petitioner in the offences alleged against him is to be decided by the learned trial Court in the totality of evidence collected on record by the investigating agency, but in view of the fair statement

made by learned Additional Advocate General that nothing is required to be recovered from the bail petitioner and further that the bail petitioner has joined investigation, this court sees no reason to let the bail petitioner incarcerate the bail petitioner in jail, for an indefinite period, especially when nothing is required to be recovered from him. Further, there is nothing to suggest that the bail petitioner, in the event of his being enlarged on bail, may tamper with the evidence or dissuade witnesses from deposing against him, or flee from justice, as such, prayer made for grant of pre-arrest bail can be accepted. In any case, apprehension raised by learned Additional Advocate General can be met with by imposing stern conditions upon the bail petitioner.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even

> Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
>
> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

8. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

9. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

10. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

11. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioner has carved out a case for himself and as such, order dated 28.6.2019 is made absolute, subject to bail petitioner furnishing fresh bail bonds in the sum of Rs.50,000/- (Rs. Fifty Thousand) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court/Investigating Officer, besides the following conditions:

> (a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

13. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Sonu Deshta ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1182 of 2019
Decided on July 8, 2019

Code of Criminal Procedure, 1973– Section 439**– Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act, 1989**- Section 3(1)(s)– Regular bail– Grant of- Circumstances- Held, on facts, accused denying his involvement in commission of crime– He already having made himself available for investigation– Investigation is complete and only the vehicle owned by accused required to be impounded by police– Petition allowed– Accused granted bail subject to conditions. (Paras 5 to 7)

Cases referred:

Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner	Mr. Manoj Pathak, Advocate.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General. Inspector Vikas Sharma, Police Station, Rohru, District Shimla, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.439 CrPC, prayer has been made on behalf of the petitioner for grant of regular bail in case FIR No. 69, dated 18.6.2019 under Ss. 341, 323 and 506 IPC and S.3(1)(s) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, registered at Police Station, Rohru, District Shimla, Himachal Pradesh.

2. Sequel to order dated 24.6.2019, Inspector Vikas Sharma, has come present with the record. Mr. Kunal Thakur, learned Deputy Advocate General, has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Before adverting to the factual matrix of the case, it may be noticed that on 24.6.2019, bail petitioner surrendered before this Court and thereafter, this court, after taking him into custody, released him on bail in the FIR detailed above, subject to furnishing of personal bonds in the sum of Rs.50,000/- subject to the satisfaction of learned Additional Registrar (Judicial). Vide aforesaid order, this court also directed the bail petitioner to join the investigation as and when required by the investigating agency.

4. Mr. Kunal Thakur, learned Deputy Advocate General, on instructions of the Investigating Officer, fairly states that though pursuant to order dated 24.6.2019, bail petitioner has joined the investigation, but till date, he has not made available the Swift car bearing registration No. HP-10A-7705. However, aforesaid statement having been made by learned Deputy Advocate General has been seriously disputed by learned counsel for the bail petitioner. Mr. Manoj Pathak, Advocate, on the instructions of his client, who is present in the court, states that he owns Car bearing registration No. HP-10B-7705 and he was ready and willing to supply keys of the vehicle to the Dy.SP., but he refused to take the same.

5. Mr. Kunal Thakur, learned Deputy Advocate General states that investigation in the case is almost complete, save and except the recovery of vehicle in which bail petitioner alongwith other accused was traveling at the time of alleged incident.

6. Close scrutiny of the record reveals that on 18.6.2019, complainant Raman Resta, filed a complaint at Police Station, Rohru, alleging therein that on that day, at 9.30 pm, when he was going towards Samholi alongwith his friend Dinesh, his vehicle collided with another vehicle i.e. Trax Billu Badshah Rantari. Complainant further alleged that at that time, a Swift Car came on the spot and occupants of the car started hurling abuses at the complainant. Complainant specifically alleged that the occupants of the car not only abused him but also called him by his caste. On the basis of aforesaid complaint, a formal FIR, as detailed herein above, came to be lodged against the bail petitioner.

7. Having heard learned counsel for the parties and perused the material available on record, this Court finds that the investigation in the case is complete, save and except, the car, registration number whereof has been taken note herein above, remains to be recovered from the bail petitioner, who states that at the time of alleged incident, he was neither driving the said Swift Car, nor was sitting in the same, however, he is ready and willing to hand over keys of car bearing registration No. HP-10B-7705. Since the bail petitioner has already made himself available for investigation, this court sees no reason for

his custodial interrogation, as such, prayer made in the application at hand deserves to be allowed. Moreover, guilt, if any, of the bail petitioner is yet to be established on record by the prosecution by leading cogent and convincing evidence, as such, no fruitful purpose would be served in case freedom of bail petitioner is curtailed for an indefinite period during trial.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

9. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

11. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while

dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

13. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 24.6.2019 is made absolute, subject to bail petitioner furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

14. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Sh. Hitesh Sharma ....Petitioner
Versus
The State of H.P. and another ....Respondents

CrMMO No. 35 of 2019
Decided on: July 9, 2019

Code of Criminal Procedure, 1973- Section 482– Inherent powers– Exercise of– Quashing of FIR - Held, cases which predominantly are of civil character particularly arising out of commercial transactions, matrimonial disputes and strained family relations can be quashed pursuant to bonafide settlement between parties– Parties closely related to each other– No useful purpose would be severed by keeping the proceedings to continue– Settlement voluntarily arrived at by parties- Admitting correctness of settlement before High Court also– FIR registered for criminal trespass and intimidation quashed. (Paras 10 & 14)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497

Gian Singh vs. State of Punjab and anr., (2012) 10 SCC 303

Narinder Singh and others vs. State of Punjab and another, (2014)6 SCC 466

Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others vs. State of Gujarat and Another, Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016

For the petitioner: Mr. Peeyush Verma, Advocate.

For the respondents: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for respondent No.1.
Mr. Arun Kumar Verma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

<u>Sandeep Sharma, J.</u> *<u>(Oral)</u>*

By way of present petition filed under S.482 CrPC, petitioner has prayed for quashing of FIR No. 59, dated 26.3.2018 under Ss. 452, 427 and 506 IPC, registered at Police Station, Dhalli, Shimla, Himachal Pradesh.

2. Facts, in brief, are that FIR detailed herein above came to be lodged at the behest of respondent No.2/complainant, Smt. Urmila Devi on 26.3.2018 at Police Station, Dhalli, alleging therein that petitioner, who is otherwise related to her, trespassed into her property without there being any legal authority and thereafter caused damage to the same. After completion of investigation, Police presented *Challan* in the court of learned Chief Judicial Magistrate Shimla and same is pending adjudication.

3. During pendency of the proceedings before the learned trial Court, petitioner and respondent No.2 have arrived at a compromise *inter se* them vide compromise dated 8.7.2019 (Ext. P-2).

4. On 13.5.2019, learned counsel representing the parties, while inviting attention of this Court to compromise placed on record, prayed that FIR as well as consequential proceedings pending in the learned trial Court may be ordered to be quashed and set aside in view of amicable settlement arrived *inter se* parties. This court, with a view to ascertain the genuineness and correctness of the compromise placed on record, directed the parties to remain present in court.

5. At this stage, Mr. Arun Kumar Verma, learned counsel for respondent No.2 also placed on record a copy of detailed compromise arrived *inter se* parties, to demonstrate that in light of terms and conditions of the compromise, both the parties have now mutually agreed to resolve their dispute.

6. Today, the parties have come present. Smt. Urmila Devi, respondent No.2/complainant on oath stated that she of her own volition and without there being any external pressure has entered into compromise with the petitioner, whereby she and petitioner have resolved to settle their dispute amicably inter se them. She also states that the compromise placed on record bears her signatures. She specifically stated that in view of compromise arrived *inter se* parties, she shall have no objection in case FIR detailed herein above is quashed and set aside alongwith consequential criminal proceedings pending in the court of learned Chief Judicial Magistrate, Shimla. Her statement is taken on record.

7. Mr. Kunal Thakur, learned Deputy Advocate General, having perused compromise placed on record as well as statement having been made by respondent No.2, fairly states that no fruitful purpose will be served in case FIR in question, lodged at the behest of respondent No.2 is allowed to continue, as such, prayer made in the petition for quashing the same, may be allowed.

8. The question which now needs consideration is whether the FIR at hand can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

9. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
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> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
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> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
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> (i) ends of justice, or
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> (ii) to prevent abuse of the process of any Court.
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> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
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> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.
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> 29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.
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> 29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.
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> 29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its

decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

10. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

11. In the case at hand, the dispute is more of a civil dispute, which is between relatives due to some misunderstanding.

12. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
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> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
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> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary

to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

13. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc.

therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

14. Since the matter stands compromised between complainant and accused, no fruitful purpose would be served in case proceedings initiated at the behest of respondent No.2 are allowed to continue. Moreover, the complainant has compromised the matter and she is no longer interested in carrying on with the criminal proceedings against the accused. Otherwise also, possibility of conviction in the case is bleak and remote, since complainant herself is not interested in carrying on with the criminal proceedings initiated at her behest.

15. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 59, dated 26.3.2018 under Ss. 452, 427 and 506 IPC, registered at Police Station, Dhalli, Shimla, Himachal Pradesh against petitioner and consequential proceedings pending before learned Chief Judicial Magistrate, Shimla are quashed and set aside. Petitioner is acquitted of the offences levelled against him in the aforesaid FIR.

16. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Sh. Nirmal Kumar and others ....Petitioners
Versus
The State of H.P. and another ....Respondents

CrMMO No. 24 of 2019
Decided on: July 9, 2019

Code of Criminal Procedure, 1973– Section 482– Inherent powers– Exercise of- Quashing of FIR– Circumstances- Held- Criminal cases which are overwhelmingly and predominantly of civil nature particularly arising out commercial transactions, matrimonial or family disputes may be quashed in exercise of powers conferred by Section 482 of Code pursuant to amicable settlement of parties involved- FIR registered against petitioners on complaint of complainant that petitioner No.1 illegally handed over trees to petitioners No. 2 & 3 for extraction of resin without any authority from her– Parties arriving at compromise voluntarily and admitting its correctness before High Court also– Petition allowed– FIR quashed. (Paras 2, 10 & 14)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497
Gian Singh vs. State of Punjab and anr., (2012) 10 SCC 303
Narinder Singh and others vs. State of Punjab and another, (2014)6 SCC 466

For the petitioners: Mr. Peeyush Verma, Advocate.
For the respondents: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for respondent No.1.
Mr. Arun Kumar Verma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, petitioners have prayed for quashing of FIR No. 25, dated 2.2.2018 under Ss. 420, 465, 467, 468 and 471 IPC, registered at Police Station, Dhalli, Shimla, Himachal Pradesh and consequential proceedings pending before learned Judicial Magistrate 1st Class(4), Shimla, Himachal Pradesh.

2. Facts in brief are that FIR detailed herein above came to be lodged at the behest of respondent No.2/complainant, Smt. Urmila Devi on 2.2.2018 at Police Station, Dhalli, who alleged that petitioner No.1, who otherwise is related to her, handed over trees to petitioners No.2 and 3 for extraction of resin without any authority. After completion of investigation, Police presented *Challan* in the court of learned Judicial Magistrate 1st Class (4), Shimla and same is pending adjudication.

3. During pendency of the proceedings before the learned trial Court, petitioner No.1 and respondent No.2 have arrived at a compromise *inter se* them vide compromise dated 8.7.2019 (Ext. P-2).

4. On 13.5.2019, learned counsel representing the parties, while inviting attention of this Court to compromise placed on record, prayed that FIR as well as consequential proceedings pending in the learned trial Court may be ordered to be quashed and set aside in view of amicable settlement arrived *inter se* parties. This court, with a view to ascertain the genuineness and correctness of the compromise placed on record, directed the parties to remain present in court.

5. At this stage, Mr. Arun Kumar Verma, learned counsel for respondent No.2 also placed on record a copy of detailed compromise arrived *inter se* parties, to demonstrate that in light of terms and conditions of the compromise, both the parties have now mutually agreed to resolve their dispute.

6. Today, the parties have come present. Smt. Urmila Devi, respondent No.2/complainant on oath stated that she of her own volition and without there being any external pressure has entered into compromise with the petitioner No.1, whereby she and petitioner No.1 have resolved to settle their dispute amicably inter se them. She also states that the compromise placed on record bears her signatures. She specifically stated that in view of compromise arrived *inter se* parties, she shall have no objection in case FIR detailed herein above is quashed and set aside alongwith consequential criminal proceedings

pending in the court of learned Judicial Magistrate 1st Class (4), Shimla. Her statement is taken on record.

7. Mr. Kunal Thakur, learned Deputy Advocate General, having perused compromise placed on record as well as statement having been made by respondent No.2, fairly states that no fruitful purpose will be served in case FIR in question, lodged at the behest of respondent No.2 is allowed to continue, as such, prayer made in the petition for quashing the same, may be allowed.

8. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

9. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
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> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the

Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307

IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

10. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

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12. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

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>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not

private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

13. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of

> simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

> "... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."

> "...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system..."

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.”

14. Since the matter stands compromised between complainant and accused, no fruitful purpose would be served in case proceedings initiated at the behest of respondent No.2 are allowed to continue. Moreover, the complainant has compromised the matter and she is no longer interested in carrying on with the criminal proceedings against the accused. Otherwise also, possibility of conviction in the case is bleak and remote, since complainant herself is not interested in carrying on with the criminal proceedings initiated at her behest.

15. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon’ble Apex Court (supra), FIR No. 25, dated 2.2.2018 under Ss. 420, 465, 467, 468 and 471 IPC, registered at Police Station, Dhalli, Shimla, Himachal Pradesh and consequential proceedings pending before learned Judicial Magistrate 1st Class (4), Shimla, are quashed and set aside. Petitioner No.1 is acquitted of the offences levelled against him in the aforesaid FIR.

16. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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BEFORE HON’BLE MR. JUSTICE SANDEEP SHARMA, J.

Raj Kumar …Petitioner

Versus

State of Himachal Pradesh …Respondent

Cr. MP (M) No. 1118 of 2019
Decided on July 9, 2019

Code of Criminal Procedure, 1973- Section 438– Pre-arrest bail– Grant of- Circumstances– Petitioner seeking bail in case registered against him for fraud and forgery- Held, on facts, investigation is complete– Custody of accused is not required for further investigation– Pre-arrest bail granted subject to stringent conditions. (Paras 3 to 5 and 11)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Sharma, Advocate.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General. ASI Dilu Ram, I/O, Police Station, Kumarsain, Shimla, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.438 CrPC, prayer has been made on behalf of the bail petitioner, for grant of pre-arrest bail in FIR No.7, dated 17.1.2019 under Ss.420, 467 and 468 IPC registered at Police Station, Kumarsain, District Shimla, Himachal Pradesh.

2. Pursuant to order dated 28.6.2019, ASI Dilu Ram has come present with the record. Mr. Sanjeev Sood, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Mr. Sanjeev Sood, learned Additional Advocate General, on the instructions of the Investigating Officer, who is present in the court, fairly states that the bail petitioner has joined the investigation and is fully cooperating. Learned Additional Advocate General further states that nothing is required to be recovered from the bail petitioner, however, in case this Court intends to grant bail to the bail petitioner, he may be put to stringent conditions to ensure that he joins the investigation as and when required by the investigating agency.

4. Since the bail petitioner has already joined the investigation and is fully cooperating with the investigating agency, this court sees no reason to send the bail petitioner for custodial interrogation, especially when investigation is complete and nothing is required to be recovered from the bail petitioner.

5. Otherwise also, guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution, as such, it would not be appropriate to curtail the freedom of bail petitioner for an indefinite period, especially when nothing remains to be

recovered from him. Apprehension expressed by learned Additional Advocate General that in event of bail petitioner being enlarged, he may tamper with the evidence, can be best met by putting bail petitioner to stringent conditions, as has been fairly admitted by learned counsel for the bail petitioner.

6. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to Police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

7. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

8. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

9. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while

dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

10. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

11. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 28.6.2019 is made absolute, subject to the bail petitioner furnishing fresh bail bonds in the sum of Rs.25,000/- (Rs. Twenty Five Thousand) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

12. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

13. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Hargopal and another ….Petitioners
Versus
State of H.P. and others ….Respondents

Cr.MMO No. 334 of 2019
Decided on: July 10, 2019

Code of Criminal Procedure, 1973- Section 482- Inherent powers – Exercise of– Quashing of FIR – Circumstances- Held, criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves– Parties amicably settled their dispute – Settlement is voluntary and parties admitting its correctness before High Court also– Chances of conviction bleak– No fruitful purpose would be served by continuing proceedings– FIR quashed- Petition allowed. (Paras 3 to 5, 9 & 14)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors., (2013(11 SCC 497
Gian Singh vs. State of Punjab and anr., (2012) 10 SCC 303
Narinder Singh and others vs. State of Punjab and another, (2014)6 SCC 466

For the petitioners: Mr. Sanjeev K. Suri, Advocate.
For the respondents: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for respondents No.1 to 3.
Mr. Mohamad Aamir, Advocate, for respondents No. 4 to 8.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, petitioners have prayed for quashing of FIR No. 62, dated 10.6.2015, under Ss. 341, 147, 149, 323 and 427 IPC registered at Police Station Gagret, District Una, Himachal Pradesh, on the basis of compromise arrived *inter se* petitioners No.1 and 2 and respondents No. 4 to 8 (page-13 of the paper-book).

2. Having perused the contents of compromise, placed on record, this court, vide order dated 19.6.2019, summoned both the petitioners in the court so that genuineness and correctness of the compromise could be ascertained. Pursuant to order dated 19.6.2019, both the petitioners alongwith respondents No.4 to 8, who are represented by Mr. Mohamad Aamir, Advocate, have come present in court.

3. Facts, as emerge from the record are that FIR detailed herein above, came to be lodged at the behest of petitioner No.1, who alleged that on the date of alleged incident, i.e. 10.6.2015, respondents No.4 to 8 obstructed their way for no reason and thereafter gave beatings to them. On the basis of aforesaid allegations, FIR in question came to be lodged against respondents No. 4 to 8.

4. Police after investigation, presented *Challan* in the competent Court of law i.e. Judicial Magistrate 1st Class Court No.2, Amb, Una, Himachal Pradesh, which is pending for adjudication. During the pendency of the proceedings before court below, petitioners and respondents No. 4 to 8 mutually agreed to resolve their dispute amicably inter se them and accordingly they entered into compromise in question, which is available at page 13 of the paper book. Present petition on behalf of petitioners has been filed before this court for quashing the FIR in question alongwith consequential proceedings i.e. Cr. Case No. 160 of 2015 pending before Judicial Magistrate 1st Class, Court No.2, Amb, Una, Himachal Pradesh.

5. Both the petitioners, on oath, stated before this court that they have entered into compromise of their own volition without there being any external pressure, whereby they have resolved to settle their dispute amicably inter se them and they have no objection in case, FIR No. 62, dated 10.6.2015, under Ss. 341, 147, 149, 323 and 427 IPC was registered at Police Station Gagret, District Una, Himachal Pradesh alongwith consequential proceedings i.e. Cr. Case No. 160 of 2015, pending before Judicial Magistrate 1st Class, Court No.2, Amb, District Una, Himachal Pradesh are quashed and set aside and respondents No.4 to 8 are acquitted of the offences alleged against them.

6. Mr. Kunal Thakur, learned Deputy Advocate General, having perused compromise placed on record as well as statements having been made by the petitioners, fairly states that no fruitful purpose will be served in case FIR in question, lodged at the behest of petitioner No.1 is allowed to continue, as such, prayer made in the petition for quashing the same, may be allowed.

7. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

8. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.
>
> 29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.
>
> 29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.
>
> 29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its

decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

10. In the case at hand, the dispute is more of a civil dispute, which is between relatives due to some misunderstanding.

11. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary

to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

12. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc.

therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

13. Since the matter stands compromised between petitioners and respondents No.4 to 8, no fruitful purpose would be served in case proceedings initiated at the behest of petitioner No. 1 are allowed to continue. Moreover, the complainant/petitioner No.1 has compromised the matter and he is no longer interested in carrying on with the criminal proceedings against respondents No.4 to 8 Otherwise also, possibility of conviction in the case is bleak and remote, since complainant is not interested in carrying on with the criminal proceedings initiated at her behest.

14. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 62, dated 10.6.2015, under Ss. 341, 147, 149, 323 and 427 IPC registered at Police Station Gagret, District Una, Himachal Pradesh alongwith consequential proceedings i.e. Cr. Case No. 160 of 2015, pending before Judicial Magistrate 1st Class, Court No.2, Amb, District Una, Himachal Pradesh are quashed and set aside. Respondents No.4 to 8 are acquitted of the offences levelled against them.

15. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Vikram Sharma ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1015 of 2019
Decided on July 11, 2019

Code of Criminal Procedure, 1973- Section 439- **Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Section 3(1)(s)- Regular bail– Grant of- Held, after surrendering and admitting him on interim bail, accused joined investigation– His custody not required for further investigation– Accused is a local resident and will be available for investigation as and when directed by investigating officer– No ground to curtail his liberty– Petition allowed– Accused admitted on bail subject to conditions. (Paras 3 to 5 & 11)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218

Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner — Mr. George, Advocate.
For the respondent — Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.
Shri Parmod Shukla, Dy.SP. alongwith ASI Ram Pal, I/O, Police Station, Sadar, Shimla.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.439 CrPC, prayer has been made on behalf of the petitioner for grant of regular bail in case FIR No. 105, dated 17.5.2019, under Ss.504 and 506 IPC and S.3(1)(R)(S)(U) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, registered at Police Station, Sadar, Shimla, Himachal Pradesh.

2. Sequel to previous order passed in the matter, Shri Parmod Shukla, Dy.SP., alongwith ASI Ram Pal, I/O, Police Station, Sadar, Shimla, has come present with the record. Mr. Kunal Thakur, learned Deputy Advocate General, has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Before adverting to the factual matrix of the case, it may be noticed that on 31.5.2019, bail petitioner surrendered before this Court and thereafter, this court, after taking him into custody, released him on bail in the FIR detailed above, subject to furnishing of personal bonds in the sum of Rs.10,000/- subject to the satisfaction of learned Additional Registrar (Judicial). Vide aforesaid order, this court also directed the bail petitioner to join the investigation as and when required by the investigating agency.

4. Mr. Kunal Thakur, learned Deputy Advocate General, on instructions of the Investigating Officer, fairly states that pursuant to order dated 31.5.2019, bail petitioner has joined the investigation and his custodial interrogation is not required, however, he may be directed to join the investigation as and when asked by the Investigating Officer.

5. Having heard learned counsel for the parties and perused the status report, this court finds that the petitioner being a local resident of address given in the memo of parties, will be available for investigation as and when asked by investigating agency. Moreover, guilt, if any, of the petitioner is yet to be proved by the prosecution by leading cogent and convincing evidence in accordance with law, as such, this court does not deem it proper to curtail the freedom of the bail petitioner for an indefinite period during trial.

6. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

7. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The

object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

8. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

9. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has

to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

10. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

11. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 31.5.2019 is made absolute, subject to bail petitioner furnishing fresh bail bonds in the sum of Rs.20,000/- (Rs. Twenty Thousand) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

12. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

13. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Khushal Singh .....Appellant
Versus
State of Himachal Pradesh ......Respondent.

Cr. Appeal No. 49 of 2017
Reserved On : 8.7.2019
Decided on: 12.7.2019

Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983- Section 10– **Indian Penal Code, 1860**– Section 409– Misconduct by criminal misappropriation of government property by public servant- Proof– Trial court convicting accused, a Junior Engineer with Irrigation and Public Health department for misappropriating cement bags belonging to state government and entrusted with him on basis of recovery of such cement bags full, opened as well as empty from his house – Trial court observed that accused was supposed to take permission from department before stacking cement bags in private accommodation– Appeal against– Held, evidence on record indicates that cement bags could not have been stored in open– For storing them in private building, accommodation was required to be taken on rent, if accused had not stored cement bags in his house – His house was in close proximity of construction site -Stacking seems to be on account of his avoiding taking of accommodation on hire – No scientific evidence that cement used in construction of house of "KK' and cement recovered from house of accused were interse compatible – Breach of instruction of storing construction material only at official godown or in private accommodation with prior approval if any,was without mens rea – Appeal allowed – Conviction set aside – Accused acquitted. (Paras 9 & 10)

For the Appellant: Mr. B.B Vaid and Mr. Ajay Chandel, Advocates.
For the Respondent: Mr. Hemant Vaid, Additional Advocate General with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Dy.A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant appeal is directed, against, the impugned judgment, of, 20.1.2017, rendered by the learned Special Judge, Kullu, District Kullu, H.P., wherethrough the appellant herein (for short 'accused'), stood convicted, by the learned trial Court, for, an offence punishable under, Sections 409 of IPC and Section 10 of HP.PSCP Act.

2. The brief facts of the case are that as per memorandums Ex. PW-1/D and Ex. PW-1/E of 11.1.1988, accused was given appointment as Junior Engineer on temporary basis in I&PH Department, and was posted as such in I&PH Division, Jubbal District Shimla, H.P. In the year 2009 , accused while posted as JE in I & PH Sub Division, Shamshi, was assigned the duties of inspection as well as to get carried out various works,

such as construction of Life Irrigation scheme to villages Bhatgram, Tuniseri, Bashona and Bagicha, construction of pump house and chowkidar quarters etc, which work was awarded to M/S Ashadeep Construction Pvt. Ltd, Tharas, vide Agreement, Ex. PW2/E, being lowest tender and vide store indents Ex. PW-2/B, Ex.PW-2/C and Ex.PW-2/D, accused were supplied various items, including certain quantity of cement bags for carrying out the works done at the construction sites, which indents were taken into possession from Pankaj vaidya (PW-2) vide memo Ex. PW-2/A alongwith agreement of work Ex. PW-2/E by the Investigating Officer. Similarly, vide store indents Ex. PW-3/B to Ex. PW-3/G, accused were also supplied certain items including certain number of cement bags etc for carrying out the work done at the construction sites, which indents were taken into possession from chamaru Ram (PW-3) vide memo Ex. PW-3/A alongwith gate passes. As per Departmental Rules, after receipt of cement supply from the Department, accused was required to stack the cement in the store of Section Headquarters and in case of non-availability of such store, accused had to take permission from the Department to stack and store the cement in private accommodation. On 5.6.2009, vide rapat Ex. PW-13/C a secret information was received in the police station of SV & ACB, Kullu, to the effect that government supply cement, stacked by the accused in his house at Buin, was being misused. It was also informed that accused was supplying the government cement to aforesaid Kamal Kishore (PW-9) for construction of his house. On the receipt of said information, the investigation of the case was entrusted to Inspector Prem Singh (PW-24), who alongwith other police officials visited the spot. The house of the accused was searched and during search 21 full bags, one open bag and 22 empty bags of government supply cement were found in the room. On the cement bags, there was inscription of words "not for sale and only for government supply". There was also mark of ISI on the bags. The cement bags were found to have been manufactured in March, 2009. 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 his committing an offence(s) punishable, under Section 409, of, IPC, and, under Sections 13(1)(d), and, under Section 13(2), of, the P.C Act, and, under Section 10 of the H.P PSCP Act, whereto which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 25 witnesses. On closure of prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure was recorded, wherein, he pleaded innocence, and, claimed false implication. He chose to lead defence evidence, and, examined three witnesses including himself', in his defence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, against, the accused, for, an offence punishable under Section 409 IPC, and, Section 10 of HP.PSCP Act.

6. The learned counsel(s) 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, by it, of the relevant material on record. Hence, he contends qua the findings of conviction, warranting reversal by this Court, in the, exercise of its appellate jurisdiction, and, theirs standing replaced by findings of acquittal.

7. The learned Additional Advocate General, has, with considerable force, and, vigour 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 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. The initial portion of the charge, appertaining to the appellant, stacking at his residence, some cement bags, does falter, (i) given PW-4 (Sh. Hari Prakash), the SDO, of the Division concerned, in his testification, embodied in his cross-examination, acquiescing to a suggestion, with, an echoing therein, vis-a-vis, all the places, rather surrounding the house of the accused, being safe for storing thereat, the construction material, (ii) besides, his also voluntarily echoing, that, the afore construction material, being unamenable rather for being stored at an open place, and, also making articulations qua, if the accused had not kept, the, material at his residence, thereupon, hence he would be required, to, hire some accommodation, on rent. The effect of the afore voicing, is qua, the accused not carrying the requisite mens rea, in his rather stacking, the, cement bags at his residence, for, his hence enabling their user, for, extraneous exercise, rather his afore stacking being a sequel, of, avoiding the hiring of accommodation, on rent, hence for stacking them, (i) besides stacking of the construction material, by the accused, at his residence also when arose, from, the factum, qua his residence, holding proximity to the site of construction, whereat, it was to be used, thereupon also he cannot be considered to hold the apt mens rea. The infraction, if any, vis-a-vis, the relevant instructions prescribing qua cement bags, being kept only in the godown, of, the Office concerned, though, appears to be breached. However, any breach of the afore instructions, also does not visit the accused, with the requisite mens rea, (ii) given, the afore portion of the charge, appertaining to the accused, ensuring user of the afore stacked cement bags, at his residence, by one Kamal Kishore, for, facilitating the latter, to, construct his house, also, requiring adduction of firm evidence, comprised in the apposite sample, taken from the construction made by Kamal Kishore, and, (iii) also there-along with, the samples taken, from the cement bags, stacked at the residence of the convict/appellant rather being dispatched, to, the lab concerned, (iv) for their apt comparison thereat, and, thereafter an opinion being rendered qua there being inter-se compatible matching(s). However, when the afore endevour, stood un-recoursed, thereupon it cannot, be concluded, that the accused had conspired with Kamal Kishore, in his purportedly rather ensuring the latter to use cement bags, stacked at his residence, hence, for facilitating Kamal Kishore, to, construct his house.

10. Be that as it may, even otherwise with PW-4 rendering a testification, vis-a-vis, the consumption of cement bags, issued under the relevant indents, hence, at the construction site concerned, and, with no best evidence being adduced, vis-a-vis, user(s) at the site concerned, of the afore bags, as, issued under the relevant indents rather not bearing commensuration, with user(s) thereof, at the relevant construction site, (i) thereupon also charge, if any, against the accused, that he had beyond, the proportion(s) of hence validly issued apposite indents, either stacked them at his residence, and, thereafter had ensured their user by one Kamal Kishore, for the latter constructing his house, rather also faltering.

11. For the foregoing reasons, the instant appeal, is, allowed, and, the impugned judgment of conviction, and, sentence, rendered by the learned trial Court below, is, unsustainable, and, as such are set aside. The accused stands acquitted, and, the fine amount, if any, deposited by the accused, is, ordered to be refunded to him. Bail bonds, if any, furnished by the accused are cancelled and discharged. Send down the records.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Mohan son of Ram Dass ……Appellant.
Versus
State of Himachal Pradesh ……Respondent.

Cr. Appeal No. 565 of 2016
Reserved on: April 16, 2019.
Date of decision: July 15, 2019.

Indian Penal Code, 1860– Section 300– Culpable homicide amounting to murder– Ingredients– Held, Ingredients of culpable homicide amounting to murder are (a) causing death intentionally and (b) causing bodily injury which is likely to cause death. (Para 17)
Indian Evidence Act, 1872 – Section 8-Motive – Existence of and relevance – Held, if accused had motive to cause death, eye witness count of occurrence may not be required– Where motive is missing, prosecution is required to prove its case with testimony of eye witnesses. (Para 17)
Indian Evidence Act, 1872– Section 27– Disclosure statement– Credibility of- Held, on facts, where disclosure statement is recorded in police station in presence of an independent person, then such person having witnessed the same must also state the purpose of his visit to police station– Witness also not stating in his examination that he was present in police station at relevant time– Disclosure statement of accused thus not proved on record. (Para 33)

Cases referred:
Geejaganda Somaiah vs. State of Karnataka, 2007(9) SCC 315
Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869
Mani vs. State of Tamil Nadu, 2009(17) SCC 273
Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622
State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (V) HP 213
State of Himachal Pradesh Vs. Sunil Kumar, ILR 2017 (III) HP 763
Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550
Vijay Thakur vs. State of Himachal Pradesh, 2015(1) SCC (Cri.) 454 = 2014(Sup.) Him. L.R. 2308

For the appellant : Mr. Lakshay Thakur, Advocate.
For the respondent :Mr. Narender Guleria, Addl. AG with Mr. Kunal Thakur, Dy. AG and Mr. Sunny Dhatwalia, Asstt. AG.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellant Mohan herein is a convict. He has been tried, convicted and sentenced to undergo rigorous imprisonment for life and to pay a sum of Rs. 10,000/- as fine for the commission of the offence punishable under Section 302 of the Indian Penal Code vide impugned judgment dated 14.9.2016 passed by learned Addl. Sessions Judge (I),

Kangra at Dharamshala, Circuit Court at Indora, District Kangra, H.P in Sessions Case No. 8-I/VII/2014.

2. On 17.11.2013, PW-1 Pratap Singh (hereinafter referred to as the complainant) was ploughing his fields at Village Naudan (Kudsan) and the accused engaged as labourer was manuring the fields. A lady came there and told the complainant that naked dead body is lying in the adjoining fields near **Chhounch khad**. The complainant went to the place where the dead body was lying. PW-18 Surjeet Singh, the Pradhan of the Gram Panchayat also came there. They both noticed that the face of dead body was crushed with stone and the injuries bled profusely. Surjeet Singh informed the police of Police Station Indora over telephone around 12:30 PM about the dead body lying in the ***nallah***. The villagers also gathered on the spot. The dead body was identified to be that of one Shanti Devi alias Shanto wife of Bishamber Singh, a resident of Kudsan village. The deceased allegedly was living separately from her husband. She had four daughters and a son. The youngest daughter of the deceased Sushma (PW-4) was married to one Sukhdev. However, on account of being tortured by her husband, their marriage had been dissolved by a decree of divorce. The accused was working as servant of the complainant. He came to Village Mirthal and started living there with deceased Shanti Devi and PW-4 Sushma in rented accommodation. The marriage of PW-4 Sushma was solemnized with the accused later on. On 15.11.2013, the accused allegedly came to the complainant with a request to engage him as labourer on daily wage basis. Accordingly, the accused was engaged by the complainant. The complainant ploughed the fields on 16.11.2013, however, the dead body was not there on that day. Deceased Shanti Devi was seen in the company of the accused on 16.11.2013 near a shop at Bhia Indorian. She allegedly was murdered thereafter during the night intervening 16/17.11.2013.

3. Consequent upon the information received in the Police Station, the police swung into action. PW-17 SI Chain Singh has taken in hand the investigation after registration of the case vide FIR Ext. PW-12/B on the basis of the statement of the complainant Ext. PW-1/A recorded under Section 154 Cr.P.C. The photographs of the dead body Ext. PW-11/A to Ext. PW-11/P were clicked by the photographer PW-11 Roshan Lal. The inquest papers Ext. PW-17/D were prepared. The spot map Ext. PW-17/B was also prepared. A stone Ext. P-3 lying near the dead body was taken into possession and sealed in a parcel with five seals of impression “R”. The blood stained soil Ext. P-5 was also taken from the spot and sealed in a box Ext. P-6 with the impression of the same seal. Parcel Ext. P-7 was taken into possession vide recovery memo Ext. PW-2/A in the presence of Om Prakash and PW-2 Raj Kumar. The sample of the soil near the dead body was also collected and sealed with the impression of seal “R”. The same was also taken into possession vide memo Ext. PW-2/B. Witnesses Om Prakash, Raj Kumar, Sushma and Jyoti had suspected the hand of the accused in the murder of deceased Shanti Devi. PW-17 SI Chain Singh made an application Ext. PW-8/A to Medical Officer, CH Nurpur for getting the post mortem of the dead body conducted. Accused Mohan was searched, however, he had absconded. His T-shirt Ext. P-1 was taken into possession vide memo Ext. PW-1/B. The household articles of the deceased were recovered near Pir Baba Temple below a banyan tree. The same were taken into possession vide recovery memo Ext. PW-3/A and handed over to PW-6 Santosh Kumari, her daughter. The dead body was referred to Dr. R.P.Medical College Tanda by the Medical Officer CH Nurpur for seeking opinion of the forensic expert. The post mortem report issued by PW-8 Dr. Mohan Singh Medical Officer, CH Nurpur is Ext. PW-8/B. The dead body was sent to Tanda Medical College vide letter Ext. PW-8/C addressed to HOD, Forensic Department. The Dy. Superintendent of Police (Hqrs.) at Dharamshala also moved the application Ext. PW-10/A requesting thereby the HOD (Forensic Department), Medical College Tanda to conduct the post mortem of deceased Shanti Devi. Another

application Ext. PW-10/B for the purpose was also moved. The post mortem was conducted by PW-10 Dr. Susheel Sharma, Asstt. Professor, Forensic Medicine Department, Dr. R.P.Medical College Tanda. He has issued the post mortem report Ext. PW-10/C. PW-10 had also handed blood in gauge, nail clips Ext. PX-1, vaginal swab Ext. PX-2 and Ext. PX-3 and articles/wearings duly sealed. The photographs Ext. P-1 to P-9 of the post mortem conducted were also taken. All the articles were handed over by PW-10 Dr. Susheel Sharma to the police vide letter Ext. PW-10/D and the same in turn were handed over to MHC, Police Station Indora for further action. The accused was arrested in this case by PW-17 SI Chain Singh on 23.11.2013. He was produced in the Court and remanded in police custody. The photographs of the accused Ext. PW-17/F-1 to Ext. PW-17/F-3 were clicked.

4. Further investigation of this case was conducted by PW-19 Insp. Balbir Chand. This witness has recorded the disclosure statement Ext. PW-2/C and on the basis thereof, the clothes (shirt Ext. P-12, Salwar Ext. P-13, koti Ext. P-14, Banyan Ext. P-15 and Kurta Ext. P-16) of the deceased concealed at ***Chhounch khad*** were produced after taking out the same from a pit. The same were taken into possession vide recovery memo Ext. PW-2/D. That spot was photographed and videographed vide photographs Ext. PW-11/H. The spot maps Ext. PW-19/A and PW-19/C were also prepared. The accused, allegedly got recovered his jean pants Ext. P-18 from the house of PW-1 Pratap Singh, the complainant. The same was sealed in a parcel and taken into possession vide recovery memo Ext. PW-2/E. The proceedings were photographed and videographed vide photographs Ext. PW-11/J and PW-11/K. The spot map Ext. PW-19/E was also prepared. One Rani Devi, Raj Kumar (PW-2) and S.I. Manohar Lal (PW-5) were also present on the spot. The articles recovered were handed over to MHC for safe custody in the malkhana.

5. The accused on 26.11.2013, made another disclosure statement Ext. PW-2/F qua identification of the place where jewellery worn by the deceased and other articles removed by him from the dead body were concealed in the presence of PW-2 Raj Kumar and S.I. Manohar Lal (PW-5). At the instance of the accused, two mobile battries Ext. P-20 and P-21, mobile Sim of Idea Ext. P-22 and that of Airtel Ext. P-23, Payal Ext. P-24, Mangal Sutra Ext. P-25, Rings Ext. P-26 and P-27, ear rings Ext. P-28, currency notes worth Rs. 40/- Ext. P-29 and photos Ext. P-30 were recovered. The place of recovery was photographed and videographed vide photographs Ext. PW-11/L to PW-11/O and CD Ext. PW-11/Q prepared. These articles were taken into possession vide recovery memo Ext. PW-2/G after the same were identified by PW-4 Sushma to be that of her mother. The accused also got recovered a pair of chappals from ***Chhounch khad*** which were taken into possession vide recovery memo Ext. PW-2/H. The chappal Ext. P-31 was also identified by PW-4 Sushma to be that of her mother. The recovery proceedings were photographed and videographed vide photographs Ext. PW-11/D and CD Ext. PW-11/Q prepared. The spot map Ext. PW-19/H of the place of recovery of jewellery and chappals was prepared. In the Police Station, all the articles were handed over to MHC for safe custody in the malkhana.

6. On 28.11.2013, PW-19 Insp. Balbir Chand had moved an application Ext. PW-9/D to Tehsildar Indora for demarcation of the spot where dead body was found lying. The demarcation was conducted on 30.11.2013 by Kanungo Ravi Kumar of Kotgarh. The report Ext. PW-9/A and the copy of Jamabandi Ext. PW-9/B along with tatima Ext. PW-9/C were supplied to the police. The case property was sent to FSL for analysis. On receipt of the reports Ext. PX-1 to PX-3 from the FSL, the same were added in the file. Certificate Ext. PW-12/C was obtained from the MHC and added in the file. On completion of the investigation, PW-19 Insp. Balbir Chand has prepared the challan and filed the same in the Court.

7. Learned Trial Judge, on going through the challan and the documents annexed therewith has found a prima-facie case for the commission of the offence punishable under Section 302 of the Indian Penal Code made out against the accused. Therefore, charge against him was accordingly framed. He, however, pleaded not guilty to the charge. The prosecution, therefore, has produced evidence in order to sustain the charge against him. The material prosecution witnesses are the complainant (PW-1 Pratap Singh), PW-4 Sushma (daughter of the deceased), PW-6 Santosh Kumari (elder daughter of the deceased) and PW-7 Ravinder Kumar (auto rikshaw driver). The other material witnesses are PW-2 Raj Kumar, a witness to the recovery of clothes of the deceased, PW-3 Bansi Lal, a witness to the recovery of ornaments etc., PW-5 SI Manohar Lal, again a witness to the recovery and PW-18 Surjeet Singh is the Pradhan of Gram Panchayat Mirthal. The Medical Officer, CH Nurpur is Dr. Mohan Singh who initially conducted the post mortem of the dead body and sent the same to Dr. R.P.Medical College Tanda for expert opinion. The expert is Dr. Sushil Sharma, Asstt. Professor Forensic Science Department, Dr. R.P.Medical College Tanda. PW-9 Ravi Kumar, Revenue Official, has supplied the demarcation report, copy of Jamabandi and Tatima of the place of recovery of the dead body to the police. PW-11 Roshan Lal is a photographer. The remaining prosecution witnesses are official witnesses, including the I.Os PW-17 SI Chain Singh and PW-19 Insp. Balbir Chand.

8. On the other hand, the statement of the accused under Section 313 Cr.P.C. was recorded. He has denied the incriminating circumstances appearing in prosecution evidence against him either being wrong or for want of knowledge. According to him, he is innocent and witnesses who were interested have deposed falsely against him. He, however, did not opt for producing evidence in support of his case.

9. The legality and validity of the judgment under challenge has been questioned on the grounds inter alia that without there being any iota of evidence to connect the accused with the commission of the offence, he could have not been convicted and sentenced. Nothing tangible has come on record to show that it is the accused alone and none else who has murdered Shanti Devi during the night intervening 16/17-11-2013. The evidence produced qua this aspect of the matter is stated to be not worthy of credence. Learned Trial Judge has failed to consider the well established legal principles in the criminal administration of justice that the prosecution is required to prove its case against the accused beyond all reasonable doubt. The prosecution evidence in the case in hand irrespective of suffering from material contradictions, improvements and omissions has erroneously been relied upon to bring the guilt home to the accused. Learned trial Court has based its findings on contradictions, surmises and hypothesis. The impugned judgment, as such, has been sought to be quashed and set aside being both against law and facts of the case.

10. We have heard Mr. Lakshay Thakur, Advocate, learned counsel appearing on behalf of the accused (appellant-convict) and Sh. Narender Guleria, learned Addl. Advocate General on behalf of the respondent-State.

11. Mr. Lakshay Thakur, Advocate has vehemently argued that the impugned judgment is not legally sustainable as the prosecution, according to him has failed to prove its case against the accused beyond all reasonable doubt. The prosecution story that the deceased was lastly seen on 16.11.2013 at 8:00 PM near a shop at Mirthal has not been proved at all. The prosecution evidence, on the other hand even if believed to be true, goes to show that on 16.11.2013 accused was away from the place of the complainant (PW-1) during the period 6:00 PM to 9:30 PM and after 9:30 PM, he remained only in his house till morning. Therefore, according to Mr. Lakshay Thakur, Advocate, it was not possible for the accused to have visited Village Mirthal where PW-4 Sushma was residing in a rented

accommodation with the deceased and after Sushma having left the rented accommodation on seeing the accused coming there, the latter accompanied by the deceased came to Kudson (Naudan) where he was working as labourer in the house of the complainant, that too along with household articles of the deceased and thereafter to murder the deceased also during the period of 3 ½ hours i.e. in between 6:00 PM to 9:30 PM. It has also been argued that as per the prosecution case, the deceased was not having cordial relations with her husband. They both were separate even in mess also. Therefore, according to Mr. Thakur, the possibility of the deceased was murdered by someone else and the accused being a resident of State of Bihar, hence, an outsider has been implicated in this case falsely at the behest of the prosecution witnesses none else but the public representative i.e. Pradhan, Up-Pradhan and Ward Members of the Gram Panchayat Kudson/Mirthal in order to save the real culprit from his prosecution cannot be ruled out.

12. The present, being a case of circumstantial evidence, the facts and circumstances established on record should be conclusive in nature and consistent only with the hypothesis of the guilt of the accused and not explainable on any other hypothesis except that the accused is guilty. No such opinion according to Mr. Thakur could have been formed on the basis of the evidence produced by the prosecution in this case.

13. On the other hand, Mr. Narender Guleria, learned Addl. Advocate General appearing on behalf of the respondent-State has urged that the prosecution case against the accused stands proved beyond all reasonable doubt. According to Mr. Guleria, the accused has failed to controvert the prosecution evidence qua the deceased was lastly seen with him in the evening on 16.11.2013. The recovery of ornaments and clothes etc. of the deceased consequent upon the disclosure statements made by the accused also connect him with the commission of the offence. It has also been argued that PW-4 Sushma, the daughter of the deceased was wife of the accused. Their relations were strained and it is for this reason, the accused killed her mother, the deceased.

14. In order to appreciate the rival contentions of the parties, we have gone through the record carefully.

15. The present being not a case of direct evidence and rather hinges upon circumstantial evidence casts an onerous duty on this Court to find out the truth by separating grain from the chaff. In other words, it has to be determined that the facts of the case and the evidence available on record constitute the commission of an offence punishable under Section 302 IPC against the accused or not. However, before coming to answer this poser, it is desirable to take note of legal provisions constituting an offence punishable under Section 302 IPC. A reference in this regard can be made to the provisions contained under Section 300 IPC. As per the Section ibid, culpable homicide is murder firstly if the offender is found to have acted with an intention to cause death or secondly with an intention of causing such bodily injury knowing fully well that the same is likely to cause death of someone or thirdly intention of causing bodily injury to any person and such injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or if it is known to such person that the act done is imminently so dangerous that the same in all probability shall cause death or such bodily injury as is likely to cause death.

16. Culpable homicide has been defined under Section 299 IPC. Whoever causes death by way of an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death can be said to have committed the offence of culpable homicide. Culpable homicide is murder if the act by which death is caused is done with the intention of causing death. Expression "intent" and "knowledge" postulate the existence of a positive

mental attitude which is of different degree. We are drawing support in this regard from the judgment of Apex Court in **Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869.**

17. The ingredients of culpable homicide amounting to murder, therefore, are: (i) causing death intentionally and (ii) causing bodily injury which is likely to cause death. In case the accused had motive to cause death of deceased, the eye witness count of the occurrence may not be required, however, where the motive is missing, the prosecution is required to prove its case with the help of the testimony of eye witnesses.

18. The present being a case of circumstantial evidence, the Court seized of the matter has to appreciate such evidence with all care and circumspection and rely upon only if establishes the guilt of the accused alone and rule out all possibilities leading to the presumption of innocence of the accused. The law is no more res integra as support can be drawn from the judgment of a Division Bench of this Court in ***Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550.*** The relevant extract of this judgment reads as follows:

> **[21]** It is well settled that in a case, which hinges on circumstantial evidence, circumstances on record must establish the guilt of the accused alone and rule out the probabilities leading to presumption of his innocence. The law is no more res integra, because the Hon'ble Apex Court in Hanumant Govind Nargundkar Vs. State of M.P, 1952 AIR(SC) 343 has laid down the following principles:
>
>> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."
>
> **[22]** The five golden principles, discussed and laid down, again by the Hon'ble Apex Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, 1984 4 SCC 116, are as follows:
>
> (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."

19. Similar is the ratio of the judgment rendered again by this Bench in ***State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213.*** The relevant text of this judgment also reads as follows:

> **“[10]** As noticed supra, there is no eye-witness of the occurrence and as such, the present case hinges upon the circumstantial evidence. In such like cases, as per the settled proposition of law, the chain of circumstances appearing on record should be complete in all respects so as to lead to the only conclusion that it is accused alone who has committed the offence. The conditions necessary in order to enable the court to record the findings of conviction against an offender on the basis of circumstantial evidence have been detailed in a judgment of this Court in Devinder Singh V. State of H.P, 1990 1 Shim LC 82 which reads as under:-
>
> “1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> 2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilt.
>
> 3. The circumstances should be of a conclusive nature and tendency.
>
> 4. They should exclude every possible hypothesis except the one to be proved AND
>
> 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> **[11]** It has also been held by the Hon'ble Apex Court in Akhilesh Halam V. State of Bihar, 1995 Supp. SCC 357 that the prosecution is not only required to prove each and every circumstance as relied upon against the accused, but also that the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The relevant portion of this judgment is reproduced here-as-under:-
>
> “ …………It may be stated that the standard of proof required to convict a person on circumstantial evidence is now settled by a serious of pronouncements of this Court. According to the standard enunciated by this court the circumstances relied upon by the prosecution in support of the case must not only be fully established but the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for as conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt of an accused is to be inferred, should be conclusive nature and consistent only with the hypothesis of the guilt of the accused and the same should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together lead to the only irresistible conclusion that the accused is the perpetrator of the crime……….”

20. This Court has again held in ***State of Himachal Pradesh Vs. Sunil Kumar, Cr. Appeal No. 326 of 2011 decided on 15.6.2017*** as under:

"13. It is more than settled that in case of circumstantial evidence, the circumstances from which inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:

i) The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.

ii) Those circumstances should be of a definite tendency un-erringly pointing out towards the guilt of the accused.

iii) The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was committed by the accused.

14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it would not be sound and safe to base the conviction of accused person.

15. In case of circumstantial evidence, each circumstances must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypothesis and should be consistent that only the guilt of the accused (See: Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173)."

21. The Hon'ble Supreme Court in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra, AIR 1984 Supreme Court 1622,*** has held as under:

"150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

… … … … … …

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation."

22. Now, if adverting to the prosecution case, the accused is permanent resident of Bihar and had come to earn his livelihood. He was unmarried before his marriage with PW-4 Sushma, the daughter of the deceased. PW-4 Sushma, a divorcee had solemnized the marriage with the accused allegedly after she had given divorce to her previous husband Sukhdev. No documentary evidence has come on record to substantiate that PW-4 Sushma had divorced her previous husband Sukhdev. Anyhow, her marriage with the accused stands established on record because not only she while in the witness-box as PW-4 but PW-1 the complainant and PW-2 Raj Kumar have also stated so while in the witness-box and the accused has also admitted while answering question No. 2 of his statement recorded under Section 313 Cr.P.C. that he is married to PW-4 Sushma. They started living in rented accommodation hired from one Jeet Singh at Village Mirthal. This part of the prosecution case also stands proved from the testimony of PW-4 Sushma and also his answer to question No. 2 in his statement recorded under Section 313 Cr.P.C. The accused as per the statement of the complainant PW-1 Pratap Singh had been working as labourer with him. He came to him on 15.11.2013 with a request to reemploy him. PW-1 Pratap Singh acceded to his request and reemployed the accused as labourer with him. PW-4 Sushma has also stated that accused was known to her as he was working with PW-1 Pratap Singh, the complainant of Village Naudan (Kudsan). No suggestion that the accused was not working with PW-1 Pratap Singh as labourer in his fields has been given either to PW-1 Pratap Singh or PW-4 Sushma. If reply to question NO. 14 in his statement recorded under Section 313 Cr.P.C. is seen, the accused has expressed his ignorance to the circumstances that on 15.11.2013, he went to Pratap Singh for reemployment and on 17.11.2013 at about 10 am went with PW-1 Pratap Singh for sowing fields. Had he not been working as labourer with PW-1 Pratap Singh, he should have denied such incriminating circumstances appearing against him in the prosecution evidence being wrong. His ignorance thereto leads to the only conclusion that he avoided to give correct answer to question No. 14 intentionally and deliberately. Therefore, the factum of he was engaged as labourer and working in the fields of PW-1 Pratap Singh is also proved on record.

23. The further case of the prosecution as has come in the statement of PW-4 Sushma that after about 10-15 days of her marriage with the accused he assaulted her with belt and on this she reported the matter to Surjeet Singh Pradhan, Gram Panchayat Mirthal, PW-4 Sushma in her cross-examination has expressed her ignorance as to which Pradhan she reported the matter after having been assaulted by the accused. Though, it finds corroboration from her statement and even PW-18 Surjeet Singh has also stated so while in the witness box, the matter, however, was reported to the police of Police Post Nangal Bhur (Punjab) is not proved irrespective of stated so by PW-4 Sushma and PW-18 Surjeet Singh. The same, however, is not proved beyond all reasonable doubt for want of the record of Police Post Nangal Bhur (Punjab). Since as per the version of PW-18 Surjeet Singh, the police had come to the spot and taken the accused to the Police post, the record thereof would have been available with the police. However, Investigating Officers have not made any effort to collect the same and produce in evidence. Therefore, the further case of the prosecution that due to the beatings given by the accused to PW-4 Sushma and she went to the house of her sister PW-6 Santosh Kumari at Gurdaspur is also doubtful irrespective of it is stated so by PW-4 Sushma. PW-6 Santosh Kumari has, however, not stated that after beaten up by the accused, PW-4 Sushma came to Gurdaspur to her house. She rather stated only that on 16.11.2013, the accused had a quarrel with her sister and she, therefore, had left the house only with a bag with her. Therefore, PW-6 Santosh Kumari has not stated that after the so called episode of 16.11.2013 in the rented accommodation at Mirthal, her sister PW-4 Sushma came to her at Gurdaspur though PW-4 Sushma had

stated that after spending the night on the roof of the house of a Kumhar at Naudan, she went to the house of her sister at Gurdaspur. Therefore, it is also not proved beyond all reasonable doubt that on 16.11.2013 when the accused came to the rented accommodation at Mirthal, PW-4 Sushma on seeing him coming there left that place with a bag and went to Gurdaspur to the house of her sister PW-6 Santosh Kumari. The further case of the prosecution is that it is the accused and the deceased who were alone left in the house after the departure of PW-4 Sushma there from. This part of the prosecution case shall be discussed herein below in this judgment.

24. What are the incriminating circumstances appearing in the prosecution evidence against the accused find mention in para 14 of the judgment of the learned trial Court. The same read as follow:

> "14.(i).On 16.11.2013 the accused was last seen with his mother-in-law Shanti Devi in the evening.
>
> (ii). The accused used to hurl threats to Shanti Devi to do away with her life.
>
> (iii). Recovery of dead body of Shanti Devi from the field of the complainant and subsequent conduct of the accused.
>
> (iv). Recovery of clothes, ornaments and a pair of Chappals of Shanti Devi on the disclosure statement of the accused.
>
> (v). Recovery of weapon of offence."

25. Learned trial Judge, on appreciation of the evidence has concluded that these circumstances stand proved beyond all reasonable doubt and the chain is complete in all respects. Also that only inescapable conclusion is that it is the accused alone who had killed the deceased during the night intervening 16/17.11.2013 with stone Ext. P-3 in the fields of PW-1 Pratap Singh, the complainant. Whether the conclusion so drawn by learned trial Judge is legally and factually sustainable is a question which needs reappraisal of the given facts and circumstances and also the evidence available on record.

26. The first two circumstances can be taken up together for consideration. The evidence that the accused had been hurling threats to deceased Shanti Devi to do away with her life has come on record by way of testimony of PW-4 Sushma. According to her, the accused killed her mother as he had been hurling threats to do away with her life as she (PW-4 Sushma) had refused to live with him. This part of her testimony, however, is an improvement as nothing of the sort has come in her statement recorded under Section 161 Cr.P.C. and to the contrary she only suspected the hands of the accused in killing her mother as according to her, the accused had been hurling threats that he will flee away after killing someone and it will not be possible to anyone to trace him out or apprehend. The statement under Section 161 Cr.PC. of PW-4 Sushma rather gives an impression that her mother, the deceased had been insisting upon her not to abandon the company of the accused and live with him. Also that she will also to live with them. No other witness has supported this part of the prosecution case because PW-6 Santosh Kumari, another daughter of deceased, though stated that she came to know about the murder of her mother by the accused, however, without there being anything on record suggesting as to what is her source of information. Therefore, in our considered opinion, learned trial Judge is not correct in placing reliance on the sole testimony of PW-4 Sushma, which in view of the findings recorded hereinabove is otherwise also an improvement qua her earlier version.

27. Now, if coming to the prosecution case that the accused and deceased were lastly seen in the company of each other in the evening on 16.11.2013 besides the statement

made by PW-4 Sushma that she left the rented accommodation at Mirthal, the moment the accused arrived there leaving behind the accused and her mother alone there, the reliance has also been placed on the testimony of PW-7 Ravinder Kumar, auto rikshaw driver. What PW-7 Ravinder Kumar tells us while in the witness-box is that he had come to Kathgarh and while going to his house in his auto rikshaw when reached near Toll Tax Barrier around 7:00 PM, one man and one lady carrying household articles hired his auto for Naudan. The lady was addressing that person as Mohan and said Mohan according to this witness was saying that his wife had left him. He dropped them at Naudan. He has also identified the accused in the Court. He admitted in his cross-examination that it was dark at that time. Therefore, it is not known as to how it can be believed that this witness had well recognized the accused and also the lady with him. Otherwise also, after a period about 2 years, as he has been examined in the Court on 24.9.2015, a person travelled in his Auto only for once that too during night time, how he could have identified him and that too in the Court. PW-7 Ravinder Kumar, therefore, seems to be a stock witness. Above all, when he has said nothing in his examination-in-chief that the accused and that lady had been quarreling in the Auto, his testimony to this effect in the cross-examination itself speaks in plenty about its veracity. Therefore, it cannot be believed by any stretch of imagination that this witness had seen the deceased in the company of the accused on that day.

28. We have already discarded the prosecution case that on 16.11.2013, on seeing the accused in the rented accommodation at Mirthal, PW-4 Sushma went therefrom to the house of her sister PW-6 Santosh Kumari being not supported by the evidence. Otherwise also, on one hand, according to PW-4 Sushma, she went to Village Naudan and spent the night on the roof of the house of a Kumhar there and in the morning (17.11.2013) went to the house of her sister at Gurdaspur. It is on the same day, they received the call that the dead body of their mother is lying in the fields in naked condition. At what time, she reached in the house of her sister that too when her sister Santosh Kumari has not said anything qua she having come there while in the witness-box as PW-6 renders the prosecution story that on leaving the rented accommodation by PW-4 Sushma, it is only the accused and her mother, the deceased who alone were left there is highly improbable.

29. Interestingly enough, PW-1 has stated in his examination-in-chief that on the previous day he had seen the deceased and the accused in the shop at Bhia Indorian. However, for want of date and time of his seeing both of them at Bhia Indorian, which he has not mentioned in his statement, such version of this witness being absurd and vague, takes us to nowhere nor it is possible to form an opinion that he had seen the deceased and the accused in the company of each other at Bhia Indorian. It is again interesting to note that as per the version of PW-1 Pratap Singh, he suspected that the accused killed Shanti Devi during the night intervening 16/17.11.2013 and thrown her dead body in his field thereafter. Nothing to this effect has, however, come in his statement Ext. PW-1/A recorded under Section 154 Cr.P.C. His suspicion, therefore, is nothing but merely an afterthought. Otherwise also, when cross-examined, it is stated by him that on previous day (on 16.11.2013), the accused was with him, however, stated voluntarily that he had not been with him in between 6:00 PM to 9:30 PM on 16.11.2013 and after 9:30 PM during the night intervening 16/17.11.2013 till morning he was in his house throughout.Therefore, even if the version of PW-1 Pratap Singh that the accused was not in his house between 6 to 9:30 PM on 16.11.2013 is believed, in that event also, it cannot be said by any stretch of imagination that during his absence for about 3 ½ hours from the house of PW-1 Pratap Singh, he could have visited the rented accommodation of PW-4 Sushma, allowed his wife PW-4 Sushma going away from there, picking the household articles and having come to Mirthal bus stand with Shanti Devi (deceased), hired the auto rikshaw there and came to Naudan (Kudson), it is thereafter he murdered the deceased and not only made her nude

but also removed her jewellery and left the dead body along with the so called weapon of offence, the stone Ext. P-3. All this was not possible for the accused to have done within the short period of 3 ½ hours when he was absent from the house of the complainant. Had the deceased been assaulted by him on her head with stone Ext. P-3, it was somewhat natural for her to have struggled to save herself from him and even would have raised alarm also because the place of occurrence is the field of PW-1 Pratap Singh which for want of the evidence to the contrary can reasonably be believed to be nearby the house of PW-1 Pratap Singh. In view of the absence of the accused from the house of PW-1 Pratap Singh for a short duration i.e. from 6:00 PM to 9:30 PM, he would have not taken the risk to kill her because of the apprehension of being seen by someone as till 9:30 PM, the people normally do not sleep. It is for this reason also in that the spot map Ext. PW-17/B of the place of recovery of the dead body, the distance of village/house of complainant has not been mentioned though his pump house and Jai Shankar Stone Crusher in existence nearby the place of recovery do find mention therein.

30. The existence of the pump house and in that very field, the orange trees and in the adjoining field crop of sugarcane shown lead to the only conclusion that the house of PW-1 Pratap Singh, the complainant or village was also situated nearby. Therefore, there is no iota of evidence to show that it is the accused alone and none else who has killed deceased Shanti Devi. He, to our mind, seems to be falsely implicated in this case.

31 As per the prosecution evidence, the relations of deceased Shanti Devi were not cordial with her husband Bishambar Dass. Athough PW-2 Raj Kumar while in the witness-box has stated that the deceased had been living with her husband in the same room, however, according to him, they both were having their food separately. Similar is the statement of PW-4 Sushma because according to her also though her parents were residing under the same roof, however, maintaining separate kitchens. In her cross-examination, she has admitted that the relations of her parents are strained. It is unbelievable that husband and wife residing under the same roof/room are separate in mess. On the other hand, as per the statement of PW-1 Pratap Singh, the deceased was living separately from her husband. Anyhow, it is satisfactorily proved from such evidence produced by the prosecution itself that the relations of deceased and her husband were not cordial. Said Bishambar Dass, the husband of the deceased, though was associated in the investigation of the case i.e. at the state of alleged recovery of the clothes/ornaments is one of the signatories to the recovery memo Ext. PW-2/H. The prosecution, however, has not examined him as a witness in the Court, may be under the apprehension of he was to be exposed by learned defence counsel during the course of cross-examination qua his relations with his wife, the deceased. Such an approach on the part of the prosecution also renders the prosecution story qua the murder of the deceased by the accused is highly improbable. On the other hand, the possibility of she was murdered by someone else and there may be hand of Bishambar Dass, her husband cannot be ruled out.

32. Therefore, in view of the appraisal of the evidence hereinabove, neither the prosecution story that the deceased was seen lastly in the company of the accused is proved nor that it is the accused who has murdered her in the field of PW-1 Pratap Singh, the complainant during the night intervening 16/17-11.2013. The findings to the contrary recorded by learned trial Judge, therefore, deserves to be quashed and set aside.

33. Now, if coming to the 4th and 5th circumstances i.e. recovery of clothes, ornaments and a pair of chappal of Shanti Devi allegedly on the disclosure statement made by the accused again, there is no grain of truth therein for the reason that disclosure statement Ext. PW-2/C allegedly has been made by the accused while in custody in the Police Station. The witness thereto is PW-2 Raj Kumar, who is none else but the husband of

Rani Devi, the Pradhan of Gram Panchayat Kudson (Naudan), the area where the dead body of deceased was lying in the field. Nothing has come in the statement of PW-2 Raj Kumar, a witness to the disclosure statement Ext. PW-2/C as to whether he was present in the Police Station at the time when the accused has made the alleged disclosure statement. In what connection he had gone there again nothing has come in his statement. As a matter of fact, in order to prove the disclosure statement, the person having witnessed the same must also state the purpose of his visit to the Police Station. Nothing of the sort has come in his statement. The reading of his statement rather gives an impression that on 17.11.2013, when he came to know that the dead body of Shanti Devi was lying in the field of PW-1 Pratap Singh, he also went there and witnessed the recovery of jean pants, T-shirt of the accused and stone Ext. P-3. The disclosure statements Ext. PW-2/C and Ext. PW-2/F as well as the recoveries consequent upon that were effected on that very day i.e. 17.11.2013, however, he has not stated that on 24.11.2013, when disclosure statement Ext. PW-2/C and on 26.11.2013 when disclosure statement Ext. PW-2/F was recorded, he was in the Police Station in connection with some work there or otherwise called by the police. The disclosure statements Ext. PW-2/C and Ext. PW-2/F, both have, therefore, been not proved to be made by the accused in the Police Station while in custody.

34. It has been held by the apex Court in ***Geejaganda Somaiah vs. State of Karnataka, 2007(9) SCC 315,*** that a confession made by an accused to a Police Officer under Section 25 of the Indian Evidence Act cannot be proved against him. Similarly, the confession made by the accused under Section 26 of the Evidence Act while in custody cannot also be proved against him. However, the disclosure statement made under Section 27 of the Evidence Act relates distinctly to the facts thereby discovered and may be proved against the accused. The statement made under Section 27 of the Act leading to the discovery of facts exclusively in the knowledge of the maker and if such facts ultimately discovered in consequence of the statement so made, some guarantee should be there that the information was true and therefore, the same can be relied upon in evidence. Such link evidence is not proved in the case in hand because it is not proved at all that the statements were recorded in the Police Station in the presence of PW-2 Raj Kumar at a stage when the accused was in police custody. Being so, the recovery of kameez Ext. P-12, salwar Ext. P-13, sweater Ext. P-14, banyan Ext. P-15 and dupatta Ext. P-16 consequent upon the disclosure statement Ext. PW-2/C is highly doubtful. No doubt, the same were taken into possession vide recovery memo Ext. PW-2/E in the presence of PW-2 Raj Kumar and also Rani Devi and PW-5 SI Manohar Lal. Rani Devi has, however, not been examined. PW-5 SI Manohar Lal, though has appeared in the witness-box, however, being a police official, it is not safe to place reliance on his testimony particularly when the disclosure statement Ext. PW-2/C has not been made by the accused in the manner as claimed by the prosecution.

35. Now, if coming to the disclosure statement Ext. PW-2/F, discussed hereinabove made by the accused and recovery of mobile battries Ext. P-20 and P-21, mobile Sim (Idea) Ext. P-22, Airtel Sim Ext. P-23, Payal Ext. P-24, Mangal sutra Ext. P-25, rings Ext. P-26 and Ext. P-27, ear rings Ext. P-28, currency notes worth Rs. 40/- Ext. P-29 and photos Ext. P-30, the same is also not proved in accordance with law because when the disclosure statement Ext. PW-2/F itself is not proved in accordance with law, the recovery of the articles hereinabove and the question of recovery of the above articles on the basis thereof does not at all arise. The recovery of the chappal Ext. P-31 is also not proved. PW-4 Sushma, one of the witnesses to the recovery memo Ext. PW-2/H has only supported the prosecution case qua recovery of ornaments and chappal of the deceased and not qua the other articles such as battries and mobile Sims etc. Another witness to this memo, Bishambar Dass (husband of the deceased) has not been examined by the prosecution to the reasons best known to it. Otherwise also, the place(s) of recovery as per the site plans Ext.

PW-17/B and Ext. PW-19/A are near and around the place of recovery of the dead body shown in the site plan Ext. PW-17/B. These articles were recovered on 24.11.2013 and 26.11.2013, respectively, hence after 7-8 days of the recovery of the dead body. It was expected from the I.O. to have inspected the area near and around the place of recovery of the dead body to have some clue about the occurrence and had it been so done, these articles kept in open could have otherwise been traced. Therefore, had the investigation been conducted in a fair manner, the I.O. would have come in contact with these articles.

36. Similarly, the recovery of jean pants Ext. P-18 of the accused pursuant to the so called disclosure statement Ext. PW-2/E is also not proved as nothing in the presence of PW-2 Raj Kumar on that day has come on record. The recovery of the domestic articles mentioned in the memo Ext. PW-3/A i.e. quilt, mat, blanket, shawl and old clothes, allegedly that of the deceased is also of no help to the prosecution case for the reason that the same were recovered from an open place i.e. beneath banyan tree at Panjbir Baba temple Kudsan. PW-3 Bansi Lal, a witness to the recovery memo Ext. PW-3/A has admitted that these articles were that of the deceased, is not known to him. Also that, such articles are generally available everywhere.

37. In a similar case where the disclosure statement made and discovery of articles from an open area like the case in hand made after more than ten days, the Apex Court in ***Mani vs. State of Tamil Nadu, 2009(17) SCC 273,*** has held as under:

> "20…………..This was nothing but a farce of discovery and could never have been accepted particularly because all the discovered articles were lying bare open barely 300 feet away from the body of the deceased Sivakumar. Even this witness had to admit that he never enquired as to in whose name the house of Mani stand. He claims that P.W.14 had done the same whereas P.W.14 is completely silent about such investigation. It is, therefore, obvious this discovery could have never been accepted by both the courts below & both the court have completely ignored this vital admission. It need not be stated that where the discovery of the relevant articles have been made from the open ground though under the bush, that too after more than 10 days of the incident, such discovery would be without any credence. It does not stand to any reasons that the concerned investigating officer did not even bother to look hither and thither when the dead body was found. We are, therefore, not prepared to accept such kind of farcical discovery which has been relied by the courts below without even taking into consideration the vital facts which we have shown above.
>
> 21. 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. …………"

38. Similar is the ratio of the judgment of the apex Court in ***Vijay Thakur vs. State of Himachal Pradesh, 2015(1) SCC (Cri.) 454 = 2014(Sup.) Him. L.R. 2308,*** which reads as follows:

> "12. Coming to the alleged disclosure of the appellant Vijay Kumar, a discovery of jacket (Exhibit P-5) is attributed to him. This recovery was sought to be proved from the statement of PW-23, who has said that appellant Vijay Kumar had made a disclosure statement that he had kept the jacket in his house and the statement was recorded as Exhibit PW-3/C. However, in his cross-examination, he has admitted that document Exhibit

> PW-3/C was prepared 10-15 minutes prior to the recovery of clothes and he was not there when recovery was effected. He had seen the clothes when they were with the Police. Therefore, recovery of jacket on the disclosure statement made by accused Vijay Kumar also becomes doubtful. In such circumstances, it would be too risky to convict these two appellants solely on the basis of alleged disclosure, which recovery is also shrouded with elements of doubts. As already discussed above, there is no other circumstance which relate these two appellants to the commission of the offence."

39. In view of the well established legal principles, the prosecution case qua recoveries having been effected pursuant to the disclosure statements made by the accused is also not proved in accordance with law.

40. If coming to the recovery of T-Shirt Ext. P-1, vide memo Ext. PW-1/B, stone Ext. P-3, sample of soil Ext. P-5, box Ext. P-6 vide recovery memo Ext. PW-2/A, no doubt, the same is supported by PW-3 Bansi Lal, one of the attesting witnesses to Ext. PW-1/B and PW-2 Raj Kumar to the memo Ext. PW-2/A, however, the recovery so made cannot be used against the accused when it is not proved that he has murdered the deceased with stone Ext. P-3.

41. Therefore, the recovery of clothes, ornaments and chappals and weapon of offence etc. made in this case is also of no help to the prosecution.

42. The last and 5th circumstance is the recovery of dead body of Shanti Devi and the so called subsequent conduct of the accused. The dead body of deceased in naked condition is not proved from the field of PW-1 Pratap Singh, the complainant for the reason that the lady who firstly has seen the dead body lying there has not been associated with the investigation of the case nor cited as witness. Though, as per the statement of PW-1 Pratap Singh in his cross-examination that lady is sister-in-law of Surjeet (PW-18), he, however, expressed his inability to tell her name. According to him, they call her by nickname "Gole". As a matter of fact, it is the said lady, would have substantiated this aspect of the case more effectively and judiciously. She, however, has not been examined by the prosecution to the reasons best known to it. Therefore, the story of the dead body lying in the field of the complainant PW-1 Pratap Singh is also doubtful. No doubt, it is stated so by PW-1 Pratap Singh, the complainant and PW-2 Raj Kumar and the spot map Ext. PW-17/B has also been relied upon by the police, however, the non-examination of the lady who had informed PW-1 Pratap Singh about the dead body lying in his field casts doubt on the prosecution story in this regard. Therefore, the recovery of the dead body in the manner as claimed by the prosecution is also not proved beyond all reasonable doubt.

43. In order to substantiate its case qua subsequent conduct of the accused, reliance has been placed by the prosecution on the statement of PW-1 Pratap Singh, the complainant. No doubt, PW-1 Pratap Singh has stated so that on coming to know about the dead body of Shanti Devi lying in his fields, the accused ran away. Even if it is believed to be so and that the accused having murdered the deceased during the night intervening 16/17-11.2013 and thrown her dead body in the nearby fields, firstly he would have run away from that place and secondly not come to the field of PW-1 Pratap Singh for working there. A mere sentence in the statement of PW-1 Pratap Singh is not sufficient to arrive at a conclusion that the accused had absconded on hearing about the dead body of Shanti Devi lying in the fields. He, being an outsider seems to have been framed falsely to save the real culprit and the police having failed to trace out any clue about the real culprit.

44. The medical evidence in the form of post mortem report Ext. PW-8/A and Ext. PW-10/C and also the statements of Dr. Mohan Singh (PW-8), Medical Officer, CH Nurpur and PW-10 Dr. Susheel Sharma, Asstt. Professor, Department of Forensic Medicine, Dr. R.P. Medical College, Tanda reveal that the cause of death of Shanti Devi (deceased) was the injuries ante mortem on her skull caused by forceful impact of some blunt weapon. The stone Ext. P-3 as per such evidence available on record can be the weapon of offence. However, nothing tangible has come on record to suggest that it is the accused who inflicted such injuries on her person intentionally and deliberately and knowing fully well that the same are likely to cause her death. The reports received from Forensic Science Laboratory Ext. PX-1 to PX-3 reveal that blood stains were on the clothes of the deceased Shanti Devi, however, no semen could be detected thereon. The blood sample was found to be human blood of group "B". No blood, however, was detected on the jean pants and T-shirt of the accused. Therefore, such scientific investigation conducted is also not suggestive of that the accused has murdered the deceased.

45. The evidence as has come on record by way of statements of official witnesses also does not connect the accused with the commission of the offence. Otherwise also, such evidence could have been used as a link evidence had the prosecution been otherwise able to bring guilt home to the accused, hence need not to be discussed any further.

46. In view of the discussion hereinabove, we are satisfied that the present is a case of sketchy evidence against the accused. Whatever evidence having come on record by way of statements of PW-1 Pratap Singh, PW-2 Raj Kumar and PW-4 Sushma cannot be relied upon against the accused as they are interested witnesses. The evidence as has come on record by way of their respective testimony is otherwise also inconsistent and contradictory in nature. They even have improved their previous version. Learned trial Court, as such, has not appreciated the evidence available on record in its right perspective and to the contrary recorded its findings on the basis of conjectures and surmises. Such an approach has certainly resulted in miscarriage of justice to the accused. He has been convicted while placing reliance on highly inadmissible evidence. The impugned judgment, as such, is neither legally nor factually sustainable.

47. Consequently, this appeal succeeds and the same is accordingly allowed. The accused is acquitted of the charge under Section 302 IPC framed against him. The accused is serving out the sentence. He be set free forthwith, if not required in any other case, however, on verification of his antecedents i.e. name, parentage, permanent residential address in the State of Bihar and on his furnishing personal bond in the sum of Rs. 25,000/- with one surety in the like amount to the satisfaction of learned trial Judge. The bonds so executed shall, however, remain in force for a period of six months. The Registry to prepare the release warrants accordingly. The amount of fine, if already deposited, be refunded to the accused against proper receipt.

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

Sh. Gaurav Thakur …Petitioner

Versus

State of Himachal Pradesh …Respondent

Cr. MP (M) No. 977 of 2019

Decided on July 17, 2019

Code of Criminal Procedure, 1973– Section 439**- Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)-** Section 21- Recovery of 6.94 gms of heroin– Regular bail– Grant of– Accused roaming in college premises without any authority and on search found possessing heroin– Accused admitted his guilt and begged for pardon before college authorities– State objecting to grant of bail on ground of accused being a drug peddler– Held, recovery of alleged contraband falls in intermediate category– Rigors of Section 37 of Act are not attracted– Petitioner in jail for the last seven months– He cannot be allowed to incarcerate in jail for indefinite period- Petition allowed and accused admitted on regular bail subject to conditions. (Paras 5 to 7 & 13)

Cases referred:

Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner — Mr. G.S. Rathour, Advocate.
For the respondent — Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner, Gaurav Thakur, who is behind bars since 23.12.2018, has approached this court, in the instant proceedings filed under S.439 CrPC, for grant of regular bail in FIR No. 367, dated 23.12.2018 under S.21 of the Narcotic Drugs & Psychotropic Substances Act, registered at Police Station, Sadar, Solan, Himachal Pradesh.

2. Close scrutiny of the record/status report made available to this Court reveals that on 23.12.2018, police, after having received information /complaint from the Director, Shoolini University, Solan, apprehended bail petitioner with 6.94 grams of Heroin. Record further reveals that prior to reaching of the police on the spot, College Authorities had actually caught the bail petitioner, who was roaming in the premises of the college without there being any authority. College Authorities suspecting credentials of the bail petitioner asked him to give his search. In the alleged search contraband as detailed above, was recovered. Subsequently, the Police weighed the contraband and found same to be 6.94 grams. After completion of necessary codal formalities, Police lodged FIR, detailed herein above, against the bail petitioner, on 23.12.2018, and since then, he is behind the bars.

3. Mr. Sanjeev Sood, learned Additional Advocate General, while acknowledging the factum with regard to completion of investigation, contended that though at this stage, nothing is required to be recovered from the bail petitioner, but keeping in view the gravity of the offence, alleged to have been committed by the bail petitioner, he does not deserve any leniency. Mr. Sood, learned Additional Advocate General further contended that as per investigation, bail petitioner had gone to Shoolini University with a view to sell narcotics to the students of the College and as such, he does not deserve to be enlarged on bail.

4. Mr. G.S. Rathour, learned counsel, while refuting the aforesaid contention/ submission made by learned Additional Advocate General, contended that the recovery, if any, fo the contraband is highly doubtful because, admittedly, in the case at hand, bail petitioner was apprehended by College authorities and not by the Police. Mr. Rathour further contended that the bail petitioner has been falsely implicated because the bail petitioner, who is a young person of 24 years of age, had gone to Shoolini University to meet his friends. Lastly Mr. Rathour, contended that though there is no evidence to conclude that the bail petitioner was carrying narcotics alongwith him, but even if story of the prosecution is presumed to be correct, bail petitioner is entitled to bail keeping in view the quantity of contraband allegedly recovered from him.

5. Having heard learned counsel for the parties and perused the material available on record, this court is not in agreement with Mr. Rathour, learned counsel for the bail petitioner that there is nothing on record to suggest that the bail petitioner was apprehended carrying 6.94 grams of Heroin on the date of alleged incident, because statements having been made by witnesses associated by the Police reveal that the bail petitioner was found roaming in the College premises without any authority and subsequently, he admitted his guilt and begged for pardon. Though recovery in the case at hand, never came to be effected by the Police, but it would be too early to conclude at this stage that recovery, if any, of the contraband is vitiated on account of non-compliance of various provisions of the Act *ibid*.

6. Leaving everything aside, this court having taken note of the fact that the bail petitioner has already suffered for more than seven months and there is nothing to suggests that he has been earlier indulging in such activities, sees no reason to let the bail petitioner incarcerate in jail for an indefinite period during trial. Moreover, quantity allegedly recovered from the bail petitioner is an 'intermediate' quantity and as such, rigours of S.37 of the Act *ibid* are not attracted to this case. Though aspects with regard to compliance of various provisions of the Act *ibid*, while conducting search of bail petitioner are to be considered and decided by the court below in the totality of evidence to be collected on record by investigating agency, but for the reasons stated above, this court sees no reason to curtail the freedom of the petitioner for an indefinite period, moreover, when nothing has been placed on record to demonstrate that the bail petitioner is a drug peddler and earlier also some case was registered against him.

7. Moreover, guilt, if any, of the petitioner is yet to be proved by the prosecution by leading cogent and convincing evidence in accordance with law, as such, this court does not deem it proper to curtail the freedom of the bail petitioner for an indefinite period during trial.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important

facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

9. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor

preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

11. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a

large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

13. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail subject to his furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the trial court/Chief Judicial Magistrate concerned, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

14. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

State of Himachal Pradesh …Petitioner
Versus
Monu @ Gulu …Respondent

Cr. Revision No. 205 of 2019
Decided on July 18, 2019

Juvenile Justice (Care and Protection of Children) Act, 2015 –Section 14– Juvenile Justice (Care and Protection of Children) Rules, 2016 – Rule 10 (6) – Presentation of final report in petty or serious offences –Time period - Juvenile Justice Board (Board) returning final report to investigating agency on ground of not having been filed within statutory period– Petition against– Held, Rule, 10 (6) of Rules provides that final report in petty or serious offences by investigating agency should be filed before Board within period of two months from date of receipt of information except in those cases where it was reasonably not know that person involved in an offence was a child– But even in such cases, application is required to be filed before Board seeking extension of time– No reason given by police for delay caused in filing final report– Order of JJB's is not illegal– Petition dismissed. (Para 4)

For the petitioner: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for the petitioner.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant criminal revision petition filed under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short "the Act"), challenge has been laid to order dated 3.10.2018, passed by the learned Principal Magistrate, Juvenile Justice Board, Solan, District Solan, HP, in Criminal Misc. Application No. 17-4 of 2018, under S.379 read with S.34 IPC, whereby final report submitted by the concerned police station has been returned being not in consonance with the law.

2. Case under aforesaid provisions came to be registered against the respondent-accused (in short "the accused") on 10.12.2016, vide FIR No. 321, dated 10.12.2016 registered at Police Station, Baddi, Solan, Himachal Pradesh.

3. As per Rule 10 (6) of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016, final report after investigation of the case is required to be filed by the Investigating Agency before the Juvenile Justice Board at the earliest and in any case, not beyond the period of two months from the date of information to the police. Since in the case at hand, final report came to be filed before Juvenile Justice Board after the prescribed period of two months, Juvenile Justice Board vide impugned order dated 3.10.2018, returned the final report to the concerned Police Station. In the aforesaid backdrop, State has approached this Court in the instant proceedings, praying therein to set-aside impugned order dated 3.10.2018 and to punish the accused in accordance with law.

4. Having heard learned Additional Advocate General and perused material available on record vis-à-vis reasoning assigned by the Juvenile Justice Board while passing

impugned order dated 3.10.2018, this Court is not persuaded to agree with Mr. Sudhir Bhatnagar, learned Additional Advocate General that learned court below, while passing impugned order has failed to appreciate the facts as well as law, rather this Court finds that though final report after lodging of FIR was prepared much before the prescribed period of two months, but same came to be filed before the Juvenile Justice Board after nineteen months of lodging of FIR. Rule 10 (6) clearly provides that final report by the Investigating Agency should be filed before the Juvenile Justice Board at the earliest and in any case not beyond the period of two months from the date of information to the police, save and except in those cases where, it was reasonably not known that the person involved in the offence was a child, but even in such like cases, application is required to be filed before the Juvenile Justice Board seeking extension of time. In the case at hand, it is not the case of the prosecution that the delay in presenting the final report occurred on account of the fact that it was not reasonably known to the prosecution that the accused involved in the offence was a child.

5. The words "in any case not beyond the period of two months" used in Rule 10 (6) clearly suggest that provision contained under Rule 10 (6) is mandatory and same is to be scrupulously adhered to. No cogent and convincing reasons came to be assigned by the Investigating Agency in support of delay in presenting the final report, which admittedly came to be filed after nineteen months of lodging of FIR. Since Juvenile justice Act, 2016 and Rules framed thereunder are special enactment, learned court below while returning the final report to the police concerned, rightly observed that procedure provided under the Code of Criminal Procedure would not prevail upon the special enactment.

6. Consequently, in view of the above, this Court finds no illegality and infirmity in the impugned order passed by the court below and as such, same is allowed and upheld, therefore, present petition fails and dismissed accordingly.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Pankaj …Appellant.
Versus
State of Himachal Pradesh ….Respondent.

Cr. Appeal Nos. 251, 257 & 258 of 2018
Reserved on: 27.6.2018
Decided on : 12.7.2019

Indian Penal Code, 1860– Sections 365, 376-D and 452– House trespass and gang rape etc – Proof – Trial court convicting and sentencing accused of house trespass and gang rape– Appeal against by accused on ground of wrong appreciation of evidence on part of trial court– Defence contending that prosecutrix did not identify accused as persons who raped her, in her statement during trial and they deserve acquittal– Held, prosecutrix admitted of having made statement recorded under Section 164 Cr.pc before Magistrate - Statement duly proved by examining Magistrate who recorded it - Statement clearly mentioning names of accused in it as perpetrators of crime– FSL report clearly linking accused "RK' and "SS' as persons whose seminal stains were found in vaginal swab of victim– Medical evidence does not rule out participation of more persons in crime in addition to 'RK' and 'SS'– Accused 'P'

specifically named in statement recorded under Section 164 of Cr. Pc– Mere non-identification of accused during trial in such circumstances is inconsequential– Appeal dismissed– Conviction upheld.(Para 10 to 15)

1.Cr. Appeal No. 251 of 2018
Pankaj ...Appellant.
Versus
State of Himachal Pradesh ....Respondent.

2.Cr. Appeal No. 257 of 2018
Shiv Singh alias Lambu ...Appellant.
Versus
State of Himachal Pradesh ....Respondent.

3. Cr. Appeal No. 258 of 2018
Rakesh Kumar ...Appellant.
Versus
State of Himachal Pradesh ....Respondent.

For the Appellant(s): Ms. Sheetal Vyas and Ms. Manika Mittal, Advocates.
For the Respondent-State: Mr. Hemant Vaid and Mr. Desh Raj Thakur, Additional Advocate Generals with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant appeals are directed against the judgment of 1.11.2017, rendered by the learned Additional Sessions Judge-I, Kangra at Dharamshala, District Kangra (H.P), in Session Case No. 8-I/VII/2015**,** whereby, the learned trial Court convicted, and, sentenced the appellants/accused to (a) undergo rigorous imprisonment for a period of two years, and, to pay a fine of Rs.2,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of three months, for commission of offence, punishable under Section 452 readwith Section 34 of the IPC, (b) undergo rigorous imprisonment for a period of two years, and, to pay a fine of Rs.2,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of three months, for commission of offence, punishable under Section 365 readwith Section 34 of the IPC, (c) undergo rigorous imprisonment for a period of twenty years, and, to pay a fine of Rs.5,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of one year, for commission of offence, punishable under Section 376D readwith Section 34 of the IPC.

2. Brief facts of the case are that the husband of the prosecutrix was working as a labourer at Lali stone Crusher, Dhangu-Mazra Road. The prosecutrix was residing with her husband, and, a three years old son in a quarter near the Lali stone crusher. On 24.3.2015 at about 7.00-8.00 P.M. accused Shiv Singh alias Lambu, Rakesh and Pankaj, who were working at Pathania Stone Crusher came to the quarter of the prosecutrix, and, consumed liquor with the husband of the prosecutrix, and, left after about half an hour. At about 11.00-11.30 P.M when the prosecutrix, her husband, and, their son, were sleeping,

the accused persons entered the quarter of the prosecutrix and gagged her mouth and lifted her from her bed and took her to a quarter that was lying vacant and raped her one by one. The prosecutrix tried to raise alarm but the accused Shiv Singh alias Lambu gagged her mouth. After committing rape, the accused persons lifted the prosecutrix, and, left her near her quarter. The prosecutrix informed her husband, who took her to Saroj, the chowkidar of the stone crusher. Saroj informed the police, and, accordingly police came at Lali Stone Crusher, where the statement of the prosecutrix under Section 154 of Cr.P.C was recorded by ASI Mohinder Kumar. On the basis of the said statement, formal FIR was registered, and, on conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

3. The accused persons were charged by the learned trial Court, for, theirs having committed offences punishable, under, Sections 452, 365, and, under section 376-D readwith Section 34 of IPC, to, which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 26 witnesses. On closure of the prosecution evidence, the statements of the accused, under Section 313 of the Code of Criminal Procedure, were recorded, wherein, they pleaded innocence and claimed false implication. They did not choose to lead, any evidence in defence.

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

6. The accused/appellants are aggrieved by the recording of judgment of conviction, and, consequent therewith sentence, imposed, upon them, by the learned trial Court. The learned counsel(s) appearing for the appellants/accused have concertedly, and, vigorously contended, that, the findings of conviction recorded by the learned trial Court, standing, not based on a proper appreciation by it, of, the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, they, contend that the findings of conviction, being reversed by this Court, in, exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, Mr. Hemant Vaid, learned Additional Advocate General, has, with considerable force and vigour, contended that the findings of conviction, recorded by the learned Court below, standing, based on a mature and balanced appreciation, by it, of the evidence on record, hence, theirs not necessitating any 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. Ms. Sheetal Vyas, learned Counsel for the appellants, has made a fervent espousal before this Court, that, the appellants/accused, rather proving their non-participation, in the relevant incriminatory occurrence, given (a) the testimony of the prosecutrix being not credible (b) lack of it being confidence inspiring, (c) hers failing to, during the course of recording, of her deposition in Court, hence identity the accused/appellants, (d) and, hers during the course of her cross-examination, by the learned PP concerned, upon, hers being declared hostile, rather acquiescing to, a, suggestion, put thereat, to her, by the learned PP, vis-a-vis, hers not disclosing the names of convicts/accused, to be the persons, who had allegedly perpetrated hence forcible sexual intercourse rather upon her, (e) the DNA expert after making analysis of the vaginal swabs', of the prosecutrix, sent thereat, for, comparison, hence with the blood grouping(s) of the accused/convicts, also omitting to render any firm opinion therein, vis-a-vis, upon, his

making the requisite comparison, with the vaginal swabs of the prosecutrix with the blood grouping of co-accused Pankaj, hence qua his participating, in, the relevant sexual encounter, (f) thereupon, the deposition of the prosecutrix, even if it, may acquire any credibility rather its credibility being eroded by the afore non-echoings, vis-a-vis, co-accused Pankaj.

10. This Court, has, read the testification recorded by the prosecutrix, and, it is apparent, on, an incisive reading, of the testimony of the prosecutrix, comprised both in her examination-in-chief, and, in her cross-examination, vis-a-vis, the defence propagating rather the plea of absolute denial, and, it not propagating the plea qua sexual intercourse(s) which occurred, inter-se, the prosecutrix and the accused, hence, being a sequel of, any, valid consent, if any, purveyed to each, hence, by the prosecutrix, consequently, it is to be fathomed from the testification rendered by the prosecutrix, vis-a-vis, the afore alluded submission, rather carrying any weight or tenacity. Further more, the defence(s) espousal, vis-a-vis, the non-participation of the accused, in, the relevant penal misdemeanors, is bedrocked, upon, qua given prevalence of darkness, at the relevant time, thereupon, there being rather misidentification of the accused, hence, by the prosecutrix, the effects whereof are (a) qua the accused, hence being forbidden, to, espouse qua there being any valid consent being meted to them, by the prosecutrix, for theirs perpetrating sexual intercourse(s) upon her (b) also given the numerical number(s) of the accused, hence theirs' being rather enabled to overpower, the prosecutrix, besides obviously theirs holding the physical capacity, to, benumb any resistive, and, obstructive postures, of the prosecutrix, vis-a-vis, their penal misdemeanors, (c) thereupon, an inference is sparked qua it being wholly inconsequential, qua omission(s), of occurrence(s), of, injuries either on the person of the prosecutrix, or, upon the accused, nor hence, from the afore omission(s), any concomitant sequel can be begotten, qua the prosecutrix meteing any valid consent to the accused. Upon a wholesome reading of the testimony, of the prosecutrix, hence, with a keen discerning mind,this Court is of the view, that the afore espousals, made before this Court, by the learned counsel for the appellants, being also legally frail, given (a) a perusal of the statement, recorded by the learned Judicial Magistrate concerned, in proceedings, drawn, under Section 164 of Cr.P.C, of the prosecutrix, rather making unveiling(s) qua hers making clear disclosure(s) therein, vis-a-vis, the names of all the co-accused, and, also it revealing qua hers naming them, as, the alleged offender(s), in, the relevant inculpatory occurrence, (b) and, with PW-20 (Niranjan Singh) also while stepping into the witness box hence proving the statement of the prosecutrix, as, embodied in Ex. PW-1/D, wherein reiteratedly, the names, of, all the convicts/accused rather are borne (c) besides his also testifying, in his examination-in-chief, vis-a-vis, his after explaining, and, reading, to the prosecutrix, all the contents borne therein, hence thereafter, the prosecutrix, appending her thumb impression(s), in red circle 'A', upon, PW-1/D, (d) furthermore, his also testifying qua the prosecutrix, being identified, by the Investigating Officer. In addition with his, in his testification, embodied in his examination-in-chief, proving his appending a certificate, comprised in Ex. PW-20/D, with a clear echoing borne therein, vis-a-vis, rather with the fullest volition, the prosecutrix, making a statement embodied in Ex. PW-1/D hence before him, (e) and, though he was also subjected, to, an exacting cross-examination, by the learned defence counsel, however, the learned defence counsel rather failing to mete any suggestion to him, vis-a-vis, the thumb impression(s) borne in Ex. PW-1/D, rather not belonging to the prosecutrix, (f) nor, any apposite suggestion standing thereat put to her, vis-a-vis, the validity of the certificate appended with PW-1/D, (g) and, rather the afore certificate carrying, an apt narration, qua the prosecutrix, making with her fullest volition hence a statement before him, against the convicts/accused, (h) cumulative effect(s) whereof, is, rather an inference standing sparked, vis-a-vis, hence the afore testification, obviously belittling the creditworthiness, if any, of the prosecutrix, to, while stepping into the witness

box hence fail, to, during the course of her examination-in-chief, rather identify the accused, (j) nor also her mere oral deposition, comprised in her cross-examination, vis-a-vis, hers not naming the accused, in her previous statement recording in writing, also not either outweighing or countervailing, the deposition, of PW-20, vis-a-vis, the prosecutrix volitionally rather making the apposite statement, borne in Ex.PW-1/D, (k) and, nor thereupon, the validity of his certificate embodied in Ex. PW-20/D, becomes belied, as, any oral deposition, of the prosecutrix in detraction, to the proven recitals, borne in Ex. PW-1/D, and, in certificate Ex. PW-20/D, is, statutorily barred, through, the statutory estoppal created, under Sections 91, and, 92 of the Indian Evidence Act, for hence for any credit being assigned thereto.

11. Reiteratedly, when she has failed, to deny her signatures, occurring in the certificate, consequently also, for all the afore reasons, the testification of the prosecutrix, is rendered both inspiring, and, creditworthy, and, the learned trial Court, has not committed any error in convicting and sentencing each, of the accused, for, terms of imprisonment, carried in the order sentencing each of them. Further more, the prosecutrix in her testimony, comprised in her, examination-in-chief, has rendered communication(s) therein, vis-a-vis, hers' making her previous statement, borne in Ex. PW-1/A, and, also on hers being declared hostile, given hers, during the course of her examination-in-chief rather failing to identify the accused, in Court, (a) and also hers' rather acquiescing to a suggestion put thereat, to her, by the learned PP concerned, vis-a-vis, hers' appending her thumb impression(s), upon, Ex. PW-1/B (b) wherethrough(s) rather certain incriminatory items, vis-a-vis, the inculpatory occurrence, hence stood recovered, and, upon, the afore items, as, carried in a sealed parcel, and, upon the embossed thereon seals, being ordered to be broken, and, upon theirs being shown, to her in Court, hers' rather admitting qua all the items, as, enclosed therewithin, hence comprising the onces, embodied in Ex. PW-1/B, (c) and, there onwards hers also admitting qua hers' making a statement, under, Section 164 of Cr.P.C, before the learned Magistrate concerned, and, thereafter hers' also acquiescing, to, a suggestion put thereat to her, by the learned PP, vis-a-vis hers, therein, disclosing the names of accused Rakesh, Pankaj, and, one Lambu, to be the person(s), who, perpetrated sexual intercourse upon her person, and, when the afore factum, is, supported by the best scientific evidence, borne in the apposite SFSL report, comprised in Ex. PW-7/D, (d) and, with the learned defence counsel, while subjecting her to cross-examination, meteing, suggestion to her, vis-a-vis, hers' disclosing names of the persons, who, perpetrated sexual intercourse upon her, and, whereto, she meted an affirmative suggestion, (e) hence filliping an inference qua the defence acquiescing, vis-a-vis, the veracities, of, recitals carried, in, her earlier statement borne in Ex. PW-1/D wherewithin a narration is borne, vis-a-vis, the names of the accused, and, whereto also, as, a natural corollary, the, apposite veracity(ies) is/are acquired , thereupon, the factum, of hers' failing to identify, the, accused in Court, is wholly effaced, and, no benefit therefrom, can be drawn, by the defence.

12. Though the testification recorded by PW-20, has been concluded by this Court, to, negate the effect, of all the afore espousals, addressed by the learned counsel for the accused, and, upon the afore conclusion, standing conjoined, with the report of FSL, embodied in Ex. PA, proven by PW-26 (Dr. Arun Sharma), and, with a perusal of Ex. PA, making a palpable disclosure, qua the sample parcel received thereat, for, the requisite comparison(s) rather carrying therein narration(s), vis-a-vis, the seals being rather, in, an unbroken condition, and, with the proven conclusions, as, embodied therein, rather unveiling, qua the expert concerned, after making the matching(s), of, blood grouping, of the convicts Rakesh Kumar, and, Shiv Singh, with the vaginal swabs of the prosecutrix, his, making a categorical opinion qua the blood grouping(s) of the afore convicts/accused rather matching with the blood groupings, of, semen, hence occurring in the vaginal swabs of the

prosecutrix, (a) thereupon, the effect of the afore pronounced unscathed conclusion(s), as, recorded, in Ex.PW-7/B, proven by PW-26, efficaciously nail the charge, against the accused Rakesh Kumar, and, also against accused Shiv Singh.

13. However, even when there is no firm conclusion against accused Pankaj, (i) nonetheless, the afore extracted conclusion, also rather making an echoing, qua the participation, of persons, other than the afore being not overruleable, and, with the Doctor concerned, who prepared report comprised, in Ex.PW-7/B, also making a testification qua the participation, of persons, other than, the afore being not overruleable, (a) thereupon dehors any firm conclusion, at par with co-accused Rakesh, and, Shiv Singh, being not made in Ex. PW-7/B, vis-a-vis, co-accused Pankaj, thereupon, also no conclusion can be formed, vis-a-vis, the afore convict Pankaj, holding no incriminatory role, in the penal occurrence, (b) conspicuously, when cogent evidence has been adduced vis-a-vis the valid authoring(s) of Ex. PW-20/D, and, of Ex.PW-1/D.

14. In summa, with the best scientific evidence, hence nailing the charge against the accused, thereupon, it has concomitant effects, of it benumbing the effects, if any, of frailty, if any, gripping, the, testification, of, the prosecutrix.

15. A wholesome analysis of the evidence on record, portrays that the appreciation of evidence, as, done by the learned trial Court, not suffering from any perversity and absurdity nor it can be said that the learned trial Court, in recording findings of conviction, has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence, on record or its omitting to appreciate the relevant and admissible evidence. In aftermath this Court does not deem it fit, and, appropriate that the findings of conviction recorded by the learned trial Court merit any interference.

16. In view of the above discussion, we find no merit in these appeal(s), which are accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Records of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Sh. Kewal Krishan …Appellant.

Versus

State of Himachal Pradesh ….Respondent.

Cr. Appeal No. 504 of 2017
Reserved on: 27.6.2018
Decided on : 12.7.2019

Narcotic Drugs and Psychotropic Substances Act, 1988- Section 20– Recovery of charas– Proof– Special Judge convicting and sentencing accused of consciously possessing 1.674 kg of charas– Appeal against– Defence arguing that no Independent witness was joined at time of search and seizure– And deposition of official witnesses is not trustworthy– Held on facts, seizure memo, different parcels containing bulk and sample contraband admittedly bearing signatures of accused– Statements of official witnesses clear and consistent– Case property found untampered from time of seizure till production in court– FSL report proving recovered stuff as charas– No fundamental rule of law that investigating officer has to join

independent witnesses in investigation- No misappreciation of evidence on record by trial court– Conviction is- based on evidence on record– Appeal dismissed -Conviction upheld. (Paras 10 & 11)

For the Appellant: Mr. Pushpender Verma, Advocate, vice counsel.
For the Respondent-State: Mr. Hemant Vaid and Mr. Desh Raj Thakur, Additional Advocate Generals with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant appeal is directed against the judgment of 23.3.2017, rendered by the learned Special Judge-II, Chamba, District Chamba, H.P., in FN/NDPS Act/429/2015, whereunder, the learned trial Court hence convicted, and, sentenced the appellant/accused to (a) undergo rigorous imprisonment for a period of ten years, and, to pay a fine of Rs.1,00,000/- and in default of payment of fine to further undergo simple imprisonment for a period of 2½ years , for commission, of, an offence, punishable under Section 20 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as 'the NDPS Act').

2. The brief facts of the case are that on 18.6.2015 around 9.15 P.M HC Virender Singh (PW-11) alongwith HC Tej Singh (PW-2), HHC Mohd. Aslam (PW-1), C. Sanjay Kumar No. 145 and C Sanjay Kumar No. 327, in government vehicle bearing No. HP 48-1220 driven by C Mehar Dutt proceeded towards Ind nalla and Koti. Around 9.45 p.m. they reached at Ind Nalla and laid the nakka there. They checked 3-4 vehicles uptill 10.25 P.M. At the same time, a person came down from the pakdandi towards Ind Nalla having one carry bag on your right hand. On seeing the police party, he tried to flee away from the spot and ran towards chamba aside. On the basis of the suspicion, he was nabbed. Thereafter his credentials were inquired on which he disclosed his name to be Kewal Krishan R/o village Malie, Tehsil Churh, District Chamba. The multi coloured carry bag on which crystal brilliant was written was checked. On opening the carry bag, brown colored half sleeve hood, and, a black coloured polythene bag came out. On opening the black coloured polythene bag, hard substance in the shape of round sticks were found. On checking the black coloured hard substance with the help of drug detection kit it was found to be cannabis/charas. On weighment, it was found to be 1 killo 674 grams. Thereafter the police commenced the investigation, and, on conclusion of the investigation, into the offences, allegedly committed by the accused, final report was prepared and presented in the Court.

3. The appellant/accused stood charged, for, his having committed offence punishable, under Section 20 of the NDPS Act, by the learned trial Court, to, which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 12 witnesses. On closure of the prosecution evidence, the statement of the appellant/accused, under, Section 313 of the Code of Criminal Procedure, was recorded, wherein, he pleaded innocence, and, claimed false implication. He did not choose to lead, any evidence in defence.

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

6. The accused/appellant, is, aggrieved by the recording of judgment of conviction, and, consequent sentence imposed upon him, by the learned trial Court. The learned vice counsel appearing for the appellant/accused has concertedly, and, vigorously contended, that, the findings of conviction, recorded by the learned trial Court, standing, not based on a proper appreciation by it, of, the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, they, contend that the findings of conviction, being reversed by this Court, in, exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, Mr. Hemant Vaid, learned Additional Advocate General, has, with considerable force and vigour, contended that the findings of conviction, recorded by the learned Court below, standing, based on a mature and balanced appreciation, by it, of the evidence on record, hence, theirs not necessitating any 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. The learned vice counsel for the appellant, has submitted qua the depositions of the official witnesses, being not credible, hence for, assigning any credit thereto, and, moreso, when no independent witnesses stood associated in the relevant seizure, as, stood made, at the site of occurrence.

10. However, the afore submission addressed, before this Court, by the learned counsel for the appellant, has no tenacity, (a) unless the depositions', of the official witnesses concerned, are, ridden with, a, gross taint, sparked by there existing no apt corroborative inter-connectivities, inter-se, the seizure of the contraband, made at the site of occurrence, from the conscious and exclusive possession of the accused, and, imperatively, upto the production of case property, before the learned trial Court, (b) and the afore inter-connectivities hence appertaining to the number(s), and, description(s), of the seal impression(s), embodied in the seizure memo, borne in PW-1/C, and, thereafter echoed in NCB form, borne in PW-9/A, abstract of malkhana register, borne in Ex. PW-10/C, and, in the report of FSL, borne in Ex. PZ, (c) wherein rather a categorical enunciation, is, borne qua the sample sent, to it, for examination rather containing therewithin hence charas. Preeminently, the afore inter-connectivities, stand cogently established, from the stage, of the seizure being made, from, the conscious and exclusive possession of the accused, upto, the production of case property in Court, whereupon, there is no enjoined necessity cast upon the Investigating Officer, to, associate any independent witness, in the relevant seizure(s). Further more, any omission on the part of the Investigating Officer, to, associate any independent witnesses in the relevant seizure, would not perse constrain any conclusion from this Court, qua, the Court, may hence not assigning any credit, vis-a-vis, the testifications' of the official witnesses concerned. In the afore endeavor, and, for the reasons to be assigned hereinafter, this Court is of the view, that, there was no enjoined necessity, upon, the Investigating Officer, to, associate in the relevant exercise, any independent witnesses thereto, as, the relevant inter connectivities, inter-se, the seizure made from the conscious and exclusive possession of the accused, through, an apt seizure memo comprised in Ex. PW-1/C, rather surviving upto the production of the case property in Court, and, the apt synonymity rather appertaining to the number(s), and, description(s), of, seal impressions embossed thereon, and, upon the afore exhibits. The recovery of the relevant item, of contraband, was made, from the conscious and exclusive possession of the accused, through memo, borne in Ext. PW-1/C, whereon, the uncontested signatures of the accused stand borne, and, hence the estopping statutory principles, engrafted in the provisions of Section 91 and 92 of the Indian Evidence Act, bar the accused to contest the

voicing(s), borne therein, unless the hereinafter alluded apt interconnectivities, do not emerge, at the stage of production of the case property in Court (a) AND also in contemporaneity, vis-à-vis, the afore seizure, standing effectuated, by the Investigating Officer concerned, from, the conscious and exclusive possession of the accused, rather NCB form, borne in Ext. PW-9/A, stood also drawn, (b) wherein reflections are cast, vis-à-vis, 5 seal impressions each, on the bulk, and, the sample parcels, hence carrying English alphabet "T", standing embossed thereon, and, whereon, the uncontested signatures of the accused stand borne, and, hence the estopping statutory principles, engrafted in the provisions of Section 91 and 92 of the Indian Evidence Act, bar the accused to contest the voicing(s), borne therein, unless, the hereinafter alluded apt interconnectivities, do not emerge, at the stage of production of the case property in Court (c) the Station House Officer concerned, upon receiving the seized contraband, at the police station concerned, also embossed thereon 3 re-sealing(s) seal impressions rather carrying English alphabet "N". The afore seizure(s) was/were, deposited in the Mallkhana concerned. Subsequent thereto, under road certificate, borne in Ext.PW-8/D, the seized contraband, stood dispatched, to the FSL concerned, for the latter, hence making an apt opinion thereon. All the afore exhibits, carry narratives therein, vis-à-vis, the description(s), and, number(s), of the seal impressions, embossed, respectively upon the bulk, and, upon the sample parcels, and, all the afore visibly carry interse compatibility(ies), and, synonymity(ies). Furthermore, the FSL concerned, upon receiving, the case property, has, in its report, embodied, in Ext. PZ, made echoing(s) therein rather bearing compatibility, vis-à-vis, the afore facet(s), as narrated in the afore-referred exhibits, (d) and has also rendered, an opinion, qua the parcel sent to it, for analysis, carrying therein rather all the ingredients, of, Charas, (e) and thereafter, echoing(s) are also borne therein, qua the FSL concerned, after extracting, the ingredients/contents, as stood carried in the sample parcel, sent to it, for analysis, and, upon, thereafter its making an opinion thereon, rather, it subsequent thereto, re-inserting the ingredient(s) in the cloth parcel, and, it embossing thereon, the, seal impression(s), of, the FSL. The charge would be concluded, to be, efficaciously proven by the prosecution, (f) upon each of the prosecution witnesses concerned, wheretowhom, the case property(ies), stood shown in Court, hence in their respective testification(s), making clear/candid echoing(s), qua the relevant congruities, and, similarities, interse, the number(s), and, description(s) of the seal impressions, as stand echoed, in the afore exhibits, also existing, emphatically upon, the case property, upon, its production in Court. However, at the time of production, of the case property in Court, and, thereat its being shown, to the prosecution witnesses concerned, though, as aforestated, the relevant connectivities, stand echoed, by the prosecution witnesses concerned, (g) and, when thereat, the accused persons stood also represented, by the defence counsel,(h) hence when the learned defence counsel, rather thereat held the opportune moment, to, on sighting the case property, hence make therethrough(s) decipherment(s), and, discerning(s), vis-à-vis, the afore congruities, or compatibilities, being amiss therein (j) or not, rather, visibly even at the afore stage, the learned defence counsel, did not, either object to the production, or exhibition, of the case property in Court, (i) nor thereafter proceeded to make any strivings, to elicit, from the prosecution witnesses concerned, any echoing(s), qua the relevant connectivities, (k) not existing(s), nor the learned defence counsel endeavored, to, hence ensure qua the Court making any observation, during, the course of recording, of the testification(s), of the prosecution witnesses', concerned, qua the aforestated relevant compatibilities, and, interconnectivities, interse the bulk, and, seal parcels, and, appertaining to the number(s), and, description(s), of, 3 seal impressions, carrying English alphabet, "N", narrated in Ext.PW9/C , (l) rather not emerging, at the stage of production, of the case property, in Court. In sequel to the afore, an inference is sparked, qua the learned defence counsel, rather acquiescing qua the relevant apposite congruities, and, connectivities, emerging

interse, the, number(s) and description(s), of the seal impressions, carrying thereon English alphabet "T", and, as stood embossed, on the samples, and, bulk parcels, and, qua wherewith, a synonymous narrative, is, carried in Ext. PW-9/A, hence at the imperative stage, of production of case property in Court.

11. A wholesome analysis of the evidence on record, portrays that the appreciation of evidence as done by the learned trial Court, not suffering from any perversity and absurdity, nor, it can be said that the learned trial Court, in recording findings of conviction, has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence, on record or its omitting, to appreciate, the, relevant and admissible evidence. In aftermath this Court does not deem it fit, and, appropriate that the findings of conviction recorded by the learned trial Court, hence, merit any interference.

12. In view of the above discussion, we find no merit in this appeal, which is accordingly dismissed, and, the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

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

Cr. Appeal No: 240 of 2009
Date of Decision No. 25.06.2019

Indian Penal Code, 1860– Sections 279 and 338– Rash and negligent driving– Proof– Appeal against acquittal of accused by State – Prosecution case being that accused by his rash driving dashed his car against cycle of victim and caused grievous injuries to him– On facts– Held – Offending car was on ascend– Injured was moving his cycle by standing on paddles– Cycle was being driven in zig-zag manner and all of sudden he turned it towards right– And hit against car coming from behind – Allegations of rash driving on part of accused not proved – Appeal dismissed – Acquittal upheld (Para 8)

For the Appellant : Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.
For the Respondent: Mr. Anup Rattan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant Criminal Appeal having been filed by the appellant-State, is directed against the judgment of acquittal dated 24.4.2009, passed by learned Additional Chief Judicial Magistrate, Dehra, District Kangra, Himachal Pradesh in Criminal case No. 391-I/2003/164-II/2004, whereby learned trial Court held respondent ***(hereinafter referred to as the 'accused')*** not guilty of having committed of offences punishable under Sections 279 and 338 of IPC and accordingly acquitted him.

2. In nutshell, the case of the prosecution as emerge from the record is that on 14.8.2003, at around 10:20 A.M, Nitin Sharma was riding on cycle and complainant namely, Shruti Vaid was going on foot and when they reached near 'Robin Cinema Chowk', at Nehran Rukhar, one Maruti car bearing registration No. HP-19-8298 being driven by the accused came from Dhaliara side in a high speed and hit cycle of Nitin Sharma from the back side, as a consequence of which, he fell down on the road and sustained serious injuries. The driver of the offending car stopped the vehicle at a distance of 50-60 feet and many people came on the spot. The accident in question allegedly occurred on account of the rash and negligent driving of the accused. The matter was reported to the police by the complainant, Shruti Vaid vide her statement made under Section 154 Cr.P.C., Ex.PW11/B, on the basis of which, formal FIR Ex.PW11/C came to be registered against the accused. After completion of the investigation, police presented the challan in the Court of learned Additional Chief Judicial Magistrate, Dehra, District Kangra, Himachal Pradesh, who being satisfied that a prima-facie case exists against the accused, put notice of accusation to him for the commission of offence punishable under Sections 279 and 337 IPC, to which he pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case examined as many as thirteen witnesses, whereas accused in his statement recorded under Section 313 Cr.P.C. denied the case of the prosecution in toto. However, he did not lead any evidence in his defence.

4. Learned trial Court on the basis of the evidence collected on record by the prosecution, held accused not guilty and accordingly acquitted him vide judgment dated 24.4.2009. In the aforesaid background, appellant-State has approached this Court in the instant proceedings, seeking conviction of the accused after setting aside the impugned judgment of acquittal recorded by the learned trial Court.

5. Having heard learned counsel representing the parties and perused the evidence adduced on record by the prosecution vis-a-vis reasoning assigned by the learned court below while passing the impugned judgment of acquittal, this court is not in agreement with Mr. Sudhir Bhatnagar, learned Additional Advocate General that learned trial Court while ascertaining the guilt, if any, of the accused failed to appreciate the evidence in its right perspective, as a consequence of which, erroneous findings have come to the fore, rather this Court having carefully perused the evidence led on record by the prosecution has no hesitation to conclude that prosecution has failed to prove beyond reasonable doubt that on the date of alleged accident, vehicle in question was being driven rashly and negligently by the accused, so as to endanger human life. Interestingly, in the case at hand, most of the independent witnesses have turned hostile and they have not supported the case of the prosecution.

6. Complainant, Shruti Vaid (PW-13) deposed that on 14.8.2003, at around 10:30 AM, she was coming to Bus stand Nehran Pukhar on foot and Nitin Sharma, who suffered injuries was coming on his cycle. She further deposed that Nitin Sharma was riding on the cycle on his left side and in the meanwhile, one car bearing registration No. HP-19-8298 being driven by the accused came there and hit the cycle, as a consequence of which, Nitin fell down on the road. She further stated that accident in question occurred due to the fault of the driver of the car, but interestingly she nowhere specifically stated that accident in question occurred on account of the rash and negligent driving of the accused. In her cross-examination, she admitted that the place where accident took place was on the ascend. Though, she denied that Nitin was riding on the cycle by negotiating it to left and right side, but she admitted that she did not disclose the name of the accused to the police. She admitted the suggestion put to her that if the car had hit the cycle from back side then she would have also received injuries.

7. Nitin Sharma injured also deposed as PW-7 and stated that on 14.8.2003, at around 10:00 AM, while he was going to drop the daughter of his aunt, namely Shruti Vaid on the cycle, one car hit him from the back side, as a consequence of which, he received injuries. He stated that accident in question occurred on account of the fault of the car driver, but he also like complainant(PW-13), nowhere stated that at the tine of alleged accident, offending vehicle was being driven rashly and negligently by the accused. In his cross-examination, he also admitted that the accident took place on the ascend. He feigned his ignorance that he was moving the cycle by standing on the paddles due to which, cycle was moving here and there. He also feigned his ignorance with regard to direction from where vehicle hit his cycle. He also feigned his ignorance with regard to particular/ identification of the driver and type of vehicle, which allegedly hit his cycle.

8. PW-2, Jeewan Singh, PW-4, Ashish Sharma, PW-8, Kundan Dogra and PW-12, Bhupinder Singh, so called independent witnesses, nowhere supported the case of the prosecution and turned hostile. Cross-examination conducted upon these witnesses, nowhere suggests that prosecution was able to extract something from them advantageous to its case. Rather, careful perusal of the cross-examination conducted on these witnesses, clearly suggests that accident occurred on account of the negligence on the part of the injured Nitin Sharma, who at that relevant time was riding on the cycle and accident took place on the ascend. PW-2, Jeewan Singh, in his cross-examination admitted that the accident took place on the ascend and sister of the cyclist was coming on foot. He also admitted that Nitin was moving the cycle by standing on the paddles and cycle was going left and right side. This witness further stated in his cross-examination that Nitin Sharma all of a sudden turned the cycle towards the right side and hit the car, which was on its right direction. This witness in his cross-examination further deposed that maruti car being driven by the accused was in slow speed and driver of the car was not at fault.

9. Similarly, Ashish Sharma (PW-4) in his cross-examination stated that cousin of Nitin Sharma was going on foot behind the cycle. He admitted that had car hit the cycle from back side then cousin of Nitin must have received injuries during the accident. He admitted that cycle had not been damaged from back side and there is ascend on the spot.

10. PW-8, Kundan Dogra was unable to tell the date of the alleged accident, however he deposed that at 10:00/11:00 A.M, he was present in his shop and Nitin Sharma was coming on the cycle, whereas his sister was coming on foot. He deposed that one Maruti car was coming from the back side, however he refused to identify the accused in the Court.

11. Bhupinder Singh (PW-12) also not supported the case of the prosecution. Careful perusal of the cross-examination conducted upon this witness, clearly reveals that he did not depose even a single word against the accused. He denied that Nitin Sharma was going towards Nehran Pukhar Chowk on the cycle and one girl was also going on foot behind the cycle. He denied that one maruti car hit the cycle of Nitin, as a consequence of which, he received injuries. He specifically denied the suggestion put to him that accident in question occurred on account of the rash and negligent driving of the vehicle by the accused. In his cross-examination, he admitted that no accident took place in his presence.

12. Careful perusal of the statements having been made by the aforesaid witnesses, nowhere proves the case of the prosecution, rather create serious doubt with regard to correctness of the story put forth by the prosecution.

13. Apart from above, version put forth by these witnesses cannot be accepted without there being corroboration, if any, of the independent witnesses. True, it is that version put forth by the interested witnesses cannot be brushed aside. In the case at hand,

prosecution itself cited four independent witnesses, but version put forth by them in their cross-examination completely demolishes the case of the prosecution because version put forth by them, clearly creates suspicion with regard to identity of the accused as well as cause of the accident.

14. Leaving everything aside, there is no specific evidence led on record by the prosecution to prove rash and negligent driving by the accused. To prove guilt, if any, of the accused under Section 279 and 337 IPC, it is incumbent upon the prosecution to prove rashness and negligence on the part of the accused and there cannot be any presumption of rashness and negligence. Onus to prove rashness and negligence is always on the prosecution, which in the present case prosecution has failed to discharge.

15. In the instant case, this Court was unable to lay its hand to specific evidence, if any, led on record by the prosecution suggestive of the fact that vehicle at that relevant time was being driven rashly and negligently that too at high speed. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in **Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406**, which reads as under:-

> ***"6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused-appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for the respondent on the other hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.***
>
> ***8. Section 279 deals with rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279 IPC is not negligence. Similarly in Section 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."***

16. The Hon'ble Apex Court in case titled "***State of Karnataka v. Satish,"1998 (8) SCC 493***, has also observed as under:-

> ***"1. Truck No. MYE-3236 being driven by the respondent turned turtle while crossing a "nalla" on 25-11-1982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was charge-sheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338 and 304A IPC and sentenced to various terms of imprisonment. The respondent***

challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.

2. We have examined the record and heard learned counsel for the parties.

3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.

4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.

5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is

dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

17. Careful perusal of aforesaid judgment clearly suggests that there cannot be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur*.

18. Reliance is also placed on judgment rendered by this Court in **State of H.P. Vs. Manpreet Singh**, Latest HLJ 2008 (HP) 538, relevant para whereof is as under:

> ***"4.Legally, in a case of rash and negligent act, if the prosecution is able to prove the essential ingredients of the offence, the onus to disprove it shifts upon the respondent to show that he had taken due care and caution to avoid the accident. It is an admitted fact that said Shri Daya Ram had died in the accident caused by the respondent but still it is incumbent upon the prosecution to prove that it was the rash and negligent act of driving to conclude the rash and negligent driving of the respondent. In other words, it must be proved that the rash or negligent act of the accused was causa causans and not causa sin qua non (cause of the proximate cause). There must be some nexus between the death of a person with rash or negligent act of the accused. According to Rupinder Parkash (PW4) deceased was hit by the motor cycle which was in a high speed but the speed is not criteria to hold the act as rash or negligent. The respondent in his statement under Section 313 of the Code of Criminal Procedure has explained that on seeing the deceased, he had blown the horn and he (deceased) stopped on the road. As soon as he reached near him, he immediately tried to cross the road and got hit. His version has been duly corroborated by Hardeep Singh (DW1) who was a pillion rider with him. Ajay Kumar (PW-1) has admitted this version that the respondent had blown the horn and Daya Ram on hearing it, had stopped for a while. In these circumstances, if a person suddenly crosses the road, without taking note of the approaching vehicle and its driver may not be in a position to save the accident, it will not be possible to hold the Driver guilty of the offence. In the instant case, the deceased knowing fully well at least the approaching vehicle stopped on hearing the horn while crossing the road but when the motor cycle reached near him, he darted before it and the accident took place. Thus in my opinion the prosecution could not prove the offence charged against the respondent beyond reasonable doubt that the respondent was driving the vehicle rashly or negligently. Therefore, in these circumstances, the learned trial Court had rightly acquitted the respondent of the charges framed against him. As such, no interference in the impugned judgment of acquittal is called for. Accordingly the appeal is dismissed. The respondent is discharged of his bail bounds entered upon by him at any stage of the trial."***

19. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests

upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)***
>
> > ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.***

20. In the case at hand, there are material contradictions and inconsistencies in the statements of the prosecution witnesses and as such, no conviction can be based upon the same.

21. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment of acquittal passed by the learned court below, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the present appeal is dismissed being devoid of any merit alongwith pending applications, if any.

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

Rajender Pal …….. Petitioner
Versus
State of Himachal Pradesh …..Respondent

Cr.MP(M) No. 946 of 2019
Date of Decision: 1.07.2019

Code of Criminal Procedure, 1973- Section 439– **Narcotic Drugs and Psychotropic Substances Act, 1985**–Sections 21 & 29 – Regular bail– Grant of– Held, recovery of carton containing 100 bottles of Kuff, a cough syrup having Codeine Phosphate Triprovidine Hydrochloride contents in them, was recovered from a car– Petitioner was not an occupant of said vehicle– Initially, occupants never told that they were carrying such consignment for and on behalf of petitioner– Custody of petitioner not required for further investigation– He already having joined investigation – Petition allowed and pre-arrest bail granted subject to conditions. (Paras 5 & 6)

Cases referred:
Dataram Singh vs. State of Uttar Pradesh & Anr., Criminal Appeal No. 227/2018, decided on 6.2.2018
Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner**:** Mr. Adarsh K. Vashista, Advocate.
For the respondent**:** Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant bail petition filed under Section 438 of the Code of Criminal Procedure, prayer has been made on behalf of the petitioner for grant of pre-arrest bail in case FIR No.62/2019, dated 10.4.2019, under Sections 20 & 29 of the Narcotic Drugs & Psychotropic Substances Act ***(for short "ND&PS Act")***,registered at police Station, Ghumarwin, District Bilaspur, Himachal Pradesh.

2. Sequel to order dated 26.6.2019, ASI Pyare Lal, has come present alongwith record. Mr. Sudhir Bhatnagar, learned Additional Advocate General, has also placed on record fresh status report prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

3. Careful perusal of the record/status report reveals that on 9.4.2019, police party, which had laid nakka near Petrol Pump (NH), Ghumarwin, District Bilaspur, H.P., apprehended car (Alto k 10) bearing registration No. HP-23-4869 coming from Ghumarwin side. On search, police recovered one carton box containing 100 plastic bottles and on each bottle, level of Codeine Phosphate Triprovidine Hydrochloride Syrup RC-Kuff Cough Syrup 100 MI was affixed. Since, occupants of the vehicle namely, Sunil Kumar and Sher Singh were unable to produce permit, if any, with regard to aforesaid bottles and as such, they were apprehended. After completion of codal formalities, police on 10.4.2019 lodged the FIR, as detailed hereinabove, under Section 20 and 29 of the Act, against the occupants of the vehicle, as named hereinabove. During investigation, above named persons, disclosed that they were handed over carton box containing contraband, as detailed hereinabove, by Amit Sharda proprietor of Sharda Medical Store, Ohar, Tehsil Ghumarwin, District Bilaspur, H.P., for delivering the same to the present bail petitioner, who also runs a medical store at

Danghar, Tehsil Ghumarwin, District Bilaspur,H.P. During investigation, one person namely, Ankush, who happened to be salesman in the shop of Amit Sharda, also disclosed to the police that persons namely, Sunil Kumar and Sher Singh had come in car No. HP-23-A-4869 on the askance of the present bail petitioner to take delivery from the shop of Sharda Medical Store. On the basis of subsequent revelations made by the occupants of the car apprehended during nakka and the salesman of Sharda Medical Store, present bail petitioner came to be named in the FIR, as referred hereinabove.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly stating that pursuant to the orders passed by this Court, bail petitioner has joined the investigation, contended that keeping in view the gravity of offences alleged to have been committed by the bail petitioner, he does not deserve any leniency, rather needs to be dealt with severely. Learned Additional Advocate General also admitted that all the co-accused have been already enlarged on bail by the learned court below and at this stage, nothing is required to be recovered from the bail petitioner.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that at first instance, recovery, if any, of the contraband came to be made from co-accused Sunil Kumar and Sher Singh,who at that relevant time were travelling in car bearing registration No. HP-23-A-4869. If the statements made by above named persons are perused, though they stated that carton box containing contraband was handed over to them by Amit Sharda, proprietor of Sharda Medical Store, Ohar, but they nowhere stated that they had gone to collect the contraband on the askance of the present bail petitioner. It is another co-accused Ankush, who subsequently revealed that occupants of the car No. HP-23-A-4869 had come to Ohar for taking consignment from Sharda Medical Store on the askance of present bail petitioner, who also run chemist shop at Danghar. No doubt, record reveals that a sum of Rs. 8000/- came to be transferred to the account of Amit Sharda, from where alleged consignment was taken to be delivered at the shop of present bail petitioner, but it is not in dispute that present bail petitioner is also registered chemist and in past also, he had been purchasing drugs from Amit Sharda, proprietor Sharda Medical store and as such, it cannot be said at this stage that money, if any, sent by present bail petitioner was for the contraband allegedly recovered from the car in question occupied by co- accused Sunil Kumar and Sher Singh. It is not in dispute that contraband in the case at hand came to be recovered from the conscious possession of co-accused Sunil Kumar and Sher Singh, who also not disclosed in their statements that they were asked by present bail petitioner to bring this consignment to his shop. Whether subsequent revelations, if any, made by co-accused can be made basis for holding present bail petitioner guilty, is a matter of trial and definitely, at this stage, it would be too early to conclude that entire transportation of contraband took place at the instance of the present bail petitioner.

6. Though, aforesaid aspects of the matter are to be considered and decided by the learned court below on the basis of the totality of evidence to be led on record by the investigating agency, but having taken note of the fact that contraband never came to be recovered from the possession of present bail petitioner, this Court sees no reason for custodial interrogation of the present bail petitioner, who has otherwise, made himself available for investigation.

7. It has been repeatedly held by Hon'ble Apex Court as well as this Court that freedom of an individual cannot be curtailed for indefinite period, especially when his/her guilt is yet to be proved, in accordance with law.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, ***Dataram Singh vs. State of Uttar Pradesh & Anr***.,decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
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> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to <u>Section 436</u> of the Code of Criminal***

Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons

9. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which arepeculiar to the accused involved in that crime.

11. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(i) nature and gravity of the accusation;

(ii) severity of the punishment in the event of conviction;

(iii) danger of the accused absconding or fleeing, if released on bail;

(iv) character, behaviour, means, position and standing of the accused;

(v) likelihood of the offence being repeated;

(vi) reasonable apprehension of the witnesses being influenced; and

(vii) danger, of course, of justice being thwarted by grant of bail.

12. Consequently, in view of the above, order dated 24.5.2019, passed by this Court, is made absolute, subject to his furnishing personal bond in the sum of Rs. 5,00,000/- (Rs. five lakh) with one local surety in the like amount, to the satisfaction of the Investigating Officer, with following conditions:

a. he shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. he shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. he shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or the Police Officer; and

d. he shall not leave the territory of India without the prior permission of the Court.

13. It is clarified that if the petitioner misuses his liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

The bail petition stands disposed of accordingly.

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

Cr. Revision No. 185 of 2009 along with Cr. Revision No. 188 of 2009 and Cr. Revision No. 34 of 2010
Reserved On: 9.7.2019
Decided on: 12.7.2019

Indian Penal Code, 1860– Section 379– **Indian Forest Act, 1927**- Sections 41 & 42**-** Illicit transport of timber– Proof– Criminal revision against concurrent findings of conviction –

Accused assailing conviction on ground of wrong appreciation of evidence on part of lower courts – Held, on facts, identification of driver of truck, 'ML' on basis of wallet recovered from truck and photocopy of driving licence lying inside it ,is insufficient - Wallet easily available in market and copy of driving licence without proof of its original will not connect 'ML' as driver of truck– Material suggesting that police themselves drove truck from place of its interception to Range Office– Seizure of truck and recovery of alleged timber at spot doubtful- Forest officials who unloaded the seized timber not cited as witnesses– Sample slippers produced before court not bearing FIR No etc., on them– Case of prosecution doubtful– Revision allowed– Conviction set aside– Accused acquitted. (Paras 10 to 15)

1. Cr. Revision No. 185 of 2009
   Muni Lal .....Petitioner.
   Versus
   State of Himachal Pradesh .....Respondent.

2. Cr. Revision No. 188 of 2009
   Devinder Kumar alias Lara .....Petitioner.
   Versus
   State of Himachal Pradesh .....Respondent.

3. Cr. Revision No. 34 of 2010
   Bhim Singh .....Petitioner.
   Versus
   State of Himachal Pradesh .....Respondent.

For the petitioner(s): Mr. Divay Raj Singh, legal aid counsel, for the petitioner in Cr. Revision No. 185 of 2009 and Mr. Satyen Vaidya, Sr. Advocate with Mr. Varun Chauhan, Advocate, for the petitioners in Cr. Revision Nos. 188 of 2009 and 34 of 2010.

For the Respondents: Mr. Hemant Vaid, Addl.A.G with Mr. Vikrant Chandel and Mr. Y.S. Thakur, Dy.A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petitions hence arise, from, the concurrently recorded verdict(s), of, conviction, and, consequent therewith sentence imposed, upon, the petitioner herein (for short accused), initially, by the learned Judicial Magistrate, Ist Class, Theog, District Shimla, H.P, upon, case No. 73-1 of 2008, and, subsequently, by the learned first appellate Court, upon, apposite appeal(s) bearing Nos. 70-S/10 of 2008, 71-S/10 of 2008, 72-S/10 of 2008, and, 73-S/10 of 2008, as, stood reared therebefore.

2. The brief facts of the case are that on 29.2.2008, police officials laid a naka on Gumma-Baghi Bifurcation road. At about 4.30 a.m. a truck being driven at hight speed was coming from Baghi road and its driver stopped the afore truck at a distance of 100 meters from the naka point and switched off its lights, and, some persons have come down from the truck. On the basis of suspicion, the police officials went to the spot, and, captured three

persons, who disclosed their names to be Bhim Singh, Vishal and Dev Bahadur. While taking advantage of darkness, some persons rant away from the spot. Wallet of the truck driver was found at the place of incident, which carries the photocopy of the Driving licence issued in the name of Muni Lal. Truck was searched, and, upon search 44 scants of deodar and 54 scants of Kail were recovered, which are transported without any valid permit. The truck bearing registration No. HR 38A-0357 alongwith the afore scants of deodar and kail were taken into possession and thereafter given on sapurdari to forest guard, Kumari Vinakshi, and, she marked the scants with hammer mark 1/KK. Thereafter the police commenced the investigation, and, on conclusion of the investigation, into the offences, allegedly committed by the accused, final report was prepared and presented in the Court.

3. The accused were charged by the learned trial Court for theirs committing offence punishable, under, Section 379 readwith Section 34 of IPC, and, under Section 42 of Indian Forest Act, to, which they pleaded not guilty, and, claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure were recorded, wherein, they pleaded false implication. However, in defence, no witnesses' were examined, by the accused persons.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, against, the accused herein, vis-a-vis, the offences charged. The accused being aggrieved, by the afore judgment of conviction, rendered, by the learned trial Court, hence preferred appeal(s) therefrom, before the learned Sessions Judge, Shimla. The learned Sessions Judge, Shimla, affirmed the judgment of conviction, as, recorded by the learned trial Court.

6. The learned counsel(s) appearing for the petitioners, have concertedly, and, vigorously contended qua the findings of conviction, recorded by the learned Courts below, standing not based, on a proper appreciation of the evidence on record, rather, theirs standing sequelled, by gross mis-appreciation, of, material on record. Hence, they contend 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 Additional 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 any 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. The prosecution witnesses concerned, all of whom, are official witnesses, deposed in unison, and, bereft of any inter-se or intra-se contradiction, vis-a-vis, the validity(ies) of drawing(s) of memo(s), respectively borne in Ex. PW-1/A, and, in Ex. PW-1/B, and, vis-a-vis, preparation of spot map(s) hence respectively, borne in Ex. PW-8/A, Ex. PW-10/B, and, in Ex. PW-10/C. However, the reliance, as, placed by both the learned Court(s) below, upon, the afore purported consistent testimonies, vis-a-vis, the genesis of the prosecution case, embodied in FIR borne in Ex. PW-6/A, and, also the further reliance placed, by both the Court(s) below, vis-a-vis, the validity(ies), of, drawing(s) of the afore memo(s), is, yet rendered legally frail, and, enfeebled, for, the reasons ascribed hereinafter.

10. PW-1 Constable Nank Chand, testifies qua, during the course of a Naka, held on the spot, enunciated in Ex. PW-10/C, the police arresting the accused Bhim Singh, Vishal,

and, Dev Bahdaur. He proceeded to identify, in Court co-accused Muni Lal, to be the person, who was driving the relevant vehicle, at the relevant time, and, the afore identification, as testified by PW-1, during, the course of his examination in chief, is, echoed therefrom, to, occur from his sighting co-accused Muni Lal, at the stage of his attempting, to flee from the truck, (i) and, his hence thereat dropping his purse Ex. P-1, (ii) and, also is testified, to spur, rather from the photocopy, of driving licence embodied, in Ex. P-3. However, the identification of accused Muni Lal, in Court, by PW-1, is rendered grossly inefficacious, and, is not amenable, for, any sustenance, being therefrom drawn rather by the prosecution, (iii) as, PW-1 testifies qua Ex. P-1, being easily available in the market, and, apparently with no apposite identification marks appertaining to the identity of co-accused Muni Lal, rather, being contained/enclosed therein, in as much as, it, not hence evidently enclosing the Adhaar Card, or, the bank passbook, of, the afore accused, (iv) and, with Ex. P-3 being the photocopy of the original, of, the Driving Licence, (v) and, with no proof qua its veracity being adduced, from the original thereof, (vi) besides with the owner of the vehicle, not stepping into the witness box, for, his deposing qua his engaging accused Muni Lal, as, a driver, upon, his vehicle, (vii) and, with the log book of the vehicle concerned, not being seized, with, disclosure occurring therein, vis-a-vis, accused Muni Lal, being the driver engaged, upon, the vehicle concerned, (viii) thereupon, obviously renders the identification in Court, of, co-accused Muni Lal by PW-1, to be holding no legal efficacy, moreso, when preceding therewith, no valid test identification parade, stood, conducted, by the Investigating Officer concerned.

11. Apart from the above, and, for the further reasons assigned by this Court, for, making hence an order of acquittal, upon, the revisionists, by, reversing the concurrently recorded verdict(s), of, conviction against the accused/revisionists herein, (i) the preeminent reason hence swaying this Court, to, reverse, hence, the concurrently recorded verdict(s) of conviction, vis-a-vis, the accused/revisionists herein, and, reasons whereof, rather also, hold sway, vis-a-vis, accused Muni Lal, are, embodied in (a) with PW-1 in his deposition, comprised in his cross-examination, rendering echoings, vis-a-vis, the truck being driven up to, the range office concerned, and, his also meteing articulations qua his soliciting the services, of, a driver from the truck union concerned, rather, for the vehicle being driven thereupto (b) thereupon, when the name of the driver, remains undivulged by PW-1, (c) whereupon the afore reticence, vis-a-vis, the name of the afore driver, whose services, hence, were solicited, by the police authorities, to, drive the vehicle, up to, the range office concerned, hence sparks a suspicion, vis-a-vis, rather the police personnel obviously proceeding to drive the vehicle concerned, from the site of occurrence, up to, the range office concerned, (d) and, the further concomitant sequel thereof, is that the afore driving, of, the vehicle, galvanizing an inference, from this Court, qua its seizure not occurring, at the site of occurrence, embodied in Ex. PW-10/B, rather it occurring elsewhere. Moreso, when the entire proceedings, stood drawn thereat, and, the factum qua hence an unnamed person, driving the relevant vehicle, from, the site of occurrence, up to the range office concerned, all when stand(s) conjoined, (e) with the further factum qua the prosecution witnesses, concerned, in their respective depositions, as, comprised in their cross-examinations, hence making unequivocal voicings, vis-a-vis, the availability, of, a bazaar, in, proximity to the site of occurrence, (f) and, when hence independent witnesses were available, to be joined, in the relevant proceedings, and, with no tenable explanation, standing purveyed, by the prosecution, for, omission to join them in the investigation, or, in the relevant proceedings, therethrough(s) rather a firm inference being generated, from, this Court, that, the prosecution hence abysmally failing, to establish, that, accused Muni Lal, was the driver of the vehicle concerned, and, also the other accused, were aboard the vehicle, or, were in proximity, to the vehicle concerned, and, that they were arrested, at the site of occurrence.

12. PW-2 kashmeer Singh, in his deposition, comprised in his cross-examination, has disclosed that, for, unloading the timber carried, in the truck, the services of forest staff, namely Rajesh Sharma, Ashok (Chowkidar) and Chet Ram, being too solicited, and, also the services of nepali laborers, being solicited. However, the citing of the afore Rajesh, Chet Ram, and, Ashok Kumar, as prosecution witnesses, hence was a dire necessity, for, benumbing the defence espousal, (i) qua with the accused, apart from accused Muni Lal, being of Nepali origin, and, that rather an abandoned truck, carrying the illicit timber stood seized, hence at the relevant site, (ii) besides for also benumbing the defence espousal, qua theirs being only deployed to unload the timber carried, in the truck concerned, (iii) conspicuously, and preeminently, for, therethrough(s), hence benumbing any germination, of any suspicion qua the afore being not validly arrested, at the relevant site. However, for want of the afore being Cited as PWs, and, also obviously for want of their stepping, into the witnesses box, rather enhances the afore defence espousal, and, when the afore factum probandem, of, non-joining, at the site of occurrence, of independent witness, despite, their availability thereat, hence stands entwined therewith, and, also with another prime factum, vis-a-vis, the reticence, of, the prosecution, vis-a-vis, the name, of, the driver, who, drove the vehicle, upto, the Range Office concerned, (iv) hence galvanizes an inference, vis-a-vis, the prosecution concocting, the site of occurrence, embodied in the site plan(s), (v) and, rather the site of occurrence being elsewhere, (vi) and, therefrom a further inevitable conclusion, being begotten, qua the prosecution rather abysmally failing to nail, the, charge against the accused.

13. Both the Court(s) below, depended mainly, upon the drawing, of, memo(s) respectively, borne in Ex. PW-4/D, in Ex. PW-4/E, and, in Ex. PW-9/B, (i) given the afore memos respectively carrying thereon, the signatures, of accused Munni Lal, Devinder Kumar and Vishal, (ii) thereupon, it stood concluded qua the prosecution sustaining the charge, (iii) however, any dependence upon the memo(s) aforesaid, is, a gross mis-dependence, given the recovery of the illicit timber carried in the vehicle concerned, standing already or prior thereto hence being effectuated, (iv) thereupon there was no enjoined necessity, upon, the Investigation Officer concerned, to, rather proceed to draw, at, the instance of the accused concerned, the afore memo(s), (v) unless, the site wherefrom the illicit timber was stolen, and, thereafter stood loaded, on to, the truck, concerned, was proven to be located, at a remote inaccessible place, and, it being only known, to the accused concerned, (v) however when the afore evidence, is grossly amiss, and, when the site, wherefrom, the allegedly stolen timber, was, loaded onto the vehicle, rather occurred at, an accessible place, and, when hence the Investigating Officer, also evidently with knowledge thereof hence could lead thereupto the co-accused concerned, and, ensure theirs making, their, signatures thereon, (vi) obviously, would not render, it to, constitute a probative piece of, evidence against the accused, emphasisingly, when/with the afore gross, and, pervasive infirmities rather gripping the prosecution case, hence remaining unbenumbed.

14. lastly, the prosecution was enjoined to prove that sample slippers Ex. P-1 and P-2, though, carrying thereon, the, requisite hammer marks, being also drawn, from, the bulk from timber, carried in the truck concerned. The exhibits, as aforestated though carries thereon, the requisite hammer marks, but, as voiced in cross-examination of PW-2, qua the FIR number, being not embossed thereon, and, when the marking of the FIR number, upon, the afore exhibits was imperative, and, when hence the apt connectivity, inter-se, the afore exhibits, vis-a-vis, the timber carried, in the truck concerned, would rather conspicuously hence emerge, (i) whereas, with lack of mark of FIR number, upon Ex. P-1, and, upon P-2, there is, an, apparent lack of connectivity, inter-se, the afore exhibits, vis-a-vis, the timber carried/seized, and, also thereupon, the, entire prosecution case hence stands jettisoned.

15. For the foregoing reasons, the instant petitions are allowed and the impugned judgment(s) of conviction and sentence, rendered by the learned trial Courts below are unsustainable, and, as such are set aside. The accused stand acquitted, and, 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 cancelled and discharged.Send down the records.

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

Kamal Dev ....Petitioner

Versus

State of Himachal Pradesh & Anr. ....Respondents

Cr.MMO No. 303 of 2018

Date of Decision:18th June, 2019

Code of Criminal Procedure, 1973– Sections 374 (3) & 389 (1)– Appeal against conviction– Suspension of sentence during pendency of appeal, when made conditional on depositing of cheque amount with trial court– Non-compliance of said condition– Consequence– Whether statutory right to appeal can be interfered with? Held, Section 374 (3) of Code nowhere suggests that at time of filing of appeal, appellant can be asked to deposit amount awarded by trial court– Section 389 of Code indicates that court can ask appellant to furnish bonds so that his presence is secured during pendency of appeal and to serve sentence awarded– Right to appeal is statutory right– It cannot be curtailed for insufficiency of amount deposited- Accused already having deposited 50% of cheque amount with trial court, Appellate court directed to decide appeal without insisting accused to deposit remaining 50% of cheque amount. (Paras 3 to 6)

Case referred:

Dilip S. Dahanukar vs. Kotak Mahindra Co. Ltd. & others, (2007) 6 SCC 528

For the Petitioner: Mr. Vinod Thakur, Advocate

For the Respondents: Mr. Ashwani Sharma & Mr. Sanjeev Sood, Additional Advocate General, with Mr. Sunny Dhatwalia, Assistant Advocate General, for respondent No.1.
Mr. Raj Kumar Negi, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with the order dated 16.5.2018, passed by learned Sessions Judge, Hamirpur, District Hamirpur, Himachal Pradesh, in Cr.M.A. No.76 of 2018 in Cr. Appeal No.27 of 2018, whereby an application under Section 389(1) Cr.P.C for suspension of sentence imposed by the learned Chief Judicial Magistrate, Hamirpur, H.P., in complaint No.37-I/2015, on 1.5.2018/2.5.2018, came to be allowed subject to the petitioner's ***(hereinafter referred to as the accused)*** furnishing personal and surety bonds to the tune of Rs. 10,000/- to the satisfaction of the learned trial Court and also subject to depositing of the cheque amount before the learned trial Court within a period of 30 days

with the undertaking to surrender before the learned trial Court to serve out the sentence in the event of failure of his appeal, petitioner has approached this Court in the instant proceedings filed under Section 482 Cr.P.C, praying therein to set-aside the order dated 16.5.2018 vide which the petitioner was called to deposit the entire cheque amount.

2. While issuing notice, this Court called upon the petitioner to deposit 50% of the cheque amount before the learned trial Court. It is not in dispute that pursuant to order, dated 18.7.2018,accused has already deposited 50% of the cheque amount with the learned trial Court.

3. Though, careful perusal of Section 374(3) Cr.P.C, nowhere suggests that at the time of filing appeal, appellant can be asked to deposit amount, if any, awarded by the learned trial Court, but certainly careful perusal of Section 389 Cr.P.C, which empowers the Appellate Court to suspend the sentence awarded by the learned trial Court during the pendency of the appeal, suggest that Court can ask the appellant to furnish bonds, so that his presence is secured during the pendency of the appeal and he makes himself available to serve the sentence awarded by the learned Appellate Court in the event of failure of appeal having been filed by him.

4. Leaving everything aside, right to appeal is a statutory right as it protects the liberty of the convict/ accused. It also provides further forum to agitate the issue of his liberty. The right to appeal is considered as a fundamental right under Article 12 of the Constitution of India. The Hon'ble Apex Court in **Dilip S. Dahanukar versus Kotak Mahindra Co. Ltd. & others,** (2007) 6 Supreme Court Cases 528, has held as under:-

> ***"12. An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for under Section 374 of the Code. Right of Appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a Fundamental Right. Right of Appeal, thus, can neither be interfered with or impaired, nor it can be subjected to any condition.***
>
> ***55. Unfortunately, the Legislature has not made any express provision in this behalf. In absence of any express provision, the question must be considered having regard to the overall object of a statute. We have noticed hereinbefore that Article 21 of the Constitution of India read with Section 374 of Crl.P.C. confers a right of appeal. Such a right is an absolute one. In a case where a judgment of conviction has been awarded, the Court can release a person on bail having regard to the nature of offence but as also the other relevant factors including its effect on society. A person upon arrest may have to remain in jail as an under trial prisoner. So would a person upon conviction. A person may also have to remain in jail, in the event he defaults in payment of fine, if he is so directed. But when a direction is issued for payment of compensation, having regard to Sub-Section (2) of Section 357 of the Code, the application thereof should ordinarily be directed to be stayed. It will, therefore, be for the Court to stay the operation of that part of the judgment whereby and whereunder compensation has been directed to be paid, which would necessarily mean that some conditions therefor may also be imposed. A fortiori a part of the amount of compensation may be directed to be deposited, but the same must be a reasonable amount.***

56.An order may not be passed which the appellant cannot comply with resulting him being sent to prison. Appellate Court, in such cases, must make an endeavour to strike a balance. Section 421 ***of the Code of the Criminal Procedure may take (sic be taken) recourse to, but therefor he cannot be remanded to custody."***

5. It is quite apparent from the aforesaid exposition of law that right of appeal can neither be interfered with or impaired, nor can it be subjected to any condition. Otherwise, very purpose of making party to deposit amount of compensation awarded by the trial Court is to ensure that in the event of failure of appeal filed by the convict, complainant or party in whose favour judgment of trial Court is passed, is not compelled to run from pillar to post to recover money awarded in his/her favour by the trial Court, but this Court is of the view that aforesaid interest of complainant can be well protected by the Court by putting convict to the stringent condition, especially in those cases where convict/party is not in a position to deposit the amount at once in terms of the judgment sought to be laid challenge by way of appeal in the Appellate Court.

6. Accordingly, in view of the above, the present petition is allowed and the learned Appellate Court below is directed to decide the appeal of the accused without insisting upon him to deposit the remaining 50% of the cheque amount.

7. Learned counsel for the parties undertake to cause presence of their respective clients before the learned Appellate Court below on **15th July, 2019,** to enable it to proceed with the matter in terms of instant judgment passed by this Court.

8. Registry is directed to apprise the learned Court below with regard to passing of the instant judgment forthwith, so that needful is done well within the stipulated period. Pending application(s), if any, also stands disposed of.

Coy **dasti.**

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

Balbir Singh ....Petitioner
Versus
State of Himachal Pradesh & another ....Respondents

Cr.MMO No. 330 of 2019
Date of Decision: 5.07.2019

Code of Criminal Procedure, 1973–Sections 320 & 482– Inherent powers– Exercise of –Quashing of FIR –Held -High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable but such power is to be exercised sparingly and with great caution- While exercising inherent power under Section 482 of Code court must have due regard to the nature and gravity of offences sought to be compounded- High Court must evaluate whether ends of justice would justify exercise of inherent power- Parties compromising dispute amicably and admitting correctness of settlement before High Court–FIR registered for rash driving ordered to be quashed. (Paras 5 & 11 to 13)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497
Gian Singh vs. State of Punjab and anr. (2012) 10 SCC 303
Narinder Singh and others vs. State of Punjab and another, (2014)6 SCC 466
Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others vs. State of Gujarat and Another, Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016

For the Petitioner: Mr. Raj Kumar Negi, Advocate.
For the Respondents: Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, for respondent No.1.
Mr. Vinod Thakur, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India, prayer has been made on behalf of the petitioner for quashing of FIR No.60 of 2018, dated 6.8.2018, under Sections 279, 337 & 323 of Indian Penal Code ***(for short'IPC'),*** and Section 187 of the Motor Vehicles Act, registered at Police Station, Nirmand, Tehsil Nirmand, District Kullu, H.P., as well as consequent proceedings pending adjudication in the Court of learned Judicial Magistrate, 1st Class, Anni, District Kullu, H.P., on the basis of the compromise ***(Annexure P-2)*** arrived *inter se* parties.

2. Sequel to order dated 21.6.2019, Mr. Vinod Thakur, Advocate has filed Power of Attorney on behalf of respondent No.2, who is present in Court alongwith his father Sh. Nand Lal. Power of Attorney is taken on record.

3. Averments contained in the petition, which is duly supported by an affidavit, reveal that at the behest of respondent No.2/ complainant, Pankaj, who is minor, FIR No.60 of 2018, dated 6.8.2018, came to be registered against the petitioner at police Station, Nirmand, District Kullu,H.P., Perusal of FIR reveals that on 6th August, 2018, complainant/ respondent No.2 was allegedly hit by the car (Alto K10) bearing registration No. HP-52-A-0432 being driven by the petitioner, as a consequence of which, he suffered minor injuries. After completion of the investigation, police presented the challan in the Court of learned Judicial Magistrate, 1st Class, Anni, District Kullu, Himachal Pradesh. Since parties have resolved to settle their dispute amicably inter se them, as is evident from the compromise(Annexure P-2), present petition has been filed by the petitioner for quashing of the FIR as well as consequent proceedings pending in the competent Court of law.

4. On 21.6.2019, this Court having carefully perused the averments contained in the compromise, deemed it fit to summon the respondent/complainant in the Court, so that correctness and genuineness of the compromise placed on record, is ascertained. Pursuant to order dated 21.06.2019 respondent No.2, Pankaj has come present alongwith his father Sh. Nand Lal. They both on oath stated before this Court that they of their own volition and without there being any external pressure have entered into the compromise with the petitioner, whereby they have resolved to settle their dispute amicably. They further stated that since the petitioner is closely known to them, they with a view to maintain cordial relationship have entered into the compromise(Annexure P-2) placed on record, which bears signature of Sh. Nand Lal, father of minor Pankaj. They categorically stated

before this Court that they have no objection in case FIR lodged at the behest of respondent No.2/complainant as well as consequent proceedings, if any, pending in the competent Court of law, are ordered to be quashed and set-aside. Their statements are taken on record.

5. Section 320(4)(a) of Cr.P.C., clearly provides that when the person, who would otherwise be competent to compound an offence under this section is under the age of eighteen years then any person competent to contract on his behalf with the permission of the Court, can pray for compounding the offence. In the case at hand, Sh. Nand Lal father of respondent No.2 has entered into the compromise on behalf of respondent No.2, who is minor.

6. Mr. Kunal Thakur, learned Deputy Advocate General after having heard the statements made by the complainant/ respondent No.2 as well as his father, Sh. Nand Lal, fairly states that since parties have resolved to settle their dispute amicably, there are very bleak chances of conviction of the petitioner and as such, no fruitful purpose would be served in case FIR lodged at the behest of the complainant as well as consequent proceedings, if any, are allowed to sustain.

7. This Court, after having carefully perused the compromise, which has been duly effected between the parties, sees substantial force in the prayer having been made by the learned counsel for the petitioner that offences in the instant case can be ordered to be compounded.

8. Since the petition has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the present petition in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another*** **(2014)6 Supreme Court Cases 466,** whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt,under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However,this power is to be as under:-

> 29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
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> 29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the

charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. The Hon'ble Apex Court in case ***Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303*** has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497** has also held as under:-

"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.

The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have

due regard to the nature and gravity of the crime. Heinous and se serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

10. Recently Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and Another***, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in ***Narinder Singh's*** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in **Central Bureau of Investigation v. Maninder Singh** (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal

filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to the power under Section 482:

> "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in **State of Tamil Nadu v R Vasanthi Stanley** (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

> "… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"
>
> "…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15.The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose

of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has bee inherent n settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transac mental tions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

11. It is quite apparent from the aforesaid exposition of law that High Court has inherent power to quash criminal proceedings even in those cases which are not

compoundable, but such power is to be exercised sparingly and with great caution. In the judgments, referred hereinabove, Hon'ble Apex Court has categorically held that Court while exercising inherent power under Section 482 Cr.P.C. must have due regard to the nature and gravity of offence sought to be compounded. Hon'ble Apex Court has though held that heinous and serious offences of mental depravity, murder, rape, dacoity etc. cannot appropriatelybe quashed though the victim or the family of the victim have settled the dispute,but it has also observed that while exercising its powers, High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases. Hon'ble Apex Court has further held that Court while exercising power under Section 482 Cr.P.C can also be swayed by the fact that settlement between the parties is going to result in harmony between them which may improve their future relationship. Hon'ble Apex Court in its judgment rendered in ***State of Tamil Nadu*** *supra*, has reiterated that Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice and has held that the power to quash under Section 482 is attracted even if the offence is non-compoundable. In the aforesaid judgment Hon'ble Apex Court has held that while forming an opinion whether a criminal proceedings or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

12. Consequently, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the parties that the matter has been compromised, and keeping in mind the well settled proposition of law as well as the compromise being genuine, this Court has no inhibition in accepting the compromise and quashing the FIR as well as consequent proceedings pending in the competent Court of law.

13. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, FIR No.60 of 2018, dated 6.8.2018, under Sections 279, 337 & 323 of IPCand Section 187 of the Motor Vehicles Act, registered at Police Station, Nirmand, Tehsil Nirmand, District Kullu, H.P., as well as consequent proceedings pending adjudication in the Court of learned Judicial Magistrate, 1st Class, Anni, District Kullu, H.P.,are quashed and set-aside.

The present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

Oriental Insurance Company …Appellant.
Versus
Smt. Surti Devi and others. ….Respondents.

FAO No. 224 of 2017
Decided on : 2.7.2019

Motor Vehicles Act, 1988- Section 166 – Motor accident – Claim application – Identity of offending vehicle- Determination – Insurer relying upon recitals made in FIR as well as untrace report for argument that offending vehicle was not involved in accident – And oral

evidence ought not to have been accepted by Tribunal – Held, contents of FIR and untrace report of police cannot prohibit Tribunal to accept reliable evidence of witness to occurrence of accident regarding vehicle involved in it. (Para 3)

Case referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the appellant:	Mr. Deepak Bhasin, Advocate.
For the Respondents:	Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 and 2. Respondent No.3 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant appeal, is, directed by the insurer of the offending vehicle, against, the impugned award, rendered by the learned Motor Accident Claims Tribunal-1, Sirmaur District at Nahan, H.P (for short "MACT), upon, MAC Petition No. 96-MAC/2 of 2014, (a) wherethrough, hence compensation amount borne, in a sum of Rs.20,36,000/- alongwith interest at the rate of 7.5% per annum, commencing from the date of the impugned award, till its realization, stood in toto assessed, as, compensation, vis-a-vis, the dependents of deceased one Ram Pal, and, the apposite indemnificatory liability was fastened, upon, the insurer of the offending vehicle.

2. The learned counsel for the appellant, has, with much vigour, contended before this Court, that, the learned MACT concerned, has untenably irrevered the factum, of, non-echoing(s) in the FIR, embodied in Ex. RW-1/A, and, as stood lodged with respect, to, the relevant occurrence, vis-a-vis, the color, and, description, of, the offending vehicle. (a) and, has also untenably irrevered the enunciation(s) borne in the apt final report comprised in Ex. RW-1/B, filed by the Investigating Officer concerned, before the learned Trial Magistrate concerned, with, voicings therein, vis-a-vis, for want of evidence, (b) hence suggestive of the involvement of the offending vehicle concerned, in the relevant collision, which purportedly occurred, at the relevant time, inter-se, the motor cycle driven, by the deceased, and, the offending vehicle driven by its driver, rather thereupon constraining him, to, file an untraced report. He also proceeds to contend that the deference meted, by the learned MACT concerned, to, the testification rendered, by an ocular witness of the occurrence, who stepped into the witness box, as, PW-3 being also likewise frail, (i) as, the color of the offending vehicle mentioned by him, in his testification, stands echoed, as "white", whereas, the, registration certificate appertaining, to, the offending vehicle discloses its color to be "silver Grey".

3. However, for all the reasons, to be assigned hereinafter, the afore submission(s), cannot, be accepted by this Court, as, the non-echoing in the FIR borne in RW-1/A, as stood lodged, with respect to the relevant occurrence, vis-a-vis, the type, number, and, description of the offending vehicle concerned, and, also, in, subsequent thereto rather in tandem therewith, the apposite final report, borne in Ex.RW-1/B, rather not overruling the testification, of PW-3 (Shri Naresh Kumar), an ocular witness, to the occurrence, (a) nor, the latter's testification hence making pointed echoings, vis-a-vis, the tort of negligence, hence being committed by the driver of the offending vehicle, also is obviously rather not discardable, (b) as, the learned MACT in meteing deference to his

testification, has, acted within the domain of its jurisdiction, hence permitting it, to receive testifications of an ocular witness, to the occurrence, dehors, the FIR as well as the untraced report not disclosing, the type and description, of the offending vehicle. Conspicuously, also when even upon, a, verdict, of, acquittal standing pronounced upon the accused, also being rather not a sufficient piece of evidence, to, discard, credible ocular account, vis-a-vis, the occurrence, whereupon the testification of PW-3, an ocular witness to the occurrence, cannot be discarded. Even if PW-3, has made a mis-description, vis-a-vis, the color of the offending vehicle, however, the afore mis-description, is to be construed, to ensue from the immense delay, which occurred, inter-se, the happening of, the relevant mishap, and, his testification being recorded, before the Court concerned, (c) besides when he evidently holds his abode in proximity to the location, whereat, the relevant accident took place, in aftermath, the afore submission addressed before this Court, by the learned counsel, for the appellant addressed before this Court, is rejected.

4. The learned counsel for the insurer, has also contended that co-claimant No.2, one Nishant, is not dependent, upon, the income of his deceased father, and, no amount of compensation is required to be assessable, vis-a-vis, him. However, the afore contention has no weight, given, the insurer not adducing any evidence, vis-a-vis, co-claimant No.2, at the relevant time, being gainfully employed.

5. The deceased was admittedly, as, reflected by salary certificate, borne in PW-1/B, hence drawing a salary of Rs.28,573/- per mensem, from his relevant employment. Even though, the respondent/claimants, have not filed any cross appeal hence seeking, therethrough, the apt meteings of hikes towards future incremental gains qua the afore figures of per mensem salary, hence within the domain of a verdict recorded by the Hon'ble Apex Court rendered in case titled as ***National Insurance Co. Ltd.*** vs. ***Pranay Sethi and others***, reported in 2017 ACJ 2700, (i) yet merely on the afore omission, this Court would not deprive the claimants, rather, the apt benefits, of accretion towards future incremental prospects, being meted to the afore figure of per mensem salary drawn, by the deceased from his relevant employment. In making the afore decision, the age of the deceased is important.

6. The deceased, uncontrovertedly pleaded to be aged 56 years, at the relevant time. With the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.61, extracted hereinafter:

> "61. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the

addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. ”

expostulating (i) that where the deceased concerned, was a self employed or on a fixed salary, as is, the apt employment, of, the deceased, (a) thereupon, hikes or accretions, on anvil of future incremental prospects, vis-a-vis, the salary drawn by him, at the time contemporaneous, to, the ill fated mishap, from his employer, being also meteable thereto. However, before applying the mandate of the aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the the deceased being aged 56 years, at the relevant time, hence with the afore extracted paragraph, mandating, of, accretions towards future incremental prospects, vis-a-vis, the salary last drawn, by the deceased, being pegged upto 15% thereof, besides being tenably meteable, vis-a-vis, the apposite last drawn salary. The last drawn salary of the deceased at the time of his death has been held to be Rs. 28,000/- (round off) per mensem. Consequently, after meteing 15% apt increase(s), vis-a-vis, the apposite last drawn salary, thereupon, the relevant last drawn salary, of, the deceased, is recoknable to be Rs. 32,200/- [Rs.28,000/-(last drawn salary of the deceased)+Rs.42,00/-[15% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, two, hence, 1/ 3rd deduction is to be visited, upon, a sum of Rs.32,200/-, hence, after making, the, apt aforesaid deduction, vis-a-vis, the afore sum, the per mensem dependency, comes to Rs.21467/- (round off). In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs.21,467/-x 12=Rs.2,57,604/-. After applying thereto, the apposite multiplier of 8, the total compensation amount, is assessed in a sum of Rs.2,57,604 X 8= Rs.20,60,832/-.

7. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.10,000/- vis-a-vis, the under the head, loss of consortium, and, quantification of compensation in a sum of Rs.10,000/- under the head “funeral charges”, is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss of consortium, vis-a-vis, the widow of the deceased, funeral expenses, and, loss of estate, being quantified only upto Rs.40,000/-, Rs.15,000/- and Rs.15,000/- respectively. Consequently, the award of the learned tribunal is also interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads, vis-a-vis, the widow of the

deceased, as also, vis-a-vis the other claimants. Accordingly, in addition to the aforesaid amount of Rs. 20,60,832/-, the claimants, are, entitled under conventional heads, namely, loss of consortium, vis-a-vis, the widow of the deceased, funeral expenses, and, loss of estate, sums of Rs.40,000/-, Rs. 15,000/- and Rs.15,000/- respectively, as such, the total compensation whereto which the appellants/claimants, are entitled, comes to Rs.20,60,832+40,000+15,000+15,000= Rs.21,30,832/-.

8. For the foregoing reasons, the appeal stands disposed of, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants/appellants, are, held entitled to a total compensation of Rs.21,30,832/-, along with interest @7.5%, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, the afore compensation amount, shall be, of the insurer of the offending vehicle. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation be apportioned in the manner as ordered by the learned tribunal.All pending applications also stand disposed of. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

The Land Acquisition Collector HP PWD & ors. ...Appellants.

Versus

M/s Sanatan Dharam Sabha Ganj Bazar, Shimla through its Secretary.

....Respondent.

RFA No. 475 of 2011
Judgment Reserved on : 11.06. 2019
Date of Decision : July 12 , 2019

Land Acquisition Act, 1894 – Sections 23 & 54 – **Code of Civil Procedure, 1908** – Order XLI Rule 33 – Enhancement of compensation by High Cour, in absence of any cross appeal or cross objection by claimant. **-** Held, even if there is no appeal, cross appeal or cross objection of claimant on record, appellate court is competent to determine fair and just compensations payable to him in an appeal pending before it. (Para 24)

Cases referred:

Krishan Kumar vs. Union of India & another, (2015) 15 SCC 220
L.A.C., Solan & another vs. Bhoop Ram, 1997 (2) Sim. L.C. 229
Narendra & others vs. State of Uttar Pradesh & others, (2017) 9 SCC 426

For the appellant	:	Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General for the appellants/State
For the respondent	:	Mr. Ashok Sood, Senior Advocate, with Mr. Dheeraj Thakur, Advocate, for the respondent.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

Vide present appeal under Section 54 of the Land Acquisition Act, 1894 (from now on referred to as the Act), the appellants/State is challenging the impugned judgment dated 29.04.2011, passed by the District Judge, Shimla, H.P. in Land Reference Case No. 7-S/4 of 2007, titled as M/s Sanatan Dharam Sabha vs. The Land Acquisition Collector & others.

2. The second Appellant, State of Himachal Pradesh through Secretary (PWD), Government of H.P., had notified and acquired 1161-75 square meters of land belonging to the claimant/respondent herein for the construction of 'Sanjauli – Dhalli Bypass Road' by notification dated 3.08.2004, issued under Section 4 of the Act. The Collector Land Acquisition passed his Award No. 25/2005 on 26.09.2005. It is a matter of record that the market value of the acquired land came to be assessed INR 80,000/- per bigha.

3. Aggrieved by the compensation, not to be in tune with their entitlement, claimant/respondent herein, filed Land Reference No. 7-S/4 of 2007, under Section 18/30 of the Act.

4. The stand of the appellants is that the respondent can claim only 50% of the compensation, out of this land. It is for the reason that the revenue records do not reflect the claimant as owner. The claimant also did not prove its title of ownership. Therefore, the remaining 50% compensation amount has to go to the appellants/State of H.P., being the recorded owners in the records of land revenue.

5. The erstwhile ruler of Koti Estate had donated a large chunk of land, to Sanatan Dharam Sabha, Shimla, for religious purposes. He made such grant more than a century ago. The claimant/Society constructed one cremation ground on this chunk of land. It has come in the evidence that this cremation ground is the central funeral place for Hindus in Shimla.

6. The claim for enhancement is contested by the appellant herein. Their main contention is that the claimant/Society does not own the notified land. The proved facts point out that the revenue records mention the State of Himachal Pradesh as the owner of the property in question. The appellants also disputed the entitlement of enhancement of claim to the claimants.

7. Vide impugned judgment dated 29.04.2011, the market value of the acquired land stands re-determined @ INR 5,32,416/- per bigha, consistently, irrespective of the classification and category of the land. The District Judge did not grant 100% claim to the claimant holding therein that 50% of the same would go to the State of H.P. Hence the Learned District Judge restricted the claim to 50% of the amount re-determined in the following terms:

> "17. In view of my findings on issue No. (i) above, the petitioner is entitled to the relief. The petitioner is entitled to 50% of the market value of the land under acquisition at the rate of `5,32,416/- per bigha. The petitioner is awarded additional compensation/interest at the rate of 12% per annum from 03.08.2004 till 26.09.2005 under Section 23(1-A) of the Act for 50% of its share of compensation. The petitioner is entitled to compulsorily acquisition charges/solatium at the rate of 30% on ½ share of the enhanced amount of compensation. Apart from this, the petitioner is entitled to interest at the rate of 9% per annum w.e.f. 27.09.2005 for one year and thereafter at the rate of 15% per annum till the amount of compensation was deposited in the court. Reference petition is accordingly answered."

8. The State is aggrieved by the impugned judgment on the ground that the learned District Judge has misinterpreted the law and has wrongly appreciated the evidence on record and that the judgment is against the facts as per law. It has further been stated that the land acquired is situated in revenue village Chalaunti (Sanjauli), Tehsil & District Shimla having meager population and the market value assessed by the District Judge is very high taking reliance of the sale deeds relating to small piece of land executed between the parties and as such the findings of the District Judge while making such reliance on one piece of land is not proper.

9. It has further been stated that the ld. District Judge Shimla has not appreciated the award passed by the Land Acquisition Collector below who has assessed the value of the acquired land according to its potential based on the location of the said land. The value assessed by the Land Acquisition Collector is according to the revenue record and the value whatever was prevailing at the time of notification under Section 4 of the Act which, as such, deserves to be upheld but not as assessed by the District Judge, Shimla. This being so because due to this abnormal hike in market value the burden upon the state, exchequer has unnecessarily been increased at the rate of `665.52% above for 1161.75 square meters, whereas total land acquired for 'Sanjauli-Dhalli Bypass' is 17552.52 square meters and thus the state government will also have to pay the enhanced value of the compensation. As such, the award of the Land Acquisition Collector being reasonable, legal and valid deserves to be upheld and the enhancement made by the District Judge, Shimla deserves to be set aside.

10. It has further been stated that pertaining to 'Sanjauli-Dhali Bypass' the District Judge, Shimla passed award in Land Reference Case No. 40-S/4 of 2005 Smt. Geeta Devi & others vs. State of H.P. (RFA No. 181/09), Land Reference No. 39-S/4 of 2008/06 Smt. Shankri Vs. State of H.P. (RFA No. 294/09), Land Reference No. 26-S/4 of 2005 in Sh. Inder Dass Bekta vs. State of H.P. and Land Reference No. 5-S/4 of 2007 Smt. Prabu Devi & others vs. State of H.P. All these cases stand challenged before the High Court by appellants on the grounds of the abnormal hike. Hence the impugned award also deserves to be clubbed and decided along with the said RFA's.

11. I have heard learned counsel for the parties and have also gone the entire record. I have even gone through the judgment passed by a Coordinate Bench of this Court in RFA No. 42 of 2009 (Dr. Saif Ali Khan vs. State of H.P.) along with connected appeal (RFA No. 293 of 2009), decided on 23.3.2016. The land in issue in this appeal was also acquired for construction of 'Sanjauli – Dhalli Bypass Road.'

12. This Court had passed the following order on 24.10.2018 in the present appeal:

> "Both learned Additional Advocate General and learned counsel representing the respondent are in agreement that point in issue involved in this appeal is covered by the judgments of this Court in *RFA No. 42 of 2009, titled as Dr. Saif Ali Khan vs. State of H.P. & ors., decided on 23.3.2016* and in *RFA No. 414 of 2010, titled as Prabhu Devi vs. Sate of H.P. & ors., decided on June 2, 2016*. But, the respondent-claimant is entitled to the compensation at the rates as enhanced by this Court in the judgments cited supra without filing any appeal or cross-objections or not, they seek adjournment to assist this Court qua this aspect of the matter on the next date. Granted."…

13. I have gone through the judgment in the matter of Dr. Saif Ali Khan (supra). The acquired land was identical and similar. It has come in the evidence that the land involved in the present RFA was only at a walking distance of half a kilometer from the main Sanjauli

bazar. The appellants object that at the cremation ground, the value of the land would be less. However, no evidence has been led to prove that the property which is near the cremation ground would have lesser market value than the similarly placed land. In modern times, people have a scientific temper, and in the absence of the specific evidence, no such presumption would arise.

14. I am of the considered opinion that the judgment passed by a Coordinate Bench of this Court in *Dr. Saif Ali Khan* (supra) covers the present case on all fours.

15. The decision in Dr. Saif Ali Khan (supra) was further followed by this Court in RFA No. 414 of 2010 (Smt. Prabhu Devi vs. State of H.P.) along with connected Appeal (RFA No. 416 of 2010), decided on 2.6.2016. This Court also followed it in RFA No. 17 of 2010 (State of H.P. vs. Sh. Inder Dass Bekta) along with Cross Objections (CO No. 360 of 2010), decided on 2.6.2016. The holdings of the co-ordinate bench of this Court binds me to follow the same. I am also inclined to take a similar view on the evidence proved in these proceedings.

16. In all these above matters, this Court had enhanced the claim by determining the market value of the acquired land @ INR 9,05,107/- per bigha along with statutory benefits.

17. Also during arguments learned Additional Advocate General did not point out as to why the compensation in respect of the acquired land should not be enhanced to INR 9,05,107/- per bigha, instead of INR 5,32,416/- per bigha.

18. The more important question involved in the present petition is as follows:

> Whether it is possible for the appellate Court to enhance the compensation in the absence of any appeal or cross-objections?

19. In *Krishan Kumar vs. Union of India & another,* (2015) 15 SCC 220, a three Judges Bench of Supreme Court holds as follows:

> "Insofar as land situate in Village Burari is concerned, as already noted above, though the LAC had given the categorisation, the Reference Court had refused to accept the same finding that the entire land was to be treated uniformly as Category 'A' land. Apart from the topography of the land, which was almost identical, the Reference Court also pointed out that the distinction had no relevance because the acquisition was for the same purpose, namely, "Biodiversity Park", and, therefore, potentiality of the land would be the same for the aforesaid purpose and it did not matter as to whether a particular parcel of the land was different from the other (though it was not even factually correct). We find this reason to be quite convincing. There appears to be no manifest justification in the judgment of the High Court in reintroducing the said categorisation. We, therefore, are of the opinion that the compensation should be awarded to all the appellants uniformly at Rs 20,20,568 per acre. For the same reasons, similar treatment is to be accorded to the appellants whose lands in Jharoda Mazra Burari are acquired by granting compensation at uniform rate of Rs 12,60,580 per acre."

20. It will be relevant to advert to the provisions of Order 41 Rule 33 of the Code of Civil Procedure, which reads as follows:

> "33. Power of Court of Appeal:

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

21. The Division Bench of this Court in *L.A.C., Solan & another vs. Bhoop Ram,* 1997 (2) Sim. L.C. 229 holds as follows:

"12. We may give reasons for invoking extra-ordinary powers under Order 41, Rule 33 of the Code of Civil Procedure to award uniform rate of Rs. 40 per square metre or Rs. 30,000 per Bigha to all the Respondents-claimants in these appeals. Though we have dismissed the appeals of the Land Acquisition Collector and the State of Himachal Pradesh, yet we have allowed the appeal of one of the Respondents-claimants, namely, Bhoop Ram in R.F.A. No. 9 of 1984 to the limited extent that he will be entitled to compensation for his acquired land at unifom rate of Rs. 40 per square metre or Rs. 30,000 per Bigha, as a result of which the impugned award is modified only in respect of the acquired land of Respondent-claimant Bhoop Ram but in respect of other Respondents-claimants by the same award different rates of market price are awarded according to classification of their acquired land, which creates an anomalous position. Therefore, in order to give just and fair compensation to all the Respondents-claimants whose lands have been acquired for the same purpose and by the same notification under Section 4 of the Act, it is in the interest of justice and fair play to award compensation at the same rate which has been awarded to one of them, namely, Bhoop Ram, without their filing appeal or cross-objections.

13. Order 41, Rule 33 of the Code of Civil Procedure has been interpreted by the Supreme Court in its number of judgments and we may refer to a few of them. In *Panna Lal v. State of Bombay and Ors*., 1963 AIR(SC) 1516, the learned Judges have held in para 12:

(12) Even a bare reading of Order 41, Rule 33 is sufficient to convince any one that the wide wording, was intended to empower the appellate Court to make whatever order it thinks fit, not only as between the Appellant and the Respondent but also as between a Respondent and a Respondent. It empowers the appellate Court not only to give or refuse relief to the Appellant by allowing or dismissing the appeal but also to give such other relief to any of the Respondents as "the case may require" In the present case, if there was no impediment in law the High Court could therefore, though allowing the appeal of the State by dismissing the Plaintiff's suits against it, give the Plaintiff a decree against any or all the other Defendants who were parties to the appeal as Respondents. While the very words of the section make this position abundantly clear the illustration puts the position beyond argument.

14. These principles are reiterated in *Koksingh v. Deokabai*, 1976 AIR(SC) 634, wherein the Respondent did not appeal from the decree of the trial Court negativing her claim in a suit for charge on the property, still the High Court had granted a decree for the enforcement of the charge. Upholding the decree of the High Court, the learned Judges of the Supreme Court have held that under Order 41, Rule 33 of the Code of Civil Procedure the High Court was competent to pass such a decree in favour of the Respondent notwithstanding the fact that the Respondent did not file any appeal from the decree.

15. In a later judgment of the Supreme Court in *Mahant Dhangir and Anr. v. Shri Madan and Ors.*, 1988 AIR(SC) 54, the learned Judges have further elaborated that:

> "… …If the cross-objection filed under Rule 22 of Order 41, Code of Civil Procedure was not maintainable against the co-Respondent, the Court could consider it under Rule 23 of Order 41, Code of Civil Procedure, Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If objection cannot be urged under Rule 22 against co-Respondent, Rule 33 could take over and come to the rescue of the objector. The appellate Court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower Court. The appellate Court could exercise that power in favour of all or any of the Respondents although such Respondent may not have filed any appeal or objection The sweep of the power under Rule 33 is wide enough to determine any question not only between the Appellant and Respondent, but also between Respondent and co-Respondent. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate Court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraints that we could see may be these: That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities.

16. From the above pronouncements of the Supreme Court it is clear that Order 41, Rule 33 confers wide and unlimited jurisdiction on Courts to pass a decree in favour of a party who has not preferred any appeal, there are however certain well defined principles in accordance with which that jurisdiction should be exercised. Normally a party who is aggrieved by a decree should file appeal or cross-object ions against it within a period of limitation, but there are well recognised exceptions to this rule. Some of

them are: (i) Where as a result of interference in the appeal it becomes necessary to readjust the rights of other parties; (ii) where the question is one to settle mutual rights and obligations between the same parties and (iii) when relief prayed for is single and indivisible but is claimed against the number of Defendants."

22. In view of the provisions under Order 41 Rule 33 CPC read with Section 53 of the Land Acquisition Act, even if Cross Objections/Cross Appeals are not on the file of this Court, on the ground of parity, the State cannot deprive the claimants of their lawful entitlement of just, fair and adequate compensation.

23. In *Narendra & others vs. State of Uttar Pradesh & others,* (2017) 9 SCC 426 the Supreme Court holds as follows:

> "5) After hearing the counsel for the parties, we are of the opinion that the issue has already been settled by this Court in *Ashok Kumar vs. State of Haryana* (2016) 4 SCC 544 wherein it is held that it is the duty of the Court to award just and fair compensation taking into consideration true market value and other relevant factors, irrespective of claim made by the land owner and there is no cap on the maximum rate of compensation that can be awarded by the court and the courts are not restricted to awarding only that amount that has been claimed by the land owners/applicants in their application before it. The relevant paras of this judgment is quoted as under:
>
> "6. Prior to amendment Act 68 of 1984, the amount of compensation that could be awarded by the Court was limited to the amount claimed by the applicant. Section 25 read as under-
>
> > '25.*Rules as to amount of compensation*-(1) When the applicant has made a claim to compensation, pursuant to any notice given Under Section 9, the amount awarded to him by the court shall not exceed the amount so claimed or be less 1 (2016) 4 SCC 544 than the amount awarded by the Collector Under Section 11.
> >
> > (2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the court shall in no case exceed the amount awarded by the Collector.
> >
> > (3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the court shall not be less than, and may exceed, the amount awarded by the Collector.'
>
> The amended Section 25 reads as under:
>
> > '25. *Amount of compensation awarded by Court not to be lower than the amount awarded by the Collector*- The amount of compensation awarded by the Court shall not be less than the amount awarded by the Collector under Section 11.'
> >
> > The amendment has come into effect on 24.09.1984.
> >
> > 7. The pre-amended provision put a cap on the maximum; the compensation by court should not be beyond the amount claimed. The amendment in 1984, on the contrary, put a cap on the minimum; compensation cannot be less that what was awarded by the Land Acquisition Collector. *The cap on maximum having been expressly*

omitted, and the cap that is put is only on minimum, it is clear that the amount of compensation that a court can award is no longer restricted to the amount claimed by the applicant. It is the duty of the Court to award just and fair compensation taking into consideration the true market value and other relevant factors, irrespective of the claim made by the owner.

xxx xxx xxx

9. In *Bhag Singh and Ors. v. Union Territory of Chandigarh* [(1985) 3 SCC 737], this Court held that there may be situations where the amount higher than claimed may be awarded to the claimant. The Court observed-

'3. ... *It must be remembered that this was not a dispute between two private citizens where it would be quite just and legitimate to confine the claimant to the claim made by him and not to award him any higher amount* than that claimed though even in such a case there may be situations where an amount higher than that claimed can be awarded to the claimant as for instance where an amount is claimed as due at the foot of an account. *Here was a claim made by the Appellants against the State Government for compensation for acquisition of their land and under the law, the State was bound to pay to the Appellants compensation on the basis of the market value of the land acquired* and if according to the judgments of the learned single Judge and the Division Bench, the market value of the land acquired was higher than that awarded by the Land Acquisition Collector or the Additional District Judge, there is no reason why the Appellants should have been denied the benefit of payment of the market value so determined. To deny this benefit to the Appellants would tantamount to permitting the State Government to acquire the land of the Appellants on payment of less than the true market value. There may be cases where, as for instance, under' agrarian reform legislation, the holder of land may, legitimately, as a matter of social justice with a view to eliminating concentration of land in the hands of a few and bringing about its equitable distribution, be deprived of land which is not being personally cultivated by him or which is in excess of the ceiling area with payment of little compensation or no compensation at all, but *where land is acquired under the Land Acquisition Act, 1894, it would not be fair and just to deprive the holder of his land without payment of the true market value when the law, in so many terms, declares that he shall be paid such market value'*

10. *In Krishi Utpadan Mandi Samiti v. Kanhaiya Lal* [(2000) 7 SCC 756], this Court held that under the amended provisions of Section 25 of the Act, the Court can grant a higher compensation than claimed by the applicant in his pleadings….

11. Further, in *Bhimasha v. Special Land Acquisition Officer and Ors*. [(2008) 10 SCC 797], a three-Judge bench reiterated the principle in Bhag Singh (supra) and rejected the contention that a higher compensation than claimed by the owner in his pleadings cannot be awarded by the Court." (Emphasis supplied)

6) The matter can be looked into from another angle as well, viz., in the light of the spirit contained in Section 28A of the Act. This provision reads as under:

> "28-A. *Re-determination of the amount of compensation on the basis of the award of the court.* - (1) Where in an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section II, the persons interested in all the other land covered by the same notification under Section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under Section 18, by written application to the Collector within three months from the date of the award of the court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the court."
>
> 7. It transpires from the bare reading of the aforesaid provision that even in the absence of exemplars and other evidence**,** higher compensation can be allowed for others whose land was acquired under the same Notification."

24. Whenever the authorities acquire the lands under the Act, then it is not the will of the landowner, but it is the will of the State which prevails. In a regular sale transaction, there is a bargain, and terms of Contract Act apply like offerer, offeree, acceptance, and consideration. All this takes place on the mutually agreed terms and conditions. To the contrary, when the authorities initiate acquisition proceeds under some statute, then even if the landowner is unwilling to sell, he can challenge such move only on extremely limited grounds. He can not negotiate the acquisition price unless the proceedings are under those provisions. Simply because some land owners or persons in possession could not file Cross Objections or Appeals because of any reason, then it does not mean that the State should close its eyes. It is expected of the State to voluntary extend equal benefits even without the claimants asking for it. India is a welfare State where the Constitution of India has declared Article 14 that Equality before Law as a fundamental right. A welfare state would give compensation, which is warranted and determined, after following just procedure of law, and which the claimant deserves and is entitled to, even without his asking for it.

25. Given the above, in the impugned judgment dated 29.04.2011 instead of land acquisition rate mentioned as INR 5,32,416/- per bigha, it shall read as INR 9,05,107/- per bigha, and this Court increase the rates to such an extent, with no other modification. All the other reliefs stand as it is. The impugned award stands modified accordingly.

All pending applications, if any, also stand closed.

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BEFORE HON'BLE MS. JYOTSNA REWAL DUA, J.

Sh. Amar Nath ....petitioner/defendant.
Versus
Shri Bhagat Chand ...... respondent/plaintiff.

CMPMO No 235 of 2018
Decided on: 14.06.2019

Indian Evidence Act, 1872- Sections 63 & 65– Secondary evidence– Leading of- Pre requisites– Held, when loss of original is not accounted for or application seeking leave of court otherwise is bereft of particulars required for discharging proof contemplated under Section 65 of Act, secondary evidence can not permitted to be adduced. (Paras 5 & 6)

Cases referred:
H. Siddiqui vs. A. Ramalingam, (2011) 4 SCC 240
J. Yashoda vs. K. Shobha Rani, (2007) 5 SCC 730
M. Chandra vs. M. Thangamuthu, (2010) 9 SCC 712
U. Sree vs. U. Srinivas, (2013) 2 SCC 114

For the petitioners. : Mr. Sanjay Bhardwaj, Advocate.
For the respondent : Mr. Yash Sharma, for the respondent.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(Oral)*

Having lost in his endeavor to lead secondary evidence in respect of agreement dated 31st May, 2010, before the learned Court below, the petitioner/defendant has preferred the instant petition under Article 227 of the Constitution of India, against the order dated 01.11.2017, passed by the learned Civil Judge, (Senior Division), Court No. 1, Rohru, District Shimla, H.P. in Civil Suit No. 18-1 of 2012, whereby application preferred by the petitioner/defendant under Section 65 of the Indian Evidence Act, was dismissed.

02. The factual position emerging from record:-

2 (i) Suit was filed by the respondent/plaintiff, seeking permanent prohibitory and mandatory injunction with respect to the land comprised in Khasra No. 1186, Khata No. 96 min Khatauni 254 and also from throwing malwa, mucc and debtries etc., over the land bearing Khasra No. 1178 comprised in K.K. No. 96 min/255 situated in revenue chak Dainwari Patwar circle Tikkri Tehsil Chirgaon Distt. Shimla, H.P.

2(ii) Written statement to the plaint was filed by the petitioner/defendant on 18.06.2012, wherein paragraph-2, it was mentioned that the petitioner/defendant had started construction of his house in the year 2010 and had given the house for construction on contractual basis to a contractor namely Sh. Karan Bahadur, for an amount of Rs. 2,55,000/-, for which purpose, an agreement was executed between the petitioner/defendant and the said contractor. House was stated to have been constructed over the suit land in the year 2010-2011.

2(iii). The record of learned Court below reveals that the evidence in the case commenced in the year 2014. The matter was fixed for defendant's evidence w.e.f. 22.11.2014 onwards. Application under Section 65 of the Indian Evidence Act on 10.7.2017 was moved by the petitioner/defendant for leading secondary evidence in respect of agreement dated 31.05.2010, alleged to have been executed, between him and one Sh. Karan Bahadur in respect of alleged construction of the house of the defendant. The professed reasons for moving the said application are that:-

> i) It was at the time of recording evidence of defendant's witnesses that the petitioner/defendant came to know about there being only a photocopy of the agreement in the court file.
>
> ii) The petitioner/defendant was under the impression that agreement, in original, was at his home.
>
> iii) Since, the agreement could not be traced out by him and the same was necessary, therefore, this application under Section 65 of Indian Evidence Act was moved.

2(iv) The plaintiff opposed the application contending that the requirements laid down under Sections 63 & 65 of the Indian Evidence Act have not been met. The application having been dismissed by the learned Trial Court vide order dated 01.11.2017, present petition has been filed.

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

4. Relying upon the judgments rendered by the Hon'ble Supreme Court in cases of *J. Yashoda Vs. K. Shobha Rani, (2007) 5 Supreme Court Cases, 730, M. Chandra Vs. M. Thangamuthu, (2010) 9 Supreme Court Cases 712, H. Siddiqui Vs. A. Ramalingam (2011) 4 Supreme Court Cases 240 & U. Sree Vs. U. Srinivas, (2013) 2 Supreme Court Cases 114,* it can be concluded that secondary evidence in respect of an ordinary document can be allowed in case following requirements inter-alia amongst others are met :-

> i) For leading secondary evidence, non production of the document in question has to be properly accounted for by giving cogent reasons inspiring confidence.
>
> ii) The party should be genuinely unable to produce the original of the document and it should satisfy the Court that it has done whatever was required at its end. It cannot for any other reason, not arising from its own default or neglect produce it.
>
> iii) Party has proved before the Court that document was not in his possession and control, further that he has done, what could be done to procure the production of it.
>
> iv) The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original.

5. The record of the case clearly indicates that in the written statement, even the date of the agreement is not mentioned. The written statement was filed on 18.06.2012. The matter was fixed for defendant's witnesses w.e.f. 22.11.2014. The application for leading secondary evidence was moved on 10.07.2017, five years after the filing of written statement. The reason for delay advanced by the petitioner/defendant that he came to know about the existence of only photocopy of the agreement in the court file, at the time of examination of defendant's witnesses, does not inspire confidence. From 22.11.2014, the matter was fixed for defendant's witnesses. The record of learned Court below demonstrates that statements of DW No.1, DW No.2,DW No.3 had already been recorded on 20.12.2016. There is no reason forthcoming in the application, which sufficiently and cogently explains the delay in moving the application.

6. The requirements laid down under Sections 63 and 65 of the Indian Evidence Act for permission to lead secondary evidence are not met in the instant case. There is no averment made in the application that the photocopy of the agreement on the record is made from the original, when it was made and who compared it. The loss of the original agreement has not been accounted for in accordance with the provisions of Section 65 of the Indian Evidence Act. The application is bereft of the particulars, which are required for discharging the proof, required under Section 65 of the Indian Evidence Act.

7. Merely, a vague averment made in the application that the document has not been traced, is not sufficient to allow the application for leading secondary evidence. Therefore, no illegality can be found in the order passed by the learned Trial Court.

8. Resultantly, the present petition is dismissed, being devoid of merit. Pending *miscellaneous application(s), if any, also stand disposed of. Record is ordered to be sent back*

to the learned Trial Court. Parties are directed to remain present before the learned Trial Court on 15th July, 2019.

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

Anil Bhardwaj ....Petitioner.
-Versus-
Shri Tek Chand and others .....Respondents.

CR No.: 154 of 2018
Decidedon: 16.07.2019

Himachal Pradesh Urban Rent Control Act, 1987 – Section 24 (5) – Interlocutory orders – Challenge thereto – Whether would lie before Appellate Authority by way of appeal or before High Court in exercise of revisional jurisdiction? Held – Appeal is maintainable against such orders of Rent Controller which decide the fate of parties and are not otherwise made appellable under Act - All other interlocutory orders are amenable to revisional jurisdiction of High Court - Therefore, the question whether status of tenant as lessee on purchase of a share in disputed premises by him would merge and enlarge his status to that of co-sharer vis a vis, landlord actually decides fate of parties as far as maintainability of rent petition is concerned – Order of Rent Controller on this point is appellable – Revision against such order not maintainable– Petition dismissed.(Paras 7 & 9)

Cases referred:
Sat Pal vs. Sunaina Devi, 2007(1) Shim. LC 163
Shah Babulal Khimji vs. Jayaben D. Kama and another,(1981) 4 SCC 8
Vinod alias Raja vs. Smt. Joginder Kaur, 2012(3) Him. L.R. (FB) 1401

For the petitioner: Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate.
For the respondents: Mr. K.D. Sood, Senior Advocate, with Mr. Shubham Sood, Advocate, for respondent No. 1.
Mr. Anuj Gupta, Advocate, for respondents No. 2 to 7.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Section 24(5) of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as 'the 1987 Act'), the petitioner/tenant has prayed for setting aside of two orders dated 02.05.2018 (Annexures P-4 & P-5), passed by the learned Rent Controller, Court No. 3, Shimla in Case No. 37-2 of 17/13, titled as *Shri Tek Chand and others Vs. Shri Anil Bhardwaj and others*, vide which a preliminary issue framed at the behest of petitioner stands decided by the learned Rent Controller against him. The preliminary issue which has been decided against the petitioner reads as under:

> *"Whether the present petition is not maintainable on account of purchase of 1/3rd undivided share by the respondent No. 1 and his wife in the building in question comprising of tenanted premises from Sh. Deepak Sood as per registered sale deed dated 22.5.2015 as alleged? OPR."*

2. When this petition was taken up for consideration, a preliminary objection was taken by Sh. K.D. Sood, learned Senior Counsel appearing for respondent No. 1 that this petition was not maintainable, as the remedy available before the petitioner herein was to assail the impugned orders was by way of filing an appeal.

3. Parties were heard on the issue of maintainability of this petition.

4. Learned Senior Counsel for respondent No. 1 has argued that the impugned orders cannot be assailed by way of a Revision Petition under Section 24(5) of the 1987 Act, as the remedy available before the petitioner to assail the said orders was by way of filing an appeal.

5. On the other hand, learned Senior Counsel for the petitioner has argued that as the impugned orders are in the nature of interlocutory orders and they do not otherwise decide the fate of the parties, therefore, they are not appealable and the only remedy available to the petitioners was to assail them under Section 24(5) of the 1987 Act.

6. I have heard learned counsel for the parties and have also gone through the pleadings on record.

7. Section 24 of the 1987 Act provides that the State Government may, by a general or special order, by notification, confer on such officers and authorities, as it thinks fit, the powers of Appellate Authorities for the purposes of 1987 Act. This Section further provides that save as otherwise provided in the Act, any person aggrieved by an order passed by the Controller, except the orders for the recovery of possession made by the Controller, as per procedure prescribed under Section 16 of the Act, may, within fifteen days from the date of such order or such longer period as the Appellate Authority may allow for reasons to be recorded in writing, prefer an appeal in writing to the Appellate Authority having jurisdiction. Sub-section (5) of Section 24 further provides that the High Court may, at any time, on the application of any aggrieved party or on its own motion call for and examine the records relating to any order passed or proceedings taken under the Act for the purpose of satisfying itself as to the legality or propriety of such order or proceedings and may pass such order in relation thereto as it may deem fit.

8. A Full Bench of this Court in ***Vinod alias Raja*** Versus ***Smt. Joginder Kaur***, 2012(3) Him. L.R. (FB) 1401 has, *inter alia,* held that under the 1987 Act, each and every order is not made appealable, but only those orders which otherwise decide the fate of the parties, in the proceedings which are not otherwise excluded under the Act, are appealable. Hon'ble Full Bench has further held that all other interlocutory orders are amenable to the revisional jurisdiction of the High Court, which may go into the legality and propriety of such orders. Hon'ble Full Bench has further held that any person aggrieved by an order which finally decides his fate in the case, for which Appellate Authority is not otherwise provided in the notification issued by the Government under Section 24(1) of the 1987 Act, can maintain an appeal as per the Scheme of the Code of Civil Procedure until otherwise specified by the Government by way of an appropriate notification.

9. Thus, it has been clearly laid down by the Hon'ble Full Bench that whereas an appeal is maintainable against an order which "otherwise decides the fate of the parties and

are not otherwise excluded under the Act", all other interlocutory orders are amenable to the revisional jurisdiction of the High Court.

10. There is yet another judgment of this Court in Civil Revision No. 84 of 2006, titled as ***Sat Pal*** Vs. ***Sunaina Devi,*** reported in 2007(1) Shim. LC 163. Said matter was placed before the Hon'ble 3rd Judge on account of divergence of opinion between two Hon'ble Judges, including the then Hon'ble Chief Justice with respect to the interpretation to be put upon Clauses (a) and (b) of Sub-section (1) of Section 24 of the Himachal Pradesh Urban Rent control Act, 1987. In this judgment, this Court has held as under:

> *"11. There can be no manner of doubt that every order passed by a Rent Controller can not be an appealable order. The section provides that a person aggrieved by an order can file an appeal. Obviously the order must be one which decides certain matters which effect the rights of the parties. Only then can one party be said to be aggrieved and will have a right to challenge the order in appeal.*
>
> *12. Some High Courts in the country such as Presidency High Courts of Bombay, Calcutta and Madras as well as High Court of Delhi, the High Court of Jammu and Kashmir and this Court have original jurisdiction. Civil suits are tried on the original side of these Courts. Under the Letters Patent of the various Courts as well as the Delhi High Court Act an appeal to a Division Bench lies against the "Judgment" of a learned Single Judge passed on the original side. The question as to what is the interpretation to be given to the word "Judgment" had been a matter of debate before the various High Courts for almost 100 years and this matter was finally decided by the Apex Court in Shah Babulal Khimji V. Jayaben D. Kama and another, (1981) 4 SCC 8. The Apex Court after considering all the previous authorities and entire law on the subject held as follows:-*
>
> *"113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a Court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-section (2) of Section 2 annnot be physically imported into the definition of the word 'judgment' as used in Clause 15 of the Letters Patent because the Letters Patent has advisedly not used the terms 'order' or 'decree' anywhere. The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a Trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:*
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> *(1) A final judgment.- A judgment which decides all the questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decree in part or in full. Such an order passed by the Trial Judge indisputably and*

unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment.-This kind of a judgment may take two forms-(a) where the Trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the Trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and, therefore, appealable to the Larger Bench. (b) Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect in the suit, absence of notice under Section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

(3) Intermediary or interlocutory judgment.- Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the Trial Judge in a suit under Order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in similar suit where the Trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an order passed by the Trial Judge would not amount to a judgment within the meaning of Clause 15 of the Letters Patent but will be purely an interlocutory order. Similarly, suppose the Trial Judge passes an order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of Order 43 Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within

Order 43 Rules 1 Clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The fact, however, remains that the order setting aside the ex parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the Trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is, therefore, appealable to a larger Bench.

114. In the course of the trial, the Trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the Trial Judge.

115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned."

13. The Apex Court thereafter gave various illustrations of interlocutory orders which could be treated as judgment. However, the Court laid down in para 122 that these examples are only illustrative in nature and are not totally exhaustive and that the law with its dynamism, pragmatism and vastness is such a large ocean that it is well-nigh impossible for the Court to envisage or provide for every possible contingency or situation so as to evolve a device or frame an exhaustive formula or strategy to confine and incarcerate the same in a strait-jacket.

…. …. …. …. ….

19. After considering the entire law I am of the view that the word 'Order' in Section 24(1)(b) not only includes final orders passed under the Rent Control Act, but shall also include other orders including interlocutory orders which finally decide a question in issue or issue in controversy relatable to the main case; similarly, interim orders which finally decide issue(s) which have material bearing and may directly effect the final decision of the case can also be appealed against and lastly, orders which though only decide a collateral issue, but which will effect the vital rights and obligations of the parties can be appealed against. In case the various judgments of the Apex Court are gone through carefully, it would be clear as to which orders are appealable and which are not. It is neither possible nor is it prudent to set out all the appealable orders in detail. It shall be for the appellate authority in the facts and circumstances of each, case to decide, whether the order appealed before it falls within the ambit and scope of appealable orders, in the light of the law discussed above.

20. I, therefore, disagree with the opinion of Surjit Singh, J. and agree with the opinion of My Lord the Chief Justice that all orders, including interlocutory orders, passed by the Rent Controller can be challenged in an appeal before the appellate authority, subject to the caveat that the order should either finally decide a question or issue in controversy in the main case; or it should be an order which materially and directly affects the final decision in the main case or which finally decides a collateral issue or question which is not the subject matter of the main case, but which vitally affects the rights and obligations of the parties and shall have material bearing on the final decision of the case."

11. Coming to the facts of the present case, herein vide impugned orders, the preliminary issue framed at the behest of the petitioner/tenant as to whether the Rent Petition was maintainable on account of purchase of 1/3rd undivided share by the tenant/respondent No. 1 and his wife in the building in question, stands answered against the tenant.

12. Learned Rent Controller has held that though it was not in dispute that tenant-Anil Bhardwaj and his wife had purchased 1/3rd share in the demised premises, however, despite this, the status of the tenant as a lessee does not get merged into the status of a co-sharer in the property. Learned Rent Controller held that purchase of a part of the estate by tenant would not end his status as that of lessee, although he has become one of the co-sharers/landlord in the property.

13. At this stage, I am not dwelling upon the legality of these orders. Moot issue that is to be decided is as to whether the orders so passed by the learned Rent Controller are appealable orders or revisable orders.

14. As I have already discussed above, Hon'ble Full Bench of this Court has categorically held that subject to other riders contained in the Act, it is not as if each and every order is appealable. However, those orders which otherwise decide the fate of the parties and are not excluded under the Act, are appealable.

15. It has been held by Hon'ble Supreme Court in ***Shah Babulal Khimji*** Vs. ***Jayaben D. Kama and another,***(1981) 4 SCC 8, as has also been taken note of by this Court in Satpal Vs. Sunaina Devi (supra) that where a Trial Judge passes an order after hearing preliminary objections raised by the defendant relating to maintainability of the suit and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits, but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant, who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds and such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

16. In the present case, while deciding the preliminary issue, learned Rent Controller has held that the status of the tenant as a lessee does not get merged into the status of a co-sharer in the property by way of his purchase of a part of the estate. It has held that the same would not end the status of the tenant as lessee, though he has become one of the co-sharers/landlord of the property. This adjudication, in my considered view, at least decides the fate of the parties as far as the issue of maintainability of the Rent Petition before the learned Rent Controller, pursuant to one of the tenant having become co-sharers in the demised premises is concerned. If we perceive the issue from other perspective, had this issue been decided in favour of the tenant, then obviously the Rent Petition would have been

dismissed as not maintainable. Such order, but obvious, was an appealable order. The effect of the adjudication of said 'Issue' against the tenant also has to be considered on the same scale and with the same yardstick. Though the adjudication on the issue by the learned Rent Controller has not put an end to the case at hand, meaning thereby, it has not finally decided the *lis*, yet there is a finality attached to these orders as far as the factum of the maintainability of the Rent Petition in the facts of the case is concerned.

17. Accordingly, in my considered view, Revision Petition against the impugned orders dated 02.05.2018 (Annexures P-4 & P-5), vide which a preliminary issue framed at the behest of petitioner with regard to the maintainability of the Rent Petition stands dismissed by the learned Rent Controller, Court No. 3, Shimla in Case No. 37-2 of 17/13 is not maintainable as the impugned orders are appealable orders. The petition is disposed of accordingly, with liberty to the petitioner to assail the impugned orders by way of an appeal, if advised. It is clarified that if any appeal(s) is filed by the petitioner, then the time spent by him in pursuing the present Revision Petition shall be taken into consideration by the learned Appellate Court for the purpose of computation of limitation. Miscellaneous applications, if any, also stand disposed of.

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

Naseeb Deen and another ....Petitioners.

-Versus-

Harnek Singh .....Respondent.

CMPMO No.: 208 of 2019
Date of Decision: 19.07.2019

Code of Civil Procedure, 1908- Order XXVI Rule 9– Local commissioner– Appointment of- Stage and purpose– Held, purpose of appointing local commissioner is to get matter in dispute elucidated– Provision cannot be used as a measure to collect and create evidence in favour of party– Order of trial court regarding appointment of local commissioner at stage when even issues were not settled is illegal as there is nothing at that stage which requires elucidation by court- Order set aside– Petition allowed.(Paras 9 & 10)

For the petitioners: Mr. Sanjay Jaswal, Advocate.
For the respondent: Mr. Anuj Gupta, Advocate.

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 petitioners have challenged order, dated 11.03.2019, passed by the Court of learned Civil Judge (Junior Division), Jawali, District Kangra, H.P., in CMA No. 61/2019 in Civil Suit No. 115/2016, titled as *Harnek Singh Vs. Naseeb Deen and another*, vide which an application filed by the respondent herein under Order XXVI, Rule 9 of the Code of Civil Procedure (hereinafter referred to as 'the Code') for appointment of a Revenue Officer as a Local Commissioner stands allowed.

2. Brief facts necessary for the adjudication of the present case are that respondent/plaintiff has filed a suit against the petitioners/defendants seeking a decree of injunction for restraining the defendants from raising any construction, dispossessing, interfering, cutting, felling and removing the trees standing upon the suit land. In the alternative, the plaintiff has also prayed for possession of the suit land. The suit has been filed in October, 2016.

3. During the pendency of the said suit, the plaintiff has filed an application under Order XXVI, Rule 9 of the Code for appointment of any Revenue Officer of Tehsil Fatehpur or Sub Division Jawali as Local Commissioner for locating the exact nature and extent of encroachment by the defendants and fixing boundaries of the suit land. It was averred in the application that the parties were having strained relation with each other; despite a status quo order having been passed, the defendants were interfering in the suit land; and they were also encroaching upon the suit land, hence appointment of a Local Commissioner was necessary for locating the exact nature and extent of encroachment by the defendants.

4. The application was resisted by the defendants, *inter alia,* on the ground that it was always open to the plaintiff to have had approached the Revenue Authorities for getting the land demarcated and the Court is not to create evidence for either of the parties. It was further the case of the defendants that they were not interfering in the suit land nor they had any intention to do so and they were in possession of their property pursuant to the recent partition having entered into between the parties and the plaintiff was estopped from filing the application. It was denied by the defendants that they were encroaching upon the suit land, as alleged.

5. Vide impugned order, learned Trial Court has allowed the application so filed by the plaintiff under Order XXVI, Rule 9 of the Code by holding that as issues were not yet framed in the main suit and as proceedings in the case were at a preliminary stage, therefore, the Court was of the opinion that if a Local Commissioner in the case was appointed, no prejudice shall be caused to the defendants, rather it will help in the proper and final adjudication of the dispute between the parties.

6. Feeling aggrieved, the petitioners, who are the defendants before the learned Court below have filed the present petition.

7. Learned counsel for the petitioners has argued that the impugned order is not sustainable in the eyes of law, as the same has been passed by the learned Court below in a hot haste, without even realizing that as even the issues were not yet framed, there was no necessity of such an application being entertained by the learned Trial Court. Because it was the allegation of the plaintiff that the suit land stood encroached upon by the defendants, onus was upon him to prove the same and it was not for the Court to create evidence in favour of the plaintiff.

8. On the other hand, learned counsel for the respondent/plaintiff has argued that there is no perversity with the impugned order, as learned Court below has rightly allowed the application to put an end to the *lis* between the parties, because the demarcation if carried out, would demonstrate as to whether there is any encroachment upon the suit land or not and the same would assist the Court in the adjudication of the case.

9. Having heard learned counsel for the parties, this Court is of the view that the impugned order is not sustainable in the eyes of law. It is not in dispute that the application under Order XXVI, Rule 9 of the Code was filed by the plaintiff before the learned Trial Court even before the issues stood framed by the learned Court below. It is the allegation of the

plaintiff that the defendants are encroaching /have encroached upon the suit land. It is settled preposition of law that he who alleges, has to prove. Meaning thereby, because it is the contention of the plaintiff that the defendants have encroached upon the suit land or are encroaching upon the same, onus is upon him to prove his case. There is no material on record to demonstrate that the plaintiff, at any stage, has approached the Revenue Authorities, for demarcation of the land in issue. In these circumstances, filing of the application by the plaintiff at the stage when not even issues were framed by the learned Trial Court, but obvious was an attempt to create evidence in his favour and this important aspect of the matter has been completely overlooked by the learned Court below. In other words, in the present case, learned Trial Court has fallen into the trap of the plaintiff by allowing the application so filed by the plaintiff and this has let out a helping hand to the plaintiff to create evidence in his favour at a stage when not even the issues were framed.

10. Order XXVI, Rule 9 of the Code, *inter alia,* provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. Meaning thereby that it has to be the satisfaction of the Court that a local investigation is necessary or proper for the purpose of elucidating any matter in dispute. This provision is not a tool which is to be permitted to be used by the parties concerned to create evidence in their favour. This important aspect of the matter has also been lost sight of by the learned Trial Court while passing the impugned order.

11. Accordingly, in view of the observations made hereinabove, this petition is allowed. Impugned order, dated 11.03.2019, passed by the Court of learned Civil Judge (Junior Division), Jawali, District Kangra, H.P., in CMA No. 61/2019 in Civil Suit No. 115/2016, titled as Harnek Singh Vs. Naseeb Deen and another, is set aside. The petition stands disposed of, so also pending miscellaneous applications, if any.

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

CMPs No.6377, 6478 & 6479 of 2019
In CR No.138 of 2014
Reserved on : 16.7.2019
Date of Decision: 18.7.2019

Code of Civil Procedure, 1908– Section 151– Inherent powers- Application requiring interpretation/clarification of terms and conditions of compromise decree– Sustainability– Landlords and tenants entering into compromise qua transfer of vacant and peaceful possession of rented accommodation being used by tenants for running a restaurant– At execution stage, workers and employees of tenants obstructing in removal of articles of tenants disabling them to hand over vacant possession to landlords– Application seeking clarification of terms of compromise filed by landlords, tenants as well as working staff – Working staff claiming dues under labour laws from tenants and praying that possession cannot be delivered till payment of their dues is made– Held, dispute was between landlords and tenants and terms of compromise effected in that litigation are to be interpreted in that context– Liabilities created by any party (landlord/ tenants) qua third party are to be cleared by that party only - Claim of staff/workers already pending before Labour Officer– Their claim under labour laws does not create any right of workers in suit premises– They cannot

obstruct delivery of possession to landlords- SHO Police station Sadar, Shimla directed to ensure handing over of possession to landlords in presence of parties– Applications disposed of. (Paras 18 to 22)

CMP No.6377/2019

Smt. Renu Baljee and others ….Tenants/Petitioners/Non-applicants
Versus
Shiv Charan & others ….Landlords/Respondents/Applicants.
C.K. Baljee ….Respondents/Non-applicants

CMP No.6478/2019

Bhagat Ram & others
….Applicants/Workers/Staff of erstwhile Baljees Restaurant & Fascination
Smt. Renu Baljee & others ….Tenants-Petitioners/Non-applicants
Versus
Shiv Charan & others ….Landlords/Respondents/Non-applicants.

CMP No.6479/2019

Smt. Renu Baljee & others ….Tenants-Petitioners/applicants
Versus
Shiv Charan & others ….Landlords/Respondents/Non-applicants

For the Tenants-Petitioners	:	Mr. Ramakant Sharma, Senior Advocate, with Ms Devyani Sharma, Advocate.
For the Landlords-Respondents No.1 to 3	:	Mr. Neeraj Gupta, Senior Advocate, with Mr. Ajit Jaswal, Advocate.
For the Workers/Staff Of Erstwhile Baljees Restaurant & Fascination	:	Mr. O.P. Chauhan and Ms Shikha Chauhan, Advocates.
		Inspector Sandeep Chaudhary, SHO, Police Station Sadar (Shimla) in person, alongwith record.
Respondent No.4		None

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

These three applications are being decided together by this common order, as question of interpretation of terms and conditions of one and the same compromise is involved therein.

2. It is undisputed that this Court is not the 'Court of first instance' in present matter and thus is not an Executing Court. Alive to such fact, learned counsel for the parties have submitted that these applications be not treated as applications filed for execution of order/ final judgment, passed by this Court, on the basis of compromise arrived at between the parties, terms and conditions whereof have also been made part of final

judgment, but the applications are to be treated to have been filed for interpretation of terms and conditions, as some confusion has arisen between the parties as also between the tenant- employer and their workers/staff, with reference to certain clauses of the compromise, especially clause (l) of the terms and conditions of the compromise, which has resulted into obstruction in complying with the final judgment in the matter, despite willingness and readiness of parties to comply with and in these extraordinary unavoidable circumstances parties have approached this Court as it would not be possible for any other Court/forum to interpret the essence and meaning of terms and conditions of compromise contained in final judgment passed by this Court.

3. **CMP No.6377 of 2019** has been preferred by Landlords, wherein referring the condition of transfer of vacant and peaceful possession of the premises in question on or before 15.7.2019, interference of this Court has been called for to explain the meaning of "vacant and peaceful possession" inclusive of the transfer of basic amenities, like water and electricity connections by the tenants in the name of the Landlords, instead of surrendering/disconnecting the same for disconnection.

4. During the course of hearing, it is submitted by learned counsel for the Landlords and Tenants that misunderstanding with regard to transfer of vacant and peaceful possession of premises stands clarified between the landlords and tenants and, as such, tenants have agreed and undertaken to facilitate the transfer of water and electricity connections by extending all kind of necessary help on the part of tenants, and landlords and tenants have arrived at mutual agreement to sort out the misunderstanding arising between them with respect to interpretation and implementation of terms and conditions of compromise, which has resulted into filing of CMP No.6377 of 2019. In view of these submissions by the contesting parties, with respect to subject matter of this application, nothing survives to be adjudicated.

5. **CMP No.6479 of 2019** has been preferred by tenants, stating therein that tenants are ready and willing to handover vacant and peaceful possession of the premises to the landlords, but staff of erstwhile Baljees Restaurant and Fascination, earlier being run by the tenants in the premises, is occupying the premises and causing obstruction in removing the articles belonging to the tenants, resultantly disabling them to handover the vacant and peaceful possession of the premises to the landlords. It is further contended in the application that despite reporting the matter to the Administration, including the Police, no help is being extended to the tenants to protect their legal rights so as to facilitate them to comply with the terms and conditions agreed between the parties, which are part of the final judgment passed by this Court. It is further stated that the major amount, which was payable to the staff and workers, stands paid and balance amount, of ten days salary of month of July 2019 and leave encashment, etc., which is due as per calculations of the tenants-employer, shall also be paid on or before 20.7.2019, regarding which tenants-employer have already given undertaking to the Labour Officer, who is exercising the power under the Industrial Disputes Act, on the complaint/application preferred by the workers/employees. Commitment of tenants-employer to pay the said amount on or before 20.7.2019 has also been reasserted. It is also submitted that as for inaction of administration and action of workers/staff, handover of possession of premises being delayed and there being possibility of damage to the property, key of the premises be retained in the Court or be ordered to be handed over to the Police.

6. **CMP No.6478 of 2019** has been preferred by the workers/staff of the erstwhile Baljees Restaurant and Fascination for direction to the tenants-employer to make all payments with respect to liability towards workers before handing over the vacant and peaceful possession to the landlords. The applicants have submitted that the workers/staff

derive right to claim payment of all dues, on or before 15.7.2019, from Clause (l) of the terms and conditions of the final judgment, passed by this Court and, therefore, unless the dues claimed by the workers/staff with respect to their retrenchment, gratuity, bonus, etc. are not cleared by the tenants-employer, the premises cannot be permitted to be handed over to landlord, as the tenants-employers themselves have undertaken in clause (l) of the terms and conditions of the compromise not to create any liability on the landlords with respect to dues payable to the workers/ staff.

7. Learned counsel for applicants has also submitted that workers/staff has every right to take all necessary steps for protecting their rights with regard to dues payable to them, in accordance with law, and shall follow the course for asserting their rights, which is available to them under law and they shall not take the law in their hands.

8. Learned counsel for the tenants, relying upon the averments made in CMP No.6479 of 2019 and referring to documents filed therein, and also Clause (l) of the compromise, has contended that Clause (l) is a settlement between the landlords and tenants, wherein the tenants have agreed not to pass over their liabilities concerning the business run by them in the premises in question, including the admissible dues of the workers/ staff, upon the landlords and for that reason tenants had issued the notice to the workers/staff, vide letter dated 11.1.2019, intimating handing over of vacant possession to the landlords of the premises on or before 15.7.2019, in terms of order dated 12.7.2018, passed in present Revision Petition No.138 of 2014 and said letter was received by Shri Bhagat Ram, President of Baljees Workers Union, who is also applicant in CMP No.6478 of 2019, however, he had responded to the intimation only on 3.6.2019, asking for payment of certain benefits to the workers and also to adjust them in case of shifting of existing business to any other place in or around Shimla and further that the tenants, in order to pay the admissible dues of workers/staff, had calculated the gratuity payable to the employees, as on 15.7.2019, and had reimbursed the same vide Cheque No.000167 dated 11.7.2019, amounting to `63,51,909/- and also reimbursed the bonus vide Cheque No.497773 dated 11.7.2019, amounting to `6,17,960/-, upto 31.3.2019 for the Financial Year 2018-19, by transferring the same into respective bank accounts of the workers/staff.

9. Learned counsel for the workers has submitted that though the workers/staff have received the payment, but calculation thereof has been made on lower side, including calculation of bonus at the rate of 8.33% instead of 14% and further after removing the articles from premises in question, tenants-employer will not be available in proceedings initiated by workers/staff against them for their various claims.

10. So far as payment of salary of ten days of month of July, 2019 and leave encashment are concerned, learned counsel for the tenants-employer has submitted, as also reiterated, in reply to CMP No.6478 of 2019, that the tenants have already undertaken before the Labour Officer to pay the same by 20.7.2019, with further submission that tenants have again reiterated the commitment to pay the same by 20.7.2019 herein also and further that other claims of the workers/staff are not admissible, in view of the reply filed by tenants-employer before the Labour Officer and has also submtited that in the application filed on behalf of the workers/staff, material fact with regard to pendency of dispute before the Labour Officer has been concealed and, therefore, this application deserves to be dismissed for not approaching the Court with clean hands and further that as tenants-employer Renu Baljee is permanent resident of Shimla, and is also owner of sufficient property in Shimla, apprehension of workers/staff, that she will flee after handing over of possession of premises in question, is baseless and uncalled.

11. Learned counsel for the landlords has submitted that workers/staff of tenants is not party to the Rent Petition, as the dispute is between the tenants and landlords, under the Urban Rent Control Act and, therefore, they were not required to be associated in the case and Clause (l) and the compromise is an arrangement between the tenants and landlords, which does not create any right in favour of the workers/staff to cause hindrance in handing over and taking over of vacant and peaceful possession of the premises. They are already before the authority, i.e. Labour Officer, where their claim is yet to be adjudicated and for dispute between the tenants and their workers, landlords should not be deprived from their legal right. It is also submitted that for any reference in compromise with regard to claims of dues by the tenants, which are payable to their workers/staff, this Court will not assume jurisdiction with respect to a dispute for which appropriate forum under the Industrial Disputes Act is available. It is further submitted that Clause (l) is to be read as a whole for its real meaning and interpretation.

12. In rebuttal, learned counsel for the workers/ staff has submitted that Clause (l) of the compromise deals with the interest of workers/staff, wherein tenants have undertaken not to create any liability upon landlord, with respect to dues payable to workers/staff, with assurance to clear them on or before 15.7.2019 and further the moment the possession of premises will be handed over to the landlords, relation of master and servant between the tenants and workers will come to an end and the workers will be rendered remediless, as the Labour Officer has already refused to interpret Clause (l) in favour of the workers/staff and in these unavoidable circumstances, workers/staff, who are not party and could not have been party to the Rent Petition, have approached this Court, relying upon and having confidence in Clause (l) of the compromise and except this there is no other efficacious remedy available to them.

13. It is undisputed that the compromise, on the basis of which litigation between the landlords and tenants has come to an end, with respect to the premises in issue, is between the landlords and tenants and terms and conditions incorporated therein, are to be read in that context. Undoubtedly, if there is an undertaking for clearance of any liability due towards third party, payable by either of the parties to the compromise, the same has to be cleared by the concerned party. Therefore, Clause (l) of the compromise is to be interpreted within the aforesaid parameters. Clause (l) basically deals with handing over of vacant and peaceful possession of the premises in question by the tenants to the landlords, with condition that tenants have agreed and undertaken to clear off all liabilities, in respect of electricity and water consumption and any other tax(es) payable by tenants on account of running of business in the premises upto 15.7.2019. In this clause further undertaking has been given by the tenants not to create any kind of business liability, liability in respect of their workers/staff and any other liability till they remained involved in the business activity upto 15.7.2019 and uptill the landlords are put in vacant and peaceful possession of the premises in question. It means that for all kinds of liabilities accrued upto 15.7.2019, on account of business activity carried on in the premises in question, the tenants shall be liable to clear such liabilities. It does not mean that liability in respect of their workers/staff or any other liability is to be cleared off by 15.7.2019, as this clause contains that liability upto 15.7.2019 or till handing over of possession, is to be borne by the tenants. Though there is no clause for clearance off liability of the workers by 15.7.2019, however, the tenants being employer were expected to clear the same and they have made efforts to clear all liabilities towards workers, which, according to them, were admissible to the workers and part of that liability has been transferred to the bank accounts of the workers and rest amount of salary of ten days of month of July, 2019, alongwith leave encashment, which is admissible according to the tenants, has been undertaken to be paid by 20.7.2019. Rest of the claims of workers/staff are already pending adjudication before

the Labour Officer and in case the tenants are found to be liable for payment thereof, they would be legally bound to make the payment thereof or to face consequences in accordance with law.

14. In Clause (l), it is not pre-condition to clear off all dues before handing over of possession, but the assurance of the clause is that all dues for the period upto 15.7.2019 are to be cleared by the tenants and such clearance may be either before 15.7.2019 or thereafter, as and when occasion arises to clear such liabilities, as there may be certain liabilities including the liabilities towards workers/staff, water and electricity which might be determined on a date beyond 15.7.2019 after adjudication of claims and counterclaims by the concerned authorities. Plea and claim of workers, with regard to making payment by the tenants by calculating the amounts on lower side, including the payment of bonus at lower rate, is also one such a dispute which is to be adjudicated by the appropriate authority, in accordance with law and this Court is neither supposed nor competent to determine the same in present proceedings.

15. In any case, dispute between the tenants and their workers does not create any right of workers/staff upon the suit premises, which belongs to the landlords and on account of final judgment passed by this Court, in the Rent Petition between the landlords and tenants, possession thereof was to be handed over to the landlords by tenants by 15.7.2019, failing which the tenants had to suffer the adverse consequences.

16. During hearing, it is also fairly admitted by learned counsel for workers/staff that the workers/staff have no right in the premises in question and thus they are not there for creating any hindrance in transfer of possession of the suit premises to the landlords.

17. Crux of the terms and conditions of the compromise, including Clause (l) is that tenants have undertaken to transfer the premises in question to landlords on 15.7.2019 and to bear all liability arisen before 15.7.2019, on account of running of business in the premises, which also includes liability towards the workers/staff also. Tenants have also taken effective steps to clear the liability towards the workers/staff, which was considered by them admissible to workers/staff and has also undertaken to pay balance claim, which is admissible according to them by 20.7.2019. Though Clause (l) does not prescribe the date for clearing of the liability but it certainly creates obligation on the tenants-employer to clear off all types of liabilities related to the workers/staff, which are admissible according to them and/or which may be determined after adjudication of the claims and counterclaims of the workers and tenants by the concerned authorities, under the relevant law, including the authority under the Industrial Disputes Act. Therefore, in future, if tenants-employer are found liable for making any payment to the workers/staff, the tenants shall be legally bound to clear off the same.

18. Plea that after handing over of possession of the premises, the relationship of master and servant between the tenants and their workers shall come to an end is misconceived, as the relationship of master and servant has already come to an end on closure of the business being run by the tenants and for period after closure of business, i.e. 10.7.2019. However, master and servant relation for previous period is not affected by either closure of business or handing over of possession of premises, as the relationship of master and servant has no concern with the handing over of possession of the premises to the landlords and the premises does not belong to the tenants and the relationship of master and servant is not because of the premises but because of running of business by the tenants, which according to the tenants has now been closed for handing over the vacant and peaceful possession of the premises to the landlords. Industrial Disputes Act

provides remedy to the workers in such situation also and, therefore, on closure of the business also the workers are not remediless and even otherwise for that reason also workers/staff will not have any charge or right to occupy the premises in question. Rights and liabilities of workers and tenants-employer shall be determined by the appropriate forum, including the competent authority under the Industrial Disputes Act.

19. For non-compliance of the conditions of the compromise, the tenants would have also been liable for punishment under the Contempt of Courts Act. Therefore, tenants have approached this Court for bringing on record the unavoidable circumstances, which have delayed the handing over to the possession of the premises to the landlords on or before 15.7.2019 and have also placed on record various communications made by them to the administration including the Police, for providing adequate police protection to hand over the vacant and peaceful possession of the premises, as the workers/staff alongwith other union leaders had occupied the premises in question.

20. Considering the averments made in the applications of tenants-employer and their workers/staff, this Court had ordered sealing of the premises in question by the SHO, Sadar (Shimla) to avoid any untoward incident and to prevent damage to the property. Now, and rightly so, the workers/staff have undertaken not take law in their hands and to take recourse of law for redressal of their grievances. Therefore, no purpose is going to be served by continuing the sealing of the premises in question.

21. Tenants were already keen and willing to hand over the possession of the premises to the landlords on 15.7.2019 and are still ready for that and in application also prayer has been made by them for permitting the tenants to deposit the key in the Court on 15.7.2019.

22. The landlords are entitled for possession of the premises on or before 15.7.2019, which has been sealed by the SHO, Sadar (Shimla) on 15.7.2019, by taking possession from the tenants. Therefore, since 15.7.2019, possession from the tenants has been taken over by the Police and, therefore, in such facts and circumstances, it is clarified that in terms of the compromise, tenants shall not be liable to pay any liability, w.e.f. 16.7.2019 and as the tenants have already proposed and agreed to hand over the possession of the premises to the landlords, the SHO, Sadar (Shimla) is directed to hand over the possession to the landlords, certainly in presence of both, i.e. tenant(s) and landlord(s) and landlord(s) shall permit the tenants to remove their articles from the premises in question, within two days or any other extended period mutually agreed between them as no other person, having legal preferential charge on the articles/property in question, has come forward to claim right thereon.

All the three applications are disposed of in the aforesaid terms.

Authenticated copy to counsel for all applicants and SHO, Sadar (Shimla).

****

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

Union of India and another …Appellants.
Versus
Balak Ram and others ..Respondents.

R.S.A. No. 630 of 2005

Date of decision: 16.7.2019.

Specific Relief Act, 1963- Section 34– **Limitation Act, 1963**- Article 113- Limitation in filing suit qua wrong revenue entries– Commencement of– Held, when order has been passed behind back of party, it would not be binding upon him– He is not required to assail it immediately on coming to know about the same– Period of limitation would commence when on basis of such order, his rights are actually threatened or invaded. (Para 19)

Himachal Pradesh Land Revenue Act, 1954 - Section 35– Attestation of mutation – Evidentiary value – Held, mutation confers no title and cannot be made basis or foundation of title – Attestation of mutation is only for fiscal purpose so as to enable State to collect revenue from person in possession. (Para 22)

Cases referred:

Baleshwar Tewari (dead) by LRs. and others vs. Sheo Jatan Tiwary and others, (1997) 5 SCC 112

Param Dev and others vs. State of Himachal Pradesh and others, 2014 (2) Shim.L.C. 928: 2014 (1) Latest HLJ (HP) 440

Parkasho Devi and others vs. Basheshar Singh alias Sher Singh and another, 2003 (2) S.L.J. 161

Rajendra Shankar Shukla and others vs. State of Chhattisgarh and others, (2015) 10 SCC 400

Rameshwar Dass (deceased) through his Lrs :Subhash Jain and others vs. Dayawanti (deceased) through her LRS: Manoj Bansal and others, 2016 (5) ILR (HP), 847

Sankalchan Jaychandbhai Patel and others vs. Vithalbhai Jaychandbhai Patel and others, (1996) 6 SCC 433

Urban Improvement Trust, Bikaner vs. Mohan Lal, (2010) 1 SCC 512

For the Appellants	:	Mr. Shashi Shirshoo, Central Government Counsel.
For the Respondents	:	Mr. R.K. Bawa, Senior Advocate, with Mr. Prashant Kumar Sharma, Advocate, for respondents No.1 to 5. Mr. Bhupinder Thakur and Ms. Svaneel Jaswal, Dy. A.Gs., and Mr. Ram Lal Thakur, Asstt. A.G., for the State.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Record reveals that the appeal came to be simply admitted without formulating any specific substantial question of law as is evident from the order dated 15.12.2005, therefore, the appeal is now formally admitted on the following substantial question of law:

> "Whether the findings recorded by the learned first appellate Court are perverse inasmuch as it has erred in misconstruing and misinterpreting the pleadings as also the oral as well as documentary evidence on record?"

2. With the consent of the parties, the appeal is heard today.

3. In order to appreciate the controversy in question, it would be first refer to the pleadings of the case.

4. The parties shall be referred to as the 'plaintiff' and the 'defendants'.

5. Brief facts of the case as set-out in the plaint are that the plaintiff and defendant No.3 were the co-owners of the land comprised in Khasra No. 116 measuring 6 bighas and 4 biswas, situated in Chak Naleha, Pargna Khagalad, Tehsil Theog, in which defendant No.3 was having the share of only 7 biswas. In the year 1987, defendant No.3 applied for the exchange of the land to the extent of 1 bigha and 7 biswas out of the suit land, though he was having the share of only 7 biswas, that too, without the consent and permission of the plaintiff and other recorded co-owners. The exchange was allowed by the Deputy Commissioner, Shimla vide its order dated 14.7.1987 which was illegal and not binding upon the parties. Consequently, the mutation attested on the basis of such order on 22.2.1988 in favour of defendant No.2 and Navodaya Vidyalaya was also wrong as no possession was ever taken from the plaintiff so as to deliver in favour of the aforesaid defendants. It was averred that the cause of action arose few days ago when defendants No.1 and 2 threatened to take the possession and the same was continued.

6. In the written statement filed by defendants No.1 and 2, preliminary objections regarding maintainability, valuation, cause of action, suit being time barred and estoppel were raised. On merits, it was contended that only 0-2 biswas of land of the plaintiff was acquired for the construction of Navodaya Vidyalaya complex in the public interest. It was averred that defendant No.3 was the real brother of the plaintiff, who offered 1-10 bighas of land comprised in Khasra No. 116/1 situated in Village Naleha for exchange with Government land comprised in Khasra Nos. 40 and 41 measuring 0-13 biswas situated in Chak Batog and Khasra No. 172/1 measuring 0-17 biswas situated in village Naleha, total 1-10 bighas on his own behalf as well as co-sharers and accepted the land of the State of Himachal Pradesh for himself as well as for co-sharers as he was representing all of them. Thereafter, the plaintiff as well as other co-sharers never objected to this transaction of exchange for a pretty long time and this transaction of exchange has been acted upon between the parties and was thus binding on the plaintiff.

7. The plaintiff filed replication to the written statement filed on behalf of defendants No.1 and 2 wherein the averments made in the corresponding paras of the plaint were re-asserted and re-affirmed and those of the written statement which were contrary to the plaint were denied. It was specifically denied that defendant No.3 while moving an application for exchange of the land had acted on his behalf or represented all the other co-sharers.

8. From the pleadings of the parties, the learned trial Court on 27.11.1998 framed the following issues:

1. *Whether order dated 14.7.87 of the Deputy Commissioner, Shimla is wrong and illegal as prayed? OPP*
2. *Whether the plaintiff is entitled for the relief of declaration as prayed? OPP*
3. *Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as prayed? OPP*
4. *Whether the suit is not maintainable? OPD*
5. *Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP*

6. Whether the suit is within limitation period? OPP

7. Whether the plaintiff is estopped from filing this suit by his own acts, conducts and acquiescences? OPD

8. Relief.

9. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit. However, in an appeal preferred by the plaintiff, the judgment and decree passed by the learned trial Court came to be set-aside, constraining the defendants/appellants to file the instant appeal.

I have heard learned counsel for the parties and gone through the material placed on record carefully.

10. At the outset, it needs to be noticed that the learned trial Court dismissed the suit filed by the plaintiff mainly on the ground that the same was not within limitation. However, it would be noticed that there is no dispute that defendant No.3 was only having a minuscule share in the joint property to the extent of only 7 biswas in the suit land and was therefore not legally competent to have applied for exchange of the land with the State of Himachal Pradesh to the extent of 1-7 bighas unless and until he was specifically authorised to do so by the other co-owners. It was for the defendants to have proved the fact that the exchange as applied for by defendant No.3 was not only on his behalf but was for and on behalf of all the co-owners including the plaintiff. This is so because it is the defendants, who were the custodian of the record. At best, defendant No.3 could have applied for exchange to the extent of his share i.e. 7 biswas only.

11. There is nothing on record to prove that the plaintiff was dispossessed from the suit land at any point of time prior to filing of the suit, therefore, could have been instituted the suit only when on the basis of the order of Deputy Commissioner, defendants No.1 and 2 threatened to take the possession and, therefore, under no circumstance, could the suit have been held to be time barred.

12. This Court cannot be un-mindful of the fact that the State being a public authority has been prohibited from raising such a plea, unless the claim of the plaintiff is not well founded and by reason of delay in filing a suit, the evidence for the purpose of resisting such a claim has become un-available.

13. In ***Urban Improvement Trust, Bikaner vs. Mohan Lal (2010) 1 SCC 512***, it was observed that it is a matter of concern that such frivolous and unjust litigations by Governments and statutory authorities are on the increase. It was further observed that statutory authorities which existed for to discharge statutory functions in public interest should be responsible litigants and cannot raise frivolous and unjust objections nor act in a callous and high-handed manner. It would be apposite to refer to the relevant observations, which reads thus:

> *"5. It is a matter of concern that such frivolous and unjust litigation by governments and statutory authorities are on the increase. Statutory Authorities exist to discharge statutory functions in public interest. They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a callous and highhanded manner. They can not behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment. They are expected to show remorse or regret when their officers act negligently or in an overbearing manner. When glaring wrong acts*

by their officers is brought to their notice, for which there is no explanation or excuse, the least that is expected is restitution/restoration to the extent possible with appropriate compensation. Their harsh attitude in regard to genuine grievances of the public and their indulgence in unwarranted litigation requires to be corrected.

6. This Court has repeatedly expressed the view that the governments and statutory authorities should be model or ideal litigants and should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice. We may refer to some of the decisions in this behalf.

7. <u>In Dilbagh Rai Jarry vs. Union of India</u> [1974 (3) SCC 554] where the Hon'ble Supreme Court extracted with approval, the following statement (from an earlier decision of the Kerala High Court (P.P. Abubacker vs. Union of India, AIR 1972 Ker 103, AIR pp. 107-08, para 5)]:(SCC p.562, para 25)

> *"25…….'5. ….."The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The lay-out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf. I am not indulging in any judicial homily but only echoing the dynamic national policy on State litigation evolved at a Conference of Law Ministers of India way back in 1957.' "*

8. <u>In Madras Port Trust v. Hymanshu International</u>, (1979) 4 SCC 176 the Hon'ble Supreme Court held: (SCC p. 177, para 2):

> *"2. …. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical*

plea, the Court has to decide it and if the plea is well founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable...."

9. In a three Judge Bench judgment of Bhag Singh & Ors. v. Union Territory of Chandigarh through LAC, Chandigarh [(1985) 3 SCC 737]: the Hon'ble Supreme Court held: (SCC p. 741, para 3)

"3... The State Government must do what is fair and just to the citizen and should not, as far as possible, except in cases where tax or revenue is received or recovered without protest or where the State Government would otherwise be irretrievably be prejudiced, take up a technical plea to defeat the legitimate and just claim of the citizen."

10. Unwarranted litigation by governments and statutory authorities basically stem from the two general baseless assumptions by their officers. They are:

(i) All claims against the government/statutory authorities should be viewed as illegal and should be resisted and fought up to the highest court of the land.

(ii) If taking a decision on an issue could be avoided, then it is prudent not to decide the issue and let the aggrieved party approach the Court and secures a decision.

The reluctance to take decisions, or tendency to challenge all orders against them, is not the policy of the governments or statutory authorities, but is attributable to some officers who are responsible for taking decisions and/or officers in charge of litigation. Their reluctance arises from an instinctive tendency to protect themselves against any future accusations of wrong decision making, or worse, of improper motives for any decision making. Unless their insecurity and fear is addressed, officers will continue to pass on the responsibility of decision making to courts and Tribunals."

14. Similar reiteration of law can be found in a fairly recent judgment of the Hon'ble Supreme Court in ***Rajendra Shankar Shukla and others vs. State of Chhattisgarh and others (2015) 10 SCC 400***, wherein again while referring to the earlier decision in ***Hymanshu's*** case (supra)*, the Hon'ble Supreme Court held in para 32 as under:*

"32. Further, this Court has frowned upon the practice of the Government to raise technical pleas to defeat the rights of the citizens in Madras Port Trust vs. Hymanshu International (1979) 4 SCC 176, wherein it was opined that it is about time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Para 2 from the said case reads thus :- (SCC p.177)

"2. We do not think that this is a fit case where we should proceed to determine whether the claim of the respondent was barred by Section 110 of

the Madras Port Trust Act (2 of 1905). The plea of limitation based on this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well-founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the. purpose of resisting such a claim has become unavailable. Here, it js obvious that the claim of the respondent was a just claim supported as it was by the recommendation of the Assistant Collector of Customs and hence in the exercise of our discretion under Article 136 of the Constitution, we do not see any reason why we should proceed to hear this appeal and adjudicate upon the plea of the appellant based on Section 110 of the Madras Port Trust Act (2 of 1905)."

15. As would be evident from the aforesaid exposition of law, even though the government and public authority should not be relying upon technical pleas, but if such plea is taken up, the Court is bound to decide and if the plea is well founded, it has to be upheld by the Court.

16. The defendants No.1 and 2 having failed to prove that the application submitted by defendant No.3 for exchange of the land was for and on behalf of all the co-sharers/co-owners including the plaintiff cannot be heard to complain against the judgment and decree pased by the learned first appellate Court as it was incumbent upon them to have proved this fact.

17. Apart from that, it would be noticed that even the Deputy Commissioner in his order or exchange dated 14.7.1987 has clearly held that defendant No.3 alone could not have offered the land for exchange, yet he proceeded to grant the exchange, that too, for reasons which are not only absurd but could not even be supported by defendants No.1 and 2 themselves. This would be clearly evident from the order of exchange which is reproduced verbatim hereinunder:

"Before Sh. J.P. Negi, I.A.S., Deputy Commissioner, Shimla.

Case No. Date of institutionDate of decision

11/3 of 87 4/6/87 14.7.87.

Application of Shri Jeet Ram S/o Shambu Ram, R/o Village Deorighat, Pargana Khagalad, Tehsil Theog, under Rule 27 of H.P. Nautor Rules, 1968.

ORDER:

This is an application of Sh. Jeet Ram S/o Sh. Shambu Ram, resident of Village Deorighat, Tehsil Theog for grant of exchange of Govt. land measuring 1-10 bighas comprising Khasra Nos. 40 and 41 (13 biswas) in village Nalha with his private land measuring 1-10 bigha comprised in Khasra No. 116/1 situated in village Neleha, Tehsil Theog.

The brief facts of the case are that the land of the applicant is required for the construction of Navodaya School Complex at Theog (Deorighat) and the applicant has applied for grant of exchange of Govt. land in lieu thereof. The

Gram Panchayat concerned has no objection to the grant of this exchange. The land sought in exchange is devoid of forest growth as reported by the Sub Divisional Officer (C), Theog and is not a forest land as per provisions of Forest Conservation Act, 1980. The market price of private land comes to Rs.7,500/- and that of Govt. land comes to Rs.6,500/-. I find from a perusal of parcha jamabandi attached with the file that the land being given in exchange is in the joint holding and the applicant alone can not give this land in exchange. I also find that the private land is mortgaged with the State Bank of Theog and Shimla. Since the land of the applicant is required for the public purposes, he deserves to be granted land in lieu thereof. (Emphasis supplied).

In view of above, I accept this application and allow the exchange in favour of all the co-sharers. Land Revenue be changed accordingly. The charge of the Bank on khasra No. 116/1 be vacated and created on the land granted to the applicants in exchange.

Shimla-1 DEPUTY COMMISSIONER, SHIMLA."

14th July, 1987.

18. In the given circumstances, there is no illegality much less perversity in the order passed by learned first appellate Court whereby it held the aforesaid order of the Deputy Commissioner to be palpably illegal.

19. Moreover, once the order is proved to have been passed behind the back of the plaintiff, obviously then, the order would not be binding upon the plaintiff and was not required to be assailed immediately on coming to know about the same and could have conveniently filed a suit when there was an invasion and actual threat of his rights.

20. In taking this view, I am supported by the judgment of this Court in ***Parkasho Devi and others vs. Basheshar Singh alias Sher Singh and another 2003 (2) S.L.J. 161,*** wherein after referring to the judgments of the Lahore High Court, it was observed as under:

> *"If a plaintiff is in possession of enjoyment of the property in suit he is not obliged to sue for a declaration of title on the first or each succeeding denial of his title by the defendant. He may look upon each denial with complancy or at his option may institute a suit to falsify the assertions of the other side. But when he finds that his rights are being actually jeopardized by the action or assertion of the defendant, then he must take proceedings within six years from the date of such actions or assertions: AIR 1922 Lah, 94, AIR 1925 Lah. 391 and 140 P.R. 1907, Dist."*

21. It would be evidently clear from the aforesaid exposition of law that a person in possession is not obliged to sue for a declaration of title on mere denial thereof by the other party unless the action of the offending party had actually jeopardized the rights of the person in possession. The ratio laid down therein applies on all fours to the present case as the assertion of the plaintiff being in possession is not specifically disputed and denied by the defendants, therefore, mere attestation of mutation, that too, on the basis of the order of the Deputy Commissioner, Shimla does not effect the rights of the plaintiff in any manner qua the suit land.

22. It is otherwise more than settled that mutation confers no title and cannot be made the basis or foundation of title as the same are only for fiscal purpose. It is settled that mutation entries only enable the State to collect revenues from the persons in possession and enjoyment of the property and the right, title and interest as to the property should be established dehors the entries. Entries are only one of the modes of proof of the enjoyment of

the property. Mutation entries do not create any title or interest therein. (Refer: ***Sankalchan Jaychandbhai Patel and others vs. Vithalbhai Jaychandbhai Patel and others (1996) 6 SCC 433).***

23. This authority, in turn, was considered by this Court in ***Param Dev and others vs. State of Himachal Pradesh and others 2014 (2) Shim.L.C. 928 : Param Dev and others vs. State of H.P. and others 2014 (1) Latest HLJ (HP) 440,*** wherein it was observed as under:

> *"7. It is well settled law that mutation does not confer any title. The mutation proceedings are summary in nature and are only for fiscal purpose to determine the land revenue and cannot be considered to be evidence about title. The Hon'ble Supreme Court in* **Sankalchan Jaychandbhai Patel and others vs. Vithalbhai Jaychandbhai Patel and others (1996) 6 SCC 433** *held as under:-*
>
> > *" Mutation entries are only to enable the State to collect revenues from the persons in possession and enjoyment of the property and the right, title and interest as to the property should be established dehors the entries. Entries are only one of the modes of proof of the enjoyment of the property. Mutation entries do not create any title or interest therein" (Para 7).*
>
> *8. In* **Smt. Sawarni vs. Smt. Inder kaur and others AIR 1996 SC 2823***, the Hon'ble Supreme Court held as under:-*
>
> > *"7. Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. The learned Additional District Judge was wholly in error in coming to a conclusion that mutation in favour of Inder Kaur conveys title in her favour. This erroneous conclusion has vitiated the entire judgment."*

24. Similar reiteration of law can thereafter be found in ***Rameshwar Dass (deceased) through his Lrs :Subhash Jain and others vs. Dayawanti (deceased) through her LRS: Manoj Bansal and others, 2016 (5) ILR (HP), 847.***

25. It is not always safe to rely upon revenue records in cases like the instant one. The Hon'ble Supreme Court in ***Baleshwar Tewari (dead) by LRs. and others vs. Sheo Jatan Tiwary and others (1997) 5 SCC 112*** held as follows:-

> *"16. Under these circumstances, even if any enquiry was conducted unless the appellant is given notice and an opportunity to adduce the evidence to establish his right in the enquiry made, the finding generally does not bind him. Entries in revenue records is the paradise of the patwari and the tiller of the soil is rarely concerned with the same. So long as his possession and enjoyment is not interdicted by due process and course of law, he is least concerned with entries. It is common knowledge in rural India that a raiyat always regards the lands he ploughs, as his dominion and generally obeys, with moral fiber the command of the intermediary so long as his possession is not disturbed. Therefore, creation of records is a camouflage to defeat just and legal right or claim and interest of the raiyat, the tiller of the soil on whom the Act confers title to the land he tills."*

26. Thus, what follows from the aforesaid exposition of law is that no benefit can be gathered by the defendants on account of attestation of mutation in their favour qua the land so exchanged.

27. In view of the aforesaid discussion, it cannot be held that the findings recorded by the learned first Appellate Court are perverse being based on misconstruction or misinterpretation of the pleadings or the oral as well as documentary evidence available on record.

The substantial question of law is answered accordingly.

28. Consequently, there is no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

****

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

Sheru (since deceased) through his LRs Hind Rustam and ors. …Appellants

Versus

Zannat and ors. ….Respondents

R.S.A. No. 209/2007
Reserved on: 11.7.2019
Date of decision: 18.7.2019

Limitation Act, 1963– Article 65 - Adverse possession– Joint land– Exclusive hissedari possession – Nature of such possession –Held, legal relationship between co-owners is not regulated by any statute - It is governed by principles of equity , justice and good conscience – For better management of joint estate, co-owners hold separate possession of parcels of joint land – Their separate possession without corresponding intent to severe joint status, does not confer a right upon co-sharer in separate possession to assert his separate ownership over it. (Paras 12 & 13)

Limitation Act, 1963– Article 65 – Adverse possession– Joint land– Exclusive possession vis-a vis plea of ouster– Held– Possession of co-owner is to be taken as possession of all co-owners– Co-owner in possession cannot render his possession adverse to other co-owners not in possession merely by any secret hostile animus on his own part– Ouster of other co-owners must be evidenced by hostile title coupled by exclusive possession and enjoyment to the knowledge of other co-owners- Mer exclusive payment of land revenue by one co-owner is not proof of ouster. (Paras 23 & 30)

Limitation Act, 1963– Article 65 – Adverse possession – Mohamedan law – Held, heirs succeed to estate of ancestor as tenants –in common in specific shares – Where heirs continue to hold estate as tenants- in -common without dividing it and one of them brings suit for recovery of share, period of limitation would start not from date of death of ancestor but from express ouster or denial of title. (Para 24)

Cases referred:

Ashok Kapoor vs. Murtu Devi, 2016 (1) Shim. L.C. 207b

Dr. Mahesh Chand Sharma vs. Raj Kumari Sharma (Smt.) and others, (1996) 8 SCC 1

Md. Mohammad Ali (dead) by LRS vs. Jagadish Kalita and others, (2004) 1 SCC 271
Mohd. Zainulabudeen (since deceased by LRs) vs. Sayed Ahmed Mohideen and others, AIR 1990 SC 507
P. Lakshmi Reddy vs. L. Lakshmi Reddy, AIR 1957 SC 314
Sant Ram Nagina Ram vs. Daya Ram NaginaRam, AIR 1961 Punjab 528
Syed Shah Gulam Ghouse Mohiudin and others vs. Syed Shah Ahmad Mohiuddin Kamisul Qadri (dead) by his legal representatives and others AIR 1971 SC 2184

For the appellants:	Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.
For the respondents:	Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate, for respondents No. 1 to 5, 7 and 8. None for respondents No.6 (a) to 6 (c).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The defendants are the appellants, who successfully proved their adverse possession over the suit land before the learned trial court, however said findings were reversed by the learned first appellate court constraining them to file the instant appeal.

2 The parties shall be referred to as the "plaintiffs" and the "defendants".

3 Brief facts giving rise to the instant case are that the plaintiffs and defendants No. 1 and 2 had been recorded as joint owners in possession of the suit land in two villages, Surajpur and Damowala in Tehsil Kasauli, District Solan. The plaintiffs, who had been residing in Kalka (Haryana) since their childhood, in the year 1986 applied to the Tehsildar Kasauli for partition of their shares in the suit land. The defendants No. 1 and 2 resisted the claim of the plaintiffs by raising question of title by setting up their ownership in the suit land on the basis of ouster, which objection was overruled by the Tehsildar, Kasauli. However, in appeal, the Sub Divisional Collector also refused their claim. Thereafter, in further appeal before the Divisional Commissioner, the plea of the defendants was accepted as the plaintiffs were found out of possession and they were thereafter directed to get the question of title raised by the defendants decided by the civil court. It was against the order of Divisional Commissioner, the plaintiffs filed the suit that they along with defendants were co-owners in possession of the suit land and the order passed by the Divisional Commissioner is without application of mind being wrong, illegal and contrary to the factum on spot. The plaintiffs prayed for decree of injunction against the defendants restraining them from interfering in their possession.

4 The defendants contested the suit by filing written statement, wherein they claimed to have become owners of the suit land by adverse possession. It was pleaded that the defendants had been coming in exclusive possession of the suit land as the plaintiffs were residing at Village Kedarpur, situated in Haryana at a distance of more than 60 kms from the suit land. The hostile possession of the defendants came to the knowledge of the plaintiffs and public at large immediately when after the death of father of the parties, which took place in 1990, the defendants did not permit the plaintiffs to pay land revenue of their share to the 'Numberdar' and also resisted the claim of the plaintiffs by use of force over their share in the suit land. It was also claimed that the defendants had spent huge money

in improvement and development of the suit land, whereas the plaintiffs never participated in the profits and loss of the land in question. It was also alleged that the plaintiffs are estopped from filing the suit on account of admission, acts, conduct and deeds, the suit is barred by *res judicata*, the suit is bad for non-joinder of necessary parties and the plaintiffs have no *locus standi* to file the present suit.

5 The issues were firstly framed on 12.9.1990 and thereafter on 29.7.1993 and the same read as under:

(1) *Whether the plaintiff is owner in possession of the suit land as alleged? OPP*

(2) *Whether the orders passed by Divisional Commissioner in revision No.7/88, 8/88, 9/88 and 10/88 on 2.3.1989 are wrong, illegal and not binding on the rights of the plaintiff as alleged? OPP*

(3) *Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed for? OPP*

(4) *Whether the plaintiff is estopped from filing the present suit as alleged? OPD*

(5) *Whether the defendants No. 1 and 2 have become owner of the suit land by way of adverse possession? OPD*

(6) *Whether the suit is bad by principle of res judicata as alleged? OPD*

(7) *Whether the suit is bad for non-joinder of necessary parties as alleged?OPD*

(8) *Whether the plaintiff has no locus standi to file the present suit as alleged? OPD*

(9) *Whether the revenue entries in favour of plaintiff in respect of the suit land are wrong as alleged? OPD*

(10) *Whether the plaintiff has no cause of action to file the present suit as alleged? OPD.*

(11) *Relief.*

6 After recording the evidence and evaluating the same, the learned trial court vide judgment and decree dated 18.4.1997 dismissed the suit. However, the judgment and decree so passed by the learned trial court was reversed by the learned first appellate court vide judgment and decree dated 20.1.2007 constraining the defendants to file the instant appeal.

7 On 3.4.2008, the instant appeal came to be admitted on following substantial question of law:

> *"1. Whether there has been misreading of evidence by the learned First Appellate Court in recording the findings in regard to adverse possession?"*

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

Substantial Question of Law No.1

9 Article 65 of the Limitation Act reads as under:-

Description of suit	Period of limitation	Time from which period begins to run
For possession of immovable property or any interest therein based on title. Explanation.—For the purposes of this article— (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

10 Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is well settled principle that a party claiming adverse possession must prove that his possession is " nec vi, nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual visible, exclusive, hostile and continued over the statutory period. Therefore, a person who claims adverse possession has to show (a) on what date he came into possession; (b) what was the nature of his possession; (c) whether the factum of possession was known to the other party ; (d) how long his possession is continued; and (e) his possession was open and undisturbed. It has to be remembered that the person pleading adverse possession has no equity in his favour since he is trying to defeat the right of the true owner, therefore, it is for him to clearly plead and establish all facts necessary to establish his adverse possession (Refer ***Dr. Mahesh Chand Sharma vs. Raj Kumari Sharma (Smt.) and others (1996) 8 SCC 1)***.

11. Property held in common, by two or more persons, whatever be its nature or origin, is said to be joint property and the owners thereof joint owners. Joint property envisages a community of interest (ownership) and a commonality of possession vested in the entire body of owners called co-sharers/joint owners. This body of owners is joint, both in possession and in ownership of the property and every co-sharer shall be owner in possession of every inch of the joint estate. Inherent in his status as a co-sharer/joint owner and flowing from his status as a joint owner or a co-sharer of the joint property is the right to assert ownership with respect to every part and parcel of the joint property. The status as a co-sharer would be preceded by a tangible act of conferring proprietary status,

whether by way of membership of a co-parcenary or by devolution of interest, pursuant to inheritance or by assignment of property by sale etc.

12. A co-sharer asserts joint title and possession even, where other co-sharers/joint owners are in separate possession of different parcels of land and as a natural consequences, a co-sharer in possession of a specific area of joint property possesses the property for and on behalf of all other co-sharers/joint owners. Co-sharers may and often do for the purpose of better management of the joint estate hold separate possession of parcels of joint land. This separation of possession, without a corresponding intent, to sever the joint status of the community of joint owners does not confer a right upon a co-sharer in separate possession to assert his separate ownership. A joint owner, therefore, would be owner of a specific share in the entire joint property but would not be entitled to claim separate ownership of any specific and particular portion of the joint property till such time, as the property remains joint.

13. The legal relationship between co-owners is not regulated by any statute. It is governed by judicial decisions, and the principles laid down by judicial decisions are based on the principle of equity, justice and good conscience.

14 The inter se rights and liabilities of the co-sharers were a subject matter of a Division Bench decision of the Punjab and Haryana High Court in ***Sant Ram Nagina Ram*** *versus* ***Daya Ram NaginaRam AIR 1961 Punjab 528*** and the following propositions inter alia were settled:-

> *"1. A co-owner has an interest in the whole property and also in every parcel of it.*
>
> *2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.*
>
> *3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.*
>
> *4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.*
>
> *5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.*
>
> *6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.*
>
> *7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition."*

15. A co-owner's possession of the common property is not prima facie adverse against another co-owner, because such possession is considered as one on behalf of all the co-owners, except when there is clear proof of ouster or assertion of a hostile title.

16. As each co-owner is entitled to possess every bit of the common property and is not restricted to enjoyment according to his share so long as he does not deny to the

other co-owners an equal right of possession and enjoyment of the common property, he is under no obligation either to account for or to pay compensation to such co-sharers. The matter is different if there is objection from the other co-sharers and no amicable arrangement is arrived at. That would equally be the case where there is ouster or denial of the title of the other co-owners and an assertion of a hostile title in himself.

17. The concept of adverse possession contemplates a hostile possession, i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's right and in fact deny the same. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. In order to determine whether the act of a person constitutes adverse possession is 'animus in doing that act' and it is most crucial factor. Adverse possession commences in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of owner's right excluded him from the enjoyment of his property. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The persons setting up adverse possession may have been holding under the rightful owner's title, i.e., trustees, guardians, bailiffs or agents, such person cannot set up adverse possession. Burden is on the defendant to prove affirmatively.

18. Thus, what is clear from the aforesaid exposition of law is that the concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of title of the true owner. The plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession has to show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. It is, therefore, explicit that unless there is specific plea and proof that adverse possession has disclaimed the right of the true owner and asserted title and possession to the knowledge of the true owner within a statutory period and the true owner has acquiesced to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription.

19. The pleading must be specific to the date when possession become adverse because it is more than settled law that mere possession however long does not necessarily mean that it is adverse to the true owner. Where a plea of adverse possession is taken, the pleadings are of utmost importance and anything, if found missing in pleadings, it may be fatal to such plea so raised. A person claiming adverse possession must prove as to how and when adverse possession commenced and whether fact of adverse possession was known to the real owner.

20. As regards adverse possession amongst or between co-owners, there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by a person claiming adverse possession to the knowledge of the others so as to constitute an ouster. A co-owner in possession cannot render his possession adverse to the other co-owner not in possession, merely by any secret hostile animus on his part to the other co-owner’s title.

21. Locus classicus on the subject is the judgment of the Hon'ble Supreme Court in ***P. Lakshmi Reddy vs. L. Lakshmi Reddy, AIR 1957 SC 314*** wherein in para-4 it was observed as under:

> *"4. ……But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See Corea v. Appuhamy, 1912 AC 230 (C)). It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be interfered when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in <u>N. Varada Pillai v. Jeevarathnammal</u>, AIR 1919 PC 44 at p. 47(D) quotes, apparently with approval, a passage from Culley v. Doed Taylerson, (1840)3 P&D 539: 52 RR566(E) which indicates that such a situation may well lead to an inference of outster "if other circumstances concur". (See also Govindrao v. Rajabai, AIR 1931 PC 48 (F)). It may be further mentioned that it is well settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."*

22. Legal principles relating to ouster and hostile possession have been elaborately considered by the Hon'ble Supreme Court in ***Md. Mohammad Ali (dead) by LRS vs. Jagadish Kalita and others (2004) 1 SCC 271***, wherein it was observed as under:

> **LEGAL PRINCIPLES RELATING TO OUSTER AND ADVERSE POSSESSION :**
>
> "17. *The fact of the matter, as noticed hereinbefore, is not much in dispute. If it be held that the two brothers Gayaram Kalita and Kashiram Kalita partitioned the properties in question; the heirs and legal representatives of Gayaram Kalita ceased to have any right, title and interest in respect of the share held by Kashiram Kalita. The defendants No. 7, 8 & 9 had, therefore, a transferable title, unless the same became extinguished.*
>
> *18. On the other hand, if no partition by meets and bounds took place, the respondents herein were bound to plead and prove ouster of the plaintiff and/ or his predecessors' interest from the land in question. For the said purpose, it was obligatory on the part of the respondents herein to specifically plead and prove as to since when their possession became adverse to the other co-sharers. Moreover, if the possession of Prafulla Kalita was permissive or he obtained the same pursuant to some sort of arrangement as had been observed by the High Court, the plea of adverse possession would fail.*

19. Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a constructive trustee of other co-sharer and the right of the appellant and/or his predecessors in interest would, thus, be deemed to be protected by the trustee. As noticed hereinbefore, the respondents in their written statement raised a plea of adverse possession only against the third set of the defendants. A plea of adverse possession set up by the respondents, as reproduced hereinbefore, do not meet the requirements of law also in proving ouster of a co-sharer. But in the event, the heirs and legal representatives of Gayaram Kalita and Kashiram Kalita partitioned their properties by meets and bounds, they would cease to be co-sharers in which event a plea of adverse possession as contra distinguished from the plea of ouster could be raised. The courts in a given situation may on reading of the written statement in its entirety come to the conclusion that a proper plea of adverse possession has been raised if requisite allegations therefor exist. In the event the plaintiff proves his title, he need not prove that he was in possession within 12 years from the date of filing of suit. If he fails to prove his title, the suit fails.

20. By reason of Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Art. 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.

21. For the purpose of proving adverse possession/ ouster the defendant must also prove animus possidendi. 22. However, in the event, the case of the defendant was that the predecessors in interest of the plaintiff ceased to be his co-sharers for any reason whatsoever, it was not necessary for them to raise a plea of ouster. We may further observe that in a proper case the court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession have been raised in the written statement or not which can also be gathered from the cumulative effect of the averments made therein.

23. The respondents herein, as noticed hereinbefore, has failed to raise any plea of ouster. No finding has been arrived at by the High Court as to from which date they began to possess adversely against the plaintiff or his predecessors in interest. Mere non-payment of rents and taxes may be one of the factors for proving adverse possession but cannot be said to be the sole factor. The High Court has not assigned any reason as to how there had been an open ouster by Prafulla Kalita since 1950.

24. Furthermore, the first appellate court applied a wrong principle of law in relation to interpretation of Article 65 of the Limitation Act, 1963. The High Court fell into the same error.

25. Possession of a property belonging to several co-sharers by one co-sharer, it is trite, shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-

sharers would not amount to ouster unless there is a clear declaration that the title of the other co-sharers was denied and disputed. No such finding has been arrived at by the High Court.

26. In the instant case, the dispute between the parties as regard mutation of the name of the appellant was finally decided, as noticed hereinbefore, only on 26.9.1977. The Money Suit filed by him was also dismissed by the Appellate Court on 19.5.1979. The appellant instituted title suit on 24.10.1979. In that view of the matter, the question of the respondents acquiring title by ouster of the appellant on the basis of the order of the Municipal Authorities in the mutation proceedings does not arise.

27. So far as submission of Mr. Ghosh to the effect that the decision in the money suit shall operate as res judicata is stated to be rejected.

28. In the aforementioned suit, the only issue which could be raised and determined was as to whether respondent No. 3 was a tenant of the plaintiff. As the plaintiff or his predecessors in interest failed to show that respondent No. 4 was inducted by them, his claim for arrears of rent was rejected but the Court while determining the said issue could not have gone into a pure question of title as well as the question as to whether the respondents herein acquired title by adverse possession.

SOME CASE LAWS ON THE QUESTION OF OUSTER/ADVERSE POSSESSION :

29. In Karbalai Begum vs. Mohd. Sayeed and Another [(1980) 4 SCC 396], the law has been stated by this Court in the following terms :

> *"...It is well settled that mere non- participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession..."*

30. In Annasaheb Bapusaheb Patil and Others etc. etc. Vs. Balwant alias Balasaheb Babusaheb Patil (Dead) by LRs. and Heirs and Others etc.etc. [(1995) 2 SCC 543, this Court held: (SCC p.554, *para 15]*

> *"15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all."*

31. In Vidya Devi alias Vidya Vati (Dead) by LRs. Vs. Prem Prakash and Others [(1995) 4 SCC 496] this Court upon referring to a large number of decisions observed: (SCC p. 505, paras 27-28)

> *"27...it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in P. Lakshmi Reddy case which has since been followed in Mohd. Zainulabudeen v. Sayed Ahmed Mohideen.*
>
> *28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all*

other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law."

32. Yet again in Darshan Singh and Others Vs. Gujjar Singh (Dead) by LRs. and Others [(2002) 2 SCC 62], it is stated (SCC pp. 65-66, para 7):

"...It is well settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers."

It has further been observed that : (SCC p.66, para 9)

"9. In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co- sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

23. Thus, what can be taken to be well settled is that the possession of a co-heir is in law treated as possession of all the co-heirs. If one co-heir has come in possession of the properties, it is presumed to be on the basis of a joint title. A co-heir in possession cannot render its possession adverse to other co-heirs not in possession, merely by any secret hostile animus on his own part, in derogation of the title of his other co-heirs. Ouster of the other co-heirs must be evidenced by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other.

24. The position of Mohamedan law is the same. The estate of a deceased Mohamedan devolves on his heirs at the moment of his death. The heirs succeed to the estate as tenants in common in specific shares. Where the heirs continue to hold the estate as tenants in common without dividing it and one of them subsequently brings a suit for recovery of the share the period of limitation for the suit does not run against him from the date of the death of the deceased but from the date of express ouster or denial of title.(See: ***Syed Shah Gulam Ghouse Mohiudin and others*** vs. ***Syed Shah Ahmad Mohiuddin Kamisul Qadri (dead) by his legal representatives and others AIR 1971 SC 2184).***

25. In ***Mohd. Zainulabudeen (since deceased by LRs) vs. Sayed Ahmed Mohideen and others AIR 1990 SC 507***, the Hon'ble Supreme Court held that the possession of one co-heir is considered possession of all the co-heirs and to constitute ouster between co-heirs, there must be open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other . It is apposite to refer to the relevant portion of the observations which reads thus:

"12….It is well settled that where one co-heir pleads adverse possession against another co-heir then it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. The possession of one co-heir is considered in law, as possession of all the co-heirs. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. Thus, it is a settled rule of law as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster…."

26. As regards this Court, a detailed judgment with respect to the rights and liabilities of co-owners have been laid down by this Court in ***Ashok Kapoor vs. Murtu Devi 2016 (1) Shim. L.C. 207b***wherein after taking into consideration some of the aforesaid judgments, it was observed in paras 41 to 45 of the judgment as under:

"41. The exposition of law as enunciated in the various judgments referred above including those of this High Court, insofar as the rights and liabilities of the co-owners is concerned, gives rise to the following propositions:-

1. *A co-owner has an interest in the whole property and also in every parcel of it.*
2. *Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.*
3. *A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.*
4. *The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.*
5. *Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.*
6. *Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.*
7. *Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition.*
8. *The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.*
9. *Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner, if he does so, he is liable to be ejected and the particular parcel will be liable to be*

restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.

42. It can further be safely concluded that co-owners hold property by several and distinct titles but by unity of possession. Actual physical possession is not indispensable, the requirement being of the right to possession of the common property.

43. As a corollary to the aforesaid right, any co-owner, in the absence of any agreement to the contrary, has a right to enter upon the common property and take possession of the whole, subject to the equal right of the other co-owners with whose right of possession he has no right to interfere.

44. A co-owner's possession of the common property is not prima facie adverse against another co-owner, because such possession is considered as one on behalf of all the co-owners, except when there is clear proof of ouster or assertion of a hostile title.

45. As each co-owner is entitled to possess every bit of the common property and is not restricted to enjoyment according to his share so long as he does not deny to the other co-owners an equal right of possession and enjoyment of the common property, he is under no obligation either to account for or to pay compensation to such co-sharers. The matter is different if there is objection from the other co-sharers and no amicable arrangement is arrived at. That would equally be the case where there is ouster or denial of the title of the other co-owners and an assertion of a hostile title in himself."

27. In view of the aforesaid exposition of law, since defendants No.1 and 2 admittedly are co-sharers in the suit land and have taken up the plea of adverse possession against another co-sharer, who is not in physical possession of the suit land, therefore, it was incumbent upon them to establish that they are not only in open and unequivocal denial of the title of the plaintiffs but such denial or repudiation was to the knowledge of the plaintiffs.

28. Adverting to the pleadings, it would be noticed that the plea of adverse possession has been raised in paras 3, 7 and 8 of the preliminary objections of the written statement filed on behalf of defendants No.1 and 2 and the same read as under:

"3. That the replying defendants denies the ownership of the plaintiff over the suit land. The replying defendants also entry the correctness of the revenue entries in column of record of rights. At the spot the physical possession of the suit land has been coming peacefully, continuously, uninterruptedly in the hands of the replying defendants as the plaintiff remained out of possession of the suit land throughout his life.

7. That the replying defendants have become absolute owners of the suit property qua the share of plaintiff, by way of adverse possession as the replying defendants assert hostile title coupled with exclusive possession to the knowledge of the plaintiff and public at large.

8. That the replying defendants also claims ouster and abandonment against plaintiff qua his share in the suit property. The plaintiff never participated in profits and losses qua his share in suit land alongwith replying defendants."

29. From the pleadings, it would be noticed that defendants No.1 and 2 have asserted their title over the suit land openly after the death of their father about 19 years

back by claiming that they had not permitted the plaintiffs to pay the land revenue of their share to the Numberdar and they also resisted the claim of the plaintiffs by use of force over his share in the suit land and since then they are in exclusive possession of the suit land. In short, the defendants wanted to establish the plea of ouster. But then coming back to the evidence i.e. the statement of DW-3 Gurdayal Singh, who has simply stated that he had seen the suit land in possession of defendants No.1 and 2 and has not stated that such possession was ever denied the title of the plaintiffs or that the defendants had asserted their own hostile title over the suit land at any point of time and, as such, has rightly held by the learned appellate Court that his statement is of no help to the defendants to prove the plea of adverse possession sought by them.

30. Labhu Ram (DW-1) is the Numberdar of the area, who in his statement has asserted that after the death of Jiwanu, which took place somewhere in the year 1969, Gulam Din tried to pay the land revenue regarding his share in the suit land, but defendants No.1 and 2 objected to payment of such land revenue and thereafter some altercation took place between them and thereafter Gulam Din never paid the land revenue to him. It would be noticed that there is nothing in the statement of this witness to infer that defendants No.1 and 2 denied the title of Gulam Din deceased plaintiff over the suit land at that time and they asserted their own hostile title over the suit land at that time. Mere objection of payment of land revenue in such circumstances cannot be construed to be the denial of title as has otherwise been rightly held by the learned first Appellate Court.

31. Now, adverting to the statement of defendant Sheroo Ram, who appeared as DW-2, it would be noticed that he has simply stated that his father Waziru died in the year 1969 and thereafter the plaintiffs never paid any land revenue regarding the suit land at any point of time to the defendants and once the plaintiffs tried to pay the land revenue but the Numberdar refused to accept such payment which led to some altercation between the parties. Thus, going by the statement of DW-2, it would be noticed that it was the Numberdar, who refused to accept the payment of land revenue from Gulam Din and thereafter some altercation took place between the plaintiffs and defendants No.1 and 2. Not only is his statement contrary to the statement of Numberdar Labhu Ram, but otherwise there is nothing on record to infer that the defendants objected to the payment of land revenue by the plaintiffs regarding their share in the suit land.

32. From the aforesaid discussion, it is absolutely clear that not only the pleadings qua adverse possession are deficit but even proof thereof is totally lacking. In such circumstances, no fault can be found with the judgment and decree passed by the learned first Appellate Court.

The substantial question of law is answered accordingly.

33. Consequently, there is no merit in this appeal and the same is accordingly dismissed. However, taking into consideration the relationship between the parties, they are left to bear their own costs. Pending application(s) if any, also stands disposed of.

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

Mukesh Kumar ….Appellant

Versus

State of H.P. ….Respondent

Cr. Appeal No. 389 of 2008
Date of Decision 22nd July, 2019

Code of Criminal Procedure, 1973- Section 195 (1) (a)(i)– **Indian Penal Code, 1860**- Section 177– Contempt of lawful authority of public servant– Cognizance of- Held, cognizance of offence punishable under Section 177 of IPC can be taken only on written complaint of public servant concerned, whose contempt of authority was committed or on complaint of some other public servant to whom such public servant was administratively subordinate - In absence of written complaint of such public servant(s) cognizance is bad in law and conviction and trial will be void at initio. (Paras 6 & 8)

Case referred:
C.Muniappan and others vs. D.K. Rajendran and others, AIR 2010 SC 3718

For the Appellant: Mr.J.R. Poswal, Advocate.
For the Respondent: Mr. S.C. Sharma and Mr. Desh Raj Thakur Additional Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(oral)

This appeal has been preferred by the accused against judgment dated 7.6.2008 passed by learned Sessions Judge, Bilaspur in sessions trial No. 17 of 2006, titled State of H.P. vs. Mukesh Kumar, whereby he has been convicted under Section 177 of IPC and has been sentenced to undergo simple imprisonment for six months and to pay fine of Rs.1000/- and in case of default of fine, to further undergo simple imprisonment for one month.

2 Brief facts of the case are that appellant Mukesh Kumar along with one Leela Devi wife of Partap Singh had stayed in a room at Matri Anchal Sarai at Sri Naina Devi Ji on 26.12.2005 by depicting her as his wife Lata Devi in the register of Sarai and on 27.12.2005 the said lady, on account of pains, was taken to CHC Ghawandal, where she was declared to be brought dead by the doctor. At that time also, appellant had disclosed the identity of deceased as his wife namely Lata Devi. However, later on during investigation under Section 174 Cr.P.C, it was disclosed that deceased was not Lata Devi, wife of Mukesh Kumar(accused), but was Leela Devi wife of Partap Singh, resident of Tunai, P.O. and Tehsil Sundernagar, District Mandi, which resulted into registration of criminal case against the appellant.

3 On completion of investigation, challan under Sections 177, 304-A and 366 IPC was presented in the Court against the accused and on conclusion of trial, he was acquitted for commission of offences punishable under Sections 366 and 304-A IPC, but was convicted for commission of offence punishable under Section 177 IPC.

4 Against the acquittal of appellant under Sections 366 and 304-A IPC, no appeal has been preferred by respondent/State. So far as the commission of offence under Section 177 IPC is concerned, the allegation of prosecution is that appellant/accused had disclosed wrong identity of deceased Leela Devi in Matri Anchal Sarai as well as at the time of conducting postmortem examined of her body in the hospital.

5 It is undisputed that neither the In-charge or care taker or official responsible for making entries in the Matri Anchal Sarai nor the doctor of CHC Ghawandal has made any complaint in writing so as to enabling the Court to take cognizance of offence committed by the appellant under Section 177 IPC.

6 Section 177 IPC provides punishment to an accused, who being legally bound to furnish information on any subject to any public servant, furnishes the wrong information as true, on the subject which he knows or has reason to believe to be false. Section 177 IPC falls in Chapter X of IPC, which provides punishment for contempts of the lawful authority of public servant. In the facts and circumstances, explained herein-above, I doubt as to whether at all Section 177 IPC is attracted in the present case or not. Even if it is considered that accused/petitioner was liable for commission of offence under Section 177 IPC, then also mandatory provisions of Section 195 of Cr.P.C. would be attracted, which provides procedure for prosecution for contempts of lawful authority of public servant, wherein its Sub-section 1(a)(i) provides that no Court shall take cognizance of any offence punishable under Section 177 IPC except on in writing complaint of public servant concerned or of some other public servant to whom such public servant is administratively subordinate.

7 First of all, in the present case, there is no evidence of contempts of lawful authority of public servant. Secondly, even if the disclosure of wrong name of deceased in the Sarai or to the doctor is to be considered an offence committed under Section 177 IPC, then concerned Public Officer has not filed any complaint in writing nor some other public servant to whom concerned public servant was administratively subordinate has filed any such written complaint.

8 The Apex Court in ***C.Muniappan and others vs. D.K. Rajendran and others*** reported in ***AIR 2010 SC 3718*** has reiterated that provisions of Section 195 Cr.P.C. are mandatory and in such cases there must be in writing complaint by the concerned public servant and further that non-compliance of it would vitiate the prosecution and all other consequential orders as the Court cannot assume the cognizance of the case without such complaint and in absence of such complaint, the trial and conviction will be void ab initio being without jurisdiction.

9 Applying the aforesaid ratio of law laid down by the Apex Court, I find that in the present case also, the trial as well as conviction has been rendered void ab initio for non-compliance of provisions of Section 195 Cr.P.C. and the learned Sessions Judge has failed to take into consideration the aspect of the case and thus has committed a mistake of law.

10 In view of above discussion, conviction and sentence imposed upon the appellant/petitioner under Section 177 IPC is set aside and appellant/petitioner is acquitted of offfence allegedly committed by him under Section 177 IPC. Bail bonds stand discharged. Fine amount deposited by the appellant/petitioner be refunded to him on filing an appropriate application.

11 Appeal is allowed in aforesaid terms. Record be sent back.

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

M/s S.B. Trading Co. ....Appellant

Versus

The State of HP and another .....Respondents

Arb. Appeal No. 6 of 2009.
Decided on: 01.07.2019.

Arbitration and Conciliation Act, 1996(New Act)– Section 34(3)– **Arbitration Act, 1940 (Old Act)**– Section 15– Objections to award– New Act vis-a-vis Old Act- Applicability– Held, when arbitration proceedings had commenced under Old Act, then in absence of consent of parties that arbitration proceedings would be governed by New Act, the provisions of Old Act will apply for all intents and purposes– Objections under Section 34 (3) of New Act to such an award are not maintainable– Rather objections, if any, are to be filed and adjudicated upon as per provisions of Old Act. (Para 10)

For the appellant : Mr. J.S. Bhogal, Sr. Advocate with Mr. T.S. Bhogal, Advocate.

For the respondents : Mr. Dinesh Thakur, Additional Advocate General with M/s R.P. Singh and Amit Kumar Dhumal, Deputy Advocate Generals.

The following judgment of the Court was delivered:

<u>Ajay Mohan Goel, Judge</u> (*Oral*)

This arbitration appeal under Section 37 of the Arbitration and Conciliation Act, 1996, has been filed against order passed by the Court of learned Additional District Judge (1), Kangra at Dharamshala in RBT Arbitration Case No. 2-D/06/02, decided on 31.03.2009, vide which Objections preferred by the present appellant under Section 34(3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') against Award passed by learned Arbitrator dated 08.02.2002 have been dismissed.

2. This case has peculiar facts. Arbitration proceedings stood initiated as per the agreement entered into between the parties under the provisions of Arbitration Act, 1940 (hereinafter referred to as the '1940 Act'). An Award was passed by the Arbitrator under the provisions of old Act (1940 Act), which stood assailed by the respondents-State. The Objections so filed by the State were allowed and the matter was remanded back to the learned Arbitrator for afresh adjudication. The first Award was passed by the learned Arbitrator on 04.08.1995 and the same was set aside on 31.07.2000 by the Court of learned Senior Sub Judge Kangra at Dharamshala.

3. Upon remand, a fresh Award was passed by the Arbitrator dated 08.02.2002. During the pendency of the said proceedings, the Arbitration and Conciliation Act, 1996 came into force and the 1940 Act was repealed. There is nothing on record to suggest that after the remand of the matter, the parties agreed before the Arbitrator that the matter be proceeded in accordance with 1996 Act, however, a perusal of para 3 of the latter Award passed by the arbitrator demonstrates that the same was passed by the Arbitrator under 1996 Act.

4. Feeling aggrieved by the Award so passed by the learned Arbitrator, Objections were filed against the same by the present appellant under Section 34(3) of the Arbitration and Conciliation Act, 1996. Objection with regard to maintainability of the said "Objections" was raised by the present respondents on the ground that the same having

been filed under Section 34(3) of the 1996 Act were not maintainable, because, as there was no consent given by both the parties to the Arbitrator while deciding the later award that proceedings be held under new Act, it was incumbent upon the learned Arbitrator to have had passed the award under the provisions of 1940 Act. Record demonstrates that said contention of the respondent did not find favour with the learned Court below. However, the “Objections” filed by the present appellant otherwise also did not find favour on merit with it and accordingly, the same were dismissed.

5. Feeling aggrieved, the present appeal was filed.

6. Mr. J.S. Bhogal, learned Senior Counsel for the appellant has argued that the order passed by the learned Court below on the Objections filed by the present appellant under Section 34(3) of the 1996 Act is void *ab initio* because as the Award impugned was deemed to have been passed under the 1940 Act, therefore, the Objections to the same ought to have been filed under the provisions of the old Act and this important aspect of the matter has been ignored by the learned Court below while passing the impugned order.

7. Learned Deputy Advocate General has argued that the plea raised by learned Senior Counsel for the appellant is not available to the appellant because the “Objections” which stand rejected by learned Court below were filed by the appellant and the appellant cannot be permitted to take benefit of his own acts of omission. He has argued that if the appellant had filed objections under wrong provisions of law, then the appellant has to suffer for its mistake.

8. I have heard learned Counsel for the parties and also gone through the record of the case as also the relevant provisions of the Statute.

9. It is not in dispute that in terms of the agreement entered into between the parties, the Arbitration process was put in motion under the provisions of 1940 Act and the initial Award was passed by the learned Arbitrator before 1996 Act came into force. It is also a matter of record that Objections filed against the said award by the State under the provisions of 1940 Act found favour with learned Senior Civil Judge, Kangra and after allowing the same and setting aside the Award, the matter was again remanded to the Arbitrator for adjudication afresh.

10. Now incidentally, though it is mentioned in the Award which was subsequently passed by the learned Arbitrator that he was passing the same under the provisions of 1996 Act, however, as the arbitration proceedings stood initiated under the old Act, the Arbitrator could not have had announced the Award under the new Act and for all intents and purposes, the Award has to be held to be announced under the provisions of the old Act. This is for the reason that after remand, as has already been taken note of by me earlier also, parties did not give any consent to the Arbitrator to thereafter proceed with the matter under the provisions of the new Act. Now, because it has been held by me that the Award announced by the Arbitrator has to be construed as Award passed under the 1940 Act, then, but obvious, Objections against the same were maintainable under the old Act and not under the old Act. This important aspect of the matter has been ignored by the learned Court below while adjudicating the Objections filed by the present appellant against the Award, which Objections having had been filed under the 1996 Act were not maintainable. The pronouncement upon the said Objections by the learned Court below thus is *per se* bad in law and is liable to be quashed and set aside *de hors* the fact that the Objections were filed before it by the present appellant.

11. In these circumstances, this appeal is partly allowed. Impugned order i.e. order dated 31.03.2009 passed in Case No. 2-D/06/02 by learned Additional District Judge,

Kangra at Dharamshala, is set aside and the matter is remanded back to the learned Court below with the direction that the Objections filed by the present appellant be adjudicated afresh in accordance with law, including the question of maintainability of the Objections.

12. At this stage, learned Senior Counsel appearing for the appellant, on instructions, submits that present appellant be permitted to withdraw the Objections with liberty to take recourse to all such remedies as are available to it in law. It is clarified that if any such request is made by the appellant, then the same shall be dealt with in accordance with law by the learned Court below.

The appeal stands disposed of in above terms, so also pending miscellaneous application(s), if any. No order as to cost.

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

Balram Kumar ....Petitioner.
Versus
Divisional Manager, Forest Working Division Rampur ...Respondent.

Arb. Case No. 55 of 2018
Decided on: 27.06.2019.

***Arbitration and Conciliation Act, 1996**- Section 33– Review of award by arbitrator– Whether permissible? Held, right to seek review is a statutory right– If no such right is conferred on party, competent authority does not have jurisdiction to entertain review against its order– Act does not have any provision conferring review jurisdiction upon arbitrator– Arbitrator cannot review award passed by him.(*Paras 4 & 5)

For the petitioner : Mr. Tara Singh Chauhan, Advocate.
For the respondent : Mr. Rajesh Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner has challenged Annexure O-3, dated 09.04.2018, vide which application filed by the present petitioner before the learned Arbitrator for review of Award dated 18.11.2018, passed by the Arbitrator stands returned to him on the ground that Arbitrator had no power to review the award passed under the Arbitration and Conciliation Act, 1996 and the power of Arbitrator was only limited to the extent correction and interpretation of the award as per the provisions of Section 33 thereof.

2. Brief facts necessary for adjudication of the present petition are as under:-

In a dispute pertaining to Lot No. 02/R/2011(Ani) (B) Rampur, an Award has been passed by the Arbitrator-cum-Director (South), HPSIDC Ltd. Shimla, dated 18.11.2017. Respondent herein was the claimant before the learned Arbitrator and petitioner was respondent. Vide said Award, claimant therein has been held entitled for an

amount of `5,17,419/- alongwith interest @ 12% per annum from the date of filing of the claim. After the passing of the said award, petitioner filed a Review Petition against said award dated 18.11.2017 with the prayer to recall the award and review the same. This review petition has been returned to the petition by the Arbitrator vide impugned Annexure.

3. Having heard learned Counsel for the parties and having gone through the documents appended with the petition, this Court is of the view that there is no illegality in the act of the Arbitrator of returning the review petition filed by the present petitioner.

4. Admittedly, the application filed before the learned Arbitrator by the present petitioner was for review of the award. It is settled law that right to file review is a statutory right. In other words, until and unless such a right is conferred upon a party under the Statute, the Authority has no jurisdiction to entertain a review against its order.

5. Learned Counsel for the petitioner has not been able to point out that there is any power of review conferred upon the Arbitrator under the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'). In this view of the matter, when such a power is not conferred upon the Arbitrator, then if any review petition is filed, but natural, he has no other option but to reject the same or to return the same for want of jurisdiction, as has been done in the present case.

6. At this stage, Mr. Chauhan, submits that though nomenclature of the application which was returned vide impugned communication is that of review but the intent of the petitioner was to seek correction of error which was a clerical error which had crept in the impugned award and simply because it was mentioned in the application that review of the award was sought for, the petitioner cannot be made to suffer on the said technical ground.

7. Be that as it may, admittedly, as the application filed before the learned Court was for review of the Award, therefore, as I have already held above, there is no infirmity with communication Annexure O-3 vide which said application stands returned for want of jurisdiction. Further, as mutually agreed, in the interest of justice, it is ordered that in case petitioner approaches the learned Arbitrator in terms of the provisions of Section 33 of the Act within two weeks from today, then said application shall be taken on record and decided on merit. This however shall be subject to payment of cost of `20,000/- by the petitioner to the respondent-Corporation. It is ordered that in case any application is filed by the petitioner under the provisions of Section 33 of the Act within two weeks from today, then the same shall be accompanied by a Bank Draft amounting to `20,000/- in favour of the Managing Director of the respondent-corporation. It is clarified that in case said application is not accompanied by the Draft qua cost as ordered above, then the same shall not be entertained by the learned Arbitrator and this order shall become inoperative.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Harbans Singh and another ....Petitioners.
Versus
Jagat Ram and others ...Respondents.

CMPMO No.: 77 of 2019.
Decided on: 08.07.2019.

Code of Civil Procedure, 1908– Order XXVI Rule 9– Appointment of local commissioner for demarcation of land– Held, purpose of appointment of local commissioner is not to gather evidence in favour of party but to elucidate factual basis that too if court deems it necessary so as to resolve dispute between parties– Demarcation report along with site plan of local commissioner already on record of trial court– Petitioners cannot file another application for appointment of local commissioner for demarcation of land. (Paras 9 & 10)

For the petitioners	:	Mr. Sanjeev Kuthiala, Sr. Advocate with Ms. Rachna Kuthiala, Advocate.
For the respondents	:	Mr. Ramakant Sharma, Sr. Advocate with Mr. Dinesh Kumar Bhatia, Advocate.

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, a prayer has been made for setting aside order dated 13.02.2019, passed by the Court of learned Civil Judge (Sr. Divn.), Nalagarh, District Solan, H.P. in CMA No. 169 of 2019, filed in Civil Suit No. 20-1 of 2013, titled as Harbans Singh and another versus Sh. Jagat Ram and others, vide which, an application filed by the present petitioners, who are the plaintiffs before the learned Trial Court, under Order 26, Rule 9 of the Code of Civil Procedure (hereinafter referred to as the 'Code'), has been dismissed by the learned Trial Court.

2. Brief facts necessary for adjudication of the present case are that the petitioners (hereinafter referred to as the 'plaintiffs') have filed a suit for permanent prohibitory injunction and mandatory injunction/possession against the defendants with regard to the suit land. At the stage of arguments, an application was filed by the plaintiffs under Order 26, Rules 9 and 10 of the Code for appointment of the Local Commissioner for fixing the boundary points of the suit land. It was mentioned in the application that the main dispute between the parties was with regard to fixation of the boundary and the litigation will not be resolved till the boundaries of the suit land are not fixed by an expert Revenue Officer by way of demarcation. Prayer was thus made in the application for appointment of some Revenue Officer as Local Commissioner to fix the boundaries of the suit land with adjoining land of the defendants.

3. This application was resisted by the non-applicants/defendants *inter alia* on the ground that no encroachment over the land of the plaintiffs by the defendants was there as alleged by the plaintiffs. It was further mentioned in the reply that defendants had raised construction in their own land. Earlier also, a Local Commissioner stood appointed to ascertain this fact and his report was on record. The Commissioner was summoned by the plaintiffs as their own witness and his report categorically demonstrated that defendants had raised construction on their own land. It was further mentioned in the reply that Local Commissioner could not be appointed to create evidence for a party as it was the duty of the parties to prove their respective cases. It was further mentioned in the reply that encroachment was to be proved by the party alleging it.

4. Said application stands dismissed by way of impugned order. Learned trial Court while dismissing the application has held that the application was filed after the case was listed for final arguments and the report of the Local Commissioner so appointed by the Court stood tendered in the evidence in the statement of Kamlesh Kaur as Ext. P-40, which report was prepared by Shri D.S. Rana, Advocate. Learned Court below also held that even demarcation stood carried out by Assistant Collector, 2nd Grade, Nalagarh, after the case was remanded by the Collector, Sub Division, Nalagarh, vide order dated 26.09.2014, which was on record as Ext. P-39 and report of the Local Commissioner was prepared pursuant to the directions issued in this regard on an application filed under Order 26, Rule 9 of the Code. Learned Court below also held that the prayer for appointment of the Local Commissioner, did not in any manner touch the controversy involved in the suit because requisite evidence stood led by both the parties and at this stage, appointment of the Local Commissioner would tantamount to fill up the lacunae left in the evidence, which was not the purpose of appointment of Local Commissioner under Order 26, Rule 9 of the Code. On these bases, learned Trial Court dismissed the application.

5. Feeling aggrieved, the plaintiffs have filed the present petition.

6. Learned Senior Counsel appearing for the petitioner has vehemently argued that order passed by the learned Trial Court was not sustainable in the eyes of law because learned Court below has erred in not appreciating that as the dispute between the parties was a boundary dispute, therefore, in consonance with the well settled principles of law relating to Order 26, Rule 9 of the Code, it was in the interest of justice had a Local Commissioner been appointed to determine the boundary points between the land of the petitioners and the respondents. He further argued that reliance placed by the learned Trial Court on the earlier demarcation was mis-conceived because earlier demarcation stood carried out by a lawyer who was not a revenue expert and his demarcation will not help the adjudication of the case.

7. On the other hand, learned Senior Counsel appearing for the respondents has argued that there was no perversity with the order passed by the learned Trial Court because the application filed by the present petitioners under Order 26, Rule 9 of the Code stood rightly rejected by the learned Trial Court. He has further argued that filing of the application was nothing but the abuse of process of law. According to him, there was already on record not only the report of Shri D.S. Rana, Advocate, who was appointed as Local Commissioner to ascertain as to whether construction was being carried out by the defendants in their own land or in the land of the plaintiffs and there was also a demarcation report Ext. P-39 on record and in view of same, there was no necessity to further appointment another Local Commissioner on the request of the petitioners. He has also argued that the suit filed by the petitioners was for permanent prohibitory injunction and also for mandatory injunction and for this purpose, there was no need to appoint Local Commissioner to ascertain the boundary points of the respective lands of the parties and that too, at the stage when the case was being listed for the arguments as Order 26, Rule 9 of the Code could not be put to use by a party to fill up the lacunae. He thus urged that petition be dismissed.

8. I have heard learned Counsel for the parties and gone through the record of the case as also the impugned order.

9. It is not in dispute that there is on record before the learned Trial Court Ext. P-39, which is a demarcation report, carried out by Assistant Collector 2nd Grade, Nalagarh, pertaining to the suit land. It is also not in dispute that in an application earlier filed under Order 26, Rule 9 of the Code and that too at the behest of the petitioners, one Shri D.S.

Rana, Advocate, was appointed as Local Commissioner to ascertain as to whether construction being raised by the defendants is being raised by the defendants in their own land or not, who has submitted his report. This Court will not comment upon said Exhibits any further as the suit is pending before the learned Trial Court. In my considered view, filing of the subsequent application by the petitioners under Order 26, Rule 9 of the Code was mis-conceived. This is for the reason that because the suit filed by the petitioners is for permanent prohibitory and mandatory injunction, thus, onus is upon them to prove that there is any encroachment over the suit land or any construction has been illegally carried out by the other party over their land. This onus cannot be shifted by the petitioners upon the Court by calling upon the Court to appoint Local Commissioner under Order 26, Rule 9 of the code, purportedly, to ascertain the boundary points of the land of the parties. It is settled position of law that the purpose of appointment of the Local Commissioner under Order 26, Rule 9 of the Code is not to garner or gather evidence in favour of a party, but the same is to elucidate the factual basis and that too, if the Court deems it necessary so as to resolve the dispute between the parties in the facts of a case.

10. In the present case, learned Trial Court has rightly rejected the subsequent application filed by the present petitioners for appointment of Local Commissioner because when there already is on record a demarcation report as also a site report of the Local Commissioner, then obviously, petitioners could not be allowed to file another application for appointment of Local Commissioner with the prayer that boundary points of the parties be ascertained. Thus, this Court does not finds any perversity with the impugned order.

In view of above discussion, as this Court does not finds any merit in the present petition, the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stands disposed of. No orders as to costs.

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

Krishna Thakur and another ….Petitioners.
Versus
Sh. Surat Ram and another …Respondents.

CMPMO No.: 102 of 2019.
Decided on: 17.07.2019.

Code of Civil Procedure, 1908– Order XVII Rules 1 & 3– Closure of evidence by court– Sustainability- Reiterated, not more than three opportunities should be granted to either of parties to lead evidence– If more opportunities are to be granted then reasons should be assigned by court as why it is showing indulgence to party concerned– More opportunities than three cannot be granted in a mechanical manner- If there is no cogent reason, then right to lead evidence should be closed. (Paras 7to 9)

For the petitioners : Ms. Kamlesh Shandil, Advocate.
For the respondents : Mr. Dibender Ghosh, Advocate.

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, petitioners have challenged order dated 09.01.2019, passed by the Court of learned Civil Judge, Court No. 3, Shimla, District Shimla, HP, in Civil Suit No. 288-1 of 2018/09, vide which, the right of the present petitioners to lead evidence has been closed on the ground that despite eight opportunities having been granted to the defendants, they failed to produce their entire evidence.

2. I have heard learned Counsel for the parties and also gone through the impugned order as well as documents appended with the petition.

3. A perusal of the documents appended with the petition demonstrates that the evidence of the plaintiff was ordered to be closed by learned Trial Court on 16.08.2017 and thereafter, the matter was listed on 05.12.2017 for the purpose of recording the evidence of the defendants. On the said date, neither any D.W. was present nor any steps were taken by the defendants to summon any witness.

4. To cut the matter short, thereafter, the case was listed before the learned Trial Court for the purpose of recording the evidence of the defendants on the following dates:- 11.01.2018, 26.02.2018, 13.03.2018, 20.07.2018, 18.08.2018, 09.10.2018, 11.12.2018 and 09.01.2019.

5. On the aforementioned dates, no D.Ws appeared in the Court for the purpose of recording the evidence. It is in these circumstances that order of closing the evidence of the defendants was passed by the learned Court below on 09.01.2019, when on the said date also, neither any D.Ws appeared nor the cost subject to which said opportunity was granted to the defendants to lead evidence was deposited.

6. In my considered view, no illegality can be attributed to the order so passed by the learned Court below on 09.01.2019, vide which, it has ordered the evidence of the present petitioners as they had failed to lead evidence despite eight opportunities having been granted in this regard.

7. This Court on more than one occasion has held that ordinarily not more than three opportunities should be granted to either of the parties to lead evidence and in case, more opportunities are to be granted by the learned Courts, then reasons should be assigned by the Court as to why it is showing indulgence to the party concerned.

8. In the present case, eight opportunities were granted to the present petitioner to lead evidence.

9. This Court fails to understand as to why still learned Courts below are not adhering to the directions passed by this Court that in case more than three opportunities have to be granted, then reasons have to be assigned by the Court and opportunity to lead evidence is not to be granted to a party in a mechanical manner. Accordingly, it is again impressed upon the learned Courts below that in case more than three opportunities are being granted to a party to lead evidence, then there has to be a cogent reason assigned by the Court for showing indulgence and in case, the Court comes to the conclusion that there is no cogent reason for granting any further opportunity to lead evidence, then, the right of the party concerned to lead evidence should be closed.

10. Coming to the facts of this case, despite eight opportunities having been granted to lead evidence, the defendants have failed to lead evidence. In this background, learned Trial Court has rightly closed the evidence of the present petitioners and said order can neither be said to be illegal nor perverse.

11. In view of the discussion held herein above, as this Court does not finds any merit in this petition, accordingly, the same is dismissed. Interim order passed, if any, stands vacated. Pending miscellaneous application(s), if any, also stand disposed of.

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

Ram Nath and another ....Petitioners.
Versus
Kuldeep Singh and others ...Respondents.

CMPMO No.: 272 of 2019.
Decided on: 25.06.2019.

Code of Civil Procedure, 1908– Order XXVI Rule 9– Local commissioner– Appointment and purpose of- Held, Order XXVI Rule 9 of Code is not a panacea which can be used as a tool whenever litigant feels that he is not in a position to prove his case– It is satisfaction of court that commissioner is required to be appointed for local investigation- This satisfaction cannot be of plaintiff or defendant– Local commissioner cannot be appointed to gather evidence for parties. (Paras 13 to 15)

For the petitioners : Mr. Dheeraj K. Vashisht, Advocate.
For the respondents : Nemo.

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, a prayer has been made for setting aside order dated 30.03.2019, passed by the Court of learned Senior Civil Judge, Court No. 1, Una, District Una, H.P. in Case Reg. No. 1361 of 2013, vide which an application filed by the present petitioners, who are the plaintiffs before the learned trial Court, under Order 26, Rule 9 of the Code of Civil Procedure (hereinafter referred to as the 'Code'), has been dismissed.

2. Brief facts necessary for adjudication of the present case are that petitioners (hereinafter referred to as the 'plaintiffs') have filed a suit under Section 5 of the Specific Relief Act for possession by way of removal of superstructure of any kind raised by the defendants over the suit land. The suit was filed in the year 2010. It is not in dispute that evidence of the defendants stood recorded on 10.04.2018 and thereafter, the matter was listed for arguments for 15.05.2018. On 15.05.2018, time was prayed for arguments and the case was accordingly ordered to be listed for arguments on 28.07.2018. On the said date, matter was partly heard and adjourned for remaining arguments for 04.08.2018.

3. On 04.08.2018, an application was filed by the present petitioner before the learned Trial Court with the prayer that a Revenue Expert be appointed with the direction to visit the spot and report whether the site 'A B C D E F G H' as shown red in colour in the site plan was part and parcel of Khasra Nos. 4329/1, 4331, 4332/1, 4333/1 for proper adjudication of the case. It was mentioned in the application by the applicants/plaintiffs that they had filed a suit for possession of site 'A B C D E F G H' with the averments that

defendants had wrongly and illegally usurped the possession of the aforesaid site from the plaintiffs. Learned trial Court had framed an issue to the effect that *"Whether the plaintiffs are entitled for the relief of possession as prayed? OPP"*. As per plaintiffs, onus to prove the issue was upon them but the same could not be discharged unless a Revenue Expert was appointed by the Court to find out whether the site in issue was part and parcel of Khasra Nos. 4329/1, 4331, 4332/1, 4333/1. It was further mentioned in the application that oral evidence touching the aforesaid Issue would not be sufficient to decide the real controversy between the parties as there was boundary dispute between the parties.

4. The application was contested by the non-applicants/defendants *inter alia* on the ground that the Issue *per se* did not involve evidence of Revenue Expert as plaintiffs had not taken any initiative to lead any cogent evidence in support of the said Issue.

5. Learned trial Court vide order dated 30.03.2019, has dismissed the application. While doing so, learned trial Court has held that the suit was filed by the plaintiffs for possession by way of removal of superstructure raised by the defendants. Thus, first of all, onus was upon the plaintiffs to prove as to how plaintiffs had concluded that portion 'ABCD', as comprised in the suit land, stood encroached upon by the defendants, for which relief of possession was sought. It held that rather it imbibed the knowledge upon their part of the delineation of boundaries of the suit property being well defined since there is specific mention of 'ABCD' point in it. Learned trial Court also held that Court cannot collect evidence for any party thereby lending a helping hand and assistance in proving its case. It held that matter may be different where the parties are adjoining land holders and share the boundary, however, in order to decide the correct delineation, the Court deems that no amount of other documentary and oral evidence will suffice in proving the plea of interference. Learned Court also held that relief of possession is sought only if the applicant is sure of the encroachment made by the other party over the suit land with specific categorical delineation, lest the entire case of the applicant will fall on its own legs. On these bases, learned Court concluded that the application could not be allowed since it would amount assisting the plaintiffs in taking possession of the property with the assistance of the Court, which otherwise has to be independently done by the plaintiffs.

6. Feeling aggrieved, the petitioners have filed this petition.

7. I have heard learned Counsel for the petitioners and gone through the record of the case as also the impugned order.

8. Mr. Dheeraj K. Vashisht, learned Counsel for the petitioners has strenuously argued that the impugned order is not sustainable in the eyes of law as the plaintiffs have no other recourse but to approach the Court under the provisions of Order 26, Rule 9 of the Civil Procedure Code, to substantiate the factum of the suit land having been encroached upon by the defendants. He has further argued that while dismissing the application, learned Trial Court has erred in not appreciating that earlier in CMPMO No. 130 of 2015 filed by the petitioners before this Court (High Court), this Court vide order dated 30.08.2016 had permitted the petitioners to withdraw the same with liberty to file the same after the evidence of the parties is recorded.

9. Having heard learned Counsel for the petitioners, in my considered view, there is no infirmity with the order impugned.

10. It is settled principle of law that he who alleges has to prove. As it is the plaintiffs who have approached the Court praying for a decree of possession through removal of superstructure raised by the defendants upon the suit land with the allegation

that the suit land stood encroached upon by the defendants, but obvious, onus to prove the same is upon the plaintiffs.

11. In the present case, the suit was filed in the year 2010. As I have already stated above that after recording the statements of the defendants' witnesses, their evidence was closed on 10.04.2018.

12. The Issue in support of which the application was filed under Order 26, Rule 9 of the Code reads as under:-

"Whether the plaintiffs are entitled for relief of possession as prayed?OPP"

In order to succeed in establishing this issue but obvious plaintiffs have to lead cogent evidence to demonstrate that the plaintiffs have some title over the suit land and the defendants are strangers to the suit land have illegally dispossessed the plaintiffs from the suit land.

13. Order 26, Rule 9 of the Code of Civil Procedure is not a panacea, which can be used by a litigant as a tool whenever litigant feels that it is not in a position to prove its case.

14. Order 26, Rule 9 of the Code *inter alia* provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to such person as it thinks fit directing him to such investigation and to report thereon to the Court.

15. In my considered view, primarily whenever any order is passed, under Rule 9 of Order 26 of the Code, the satisfaction has to be of the Court as to whether local investigation for the purpose of elucidating any matter in dispute is necessary or not. This satisfaction cannot be of the plaintiffs or defendants. The plaintiff or the defendant has to stand on its own legs and provisions of Order 26, Rule 9 of the Code cannot be used to garner or gather evidence for them through the Court process. This is exactly what has been held by the learned Court below by way of the impugned order. Learned Court has held and rightly so that onus is upon the plaintiffs to prove their case and the Court cannot lend a helping hand and assist the plaintiffs to prove their case. These findings returned by the learned Court below cannot be said to be illegal as they are in consonance with the spirit of law with regard to the interpretation of Order 26, Rule 9 of the Civil Procedure Code. Plaintiffs cannot be permitted to a local commissioner appointed simply because they have not been able to lead cogent evidence to prove their case. That is not the intent of Order 26, rule 9 of the Code.

In view of above discussion, as this Court does not find any merit in the present petition, the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stands disposed of. No orders as to costs.

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

Smt. Vidya Devi and others ….Petitioners.

Versus

Sh. Khayali Ram …Respondent.

CMPMO No.: 322 of 2019.

Decided on: 16.07.2019.

Code of civil Procedure, 1908– Section 151– Inherent powers– Exercise of- Grant of police help for ensuring compliance with interim stay order– Held, ad interim stay order has same force as of a final order– Party cannot refuse to abide an ad interim order simply on ground that it is only an ad interim direction– On prima facie proof of disobedience of such order, court can grant police assistance for its compliance. (Para 9)

For the petitioners : M/s Mohan Singh and Pawan Kumar, Advocates.
For the respondents : Nemo.

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, petitioner has challenged order dated 25.06.2019 passed by the Court of learned Civil Judge, Court No. 2, Ghumarwin, District Bilaspur, HP, in CMA No. 137-6 of 2019 filed in Civil Suit No. 81-1 of 2019, vide which an application filed by the respondent herein under Section 151 of the Code of Civil Procedure for grant of police assistance to implement the order passed by the learned Trial Court in an application so filed by the respondent herein (who is the plaintiff before the learned Trial Court) under Order 39, Rules 1 and 2 of the Code of Civil Procedure (hereinafter referred to as the 'Code'), has been allowed.

2. I have heard learned Counsel for the petitioner and gone through the impugned order as well as documents appended with the petition.

3. Record demonstrates that respondent herein/ plaintiff has filed a suit before the learned Court below praying for a decree for permanent prohibitory injunction for restraining the defendants from causing any interference in the construction work being carried out by the plaintiff over the suit land. Alongwith the suit, an application under Order 39, Rules 1 and 2 of the Code was also filed. On this application, on 24.4.2019, learned Court passed the following order:-

> *"Be listed for filing reply on 3-5-19. Till then respondents are restrained from causing interference in the suit land."*

4. Feeling aggrieved by the factum of the said order not being obeyed by the petitioners herein, respondent/ plaintiff filed an application under Section 151 of the Code before the learned Trial Court praying for police assistance in the implementation of the *ad interim* order passed by the learned Trial Court. The same was contested by the petitioners herein. This application has been allowed by the learned Trial Court by way of the impugned order by directing the concerned Police Station to implement order dated 24.04.2019 at the spot by use of necessary force if required under the circumstances at the spot.

5. While passing the said order, learned Trial Court held that as the applicant therein had satisfied the Court that the injunction order passed by it was being disobeyed, therefore, in exercise of its inherent power under Section 151 of the Code, the Court could direct the police authorities to render aid to the applicant for the purpose of enforcement of order of injunction granted by the Court. Learned Court also took into consideration the stand of the present petitioners (respondents before it), who had denied that they were causing any interference or restraining the applicant therein from raising construction over

his old foundation. Learned Court observed that if this was the case, then also if the police assistance was granted to the applicant, the same would not harm the non-applicants, because if they were not restraining the applicants from raising construction over the old foundations, then they would not be affected by the order of providing police assistance.

6. Feeling aggrieved by the passing of the said order, the petitioners have filed this petition.

7. Learned Counsel for the petitioners has argued that the order passed by the learned Trial Court is not sustainable in the eyes of law as learned Court has erred in granting police assistance to the respondent. He has argued that as learned Court had only passed an *ad interim* order, therefore, till the same attained finality, no order of police protection could have been passed in favour of the applicant therein by the learned Trial Court. He has further argued that one of the petitioners, i.e. petitioner No. 6, has also filed a suit against the present respondent and in that suit, there was an injunction order passed in favour of petitioner No. 6 and this important aspect of the matter has also not been taken into consideration by the learned Trial Court while passing the impugned order.

8. Having heard learned Counsel for the petitioners, this Court is of the view that submission so made on behalf of the petitioners are without any merit. It is not in dispute that there is an *ad interim* order passed in favour of the present respondent by the learned Trial Court on 24.04.2019. It is not in dispute that on the ground of alleged non-compliance of said order by the present petitioner, an application stood filed by the respondent before the learned Trial Court for grant of police assistance. Said application has been allowed by the learned Trial Court after *prima-facie* coming to the conclusion that the order passed by it on 24.4.2019 was being violated by the present petitioners. That being so, in my considered view, there is no perversity with the order passed by the learned Trial Court wherein it has directed the police authorities to render necessary police assistance for implementation of order passed by it on 24.04.2019. This Court concurs with the findings so returned by the learned Trial Court that in case present petitioners are not violating the order passed by learned Court below on 24.4.2019, then providing of police assistance by the learned Trial Court is nothing but an innocuous order, because it will not have any adverse effect on them if their version is correct that they are not causing any interference nor they are restraining the respondent from making construction over his old foundations. On the contrary, if there is any interference being caused by them despite there being an injunction order passed by the learned Trial Court, then, learned Trial Court is within its jurisdiction to exercise its inherent powers conferred under Section 151 of the Code to ensure that the order(s) passed by it are obeyed.

9. As far as the contention of learned Counsel for the petitioners that no order of police protection could have been passed by learned Trial Court till the *ad interim* order was made absolute is concerned, in my considered view, there is no merit in the same. An *ad interim* order has the same force as any final order and a party cannot refuse to abide by an *ad interim* order passed by any Court simply on the ground that the same is only an *ad interim* direction. His other contention that the impugned order is bad as learned Court below has not gone into the effect of a restraint order being there against the plaintiff in a suit filed by present petitioner No. 6, in my considered view, is also without any merit. Learned Counsel has not been able to connect the so called interim order passed in favour of petitioner No. 6 with the suit land. It could not be pointed out by the petitioners as to what is the suit filed by petitioner No. 6 and what order has been passed in favour of petitioner No. 6 in the same and the same pertains to which land.

In view of above discussion, as this Court does not finds any merit in the present petition, the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of. No orders as to costs.

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

Balram and others ....Petitioners.
Versus
Smt. Gurdei and another ...Respondents.

CMPMO No.: 247 of 2019.
Decided on: 04.07.2019.

Code of Civil Procedure, 1908– Section 47– Decree of declaration and injunction– Decree holders granted right in temple offerings -Execution of– Objection thereto– Judgment debtor objecting to execution of decree which attained finality by way of judgment of Hon'ble Supreme Court, on ground that decree was obtained by plying fraud and trial court had no jurisdiction in the matter– Held, executing court cannot go behind decree– Objections regarding jurisdiction and fraud cannot be raised under Section 47 of Code– Judgment debtor ought to have taken these objections in appeal– Order of executing court dismissing objections upheld- Petition dismissed. (Paras 11 & 12)

For the petitioners : Mr. Sanket Sankhyan, Advocate.
For the respondents : Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner has challenged order dated 24.04.2019, passed by the Court of learned Civil Judge, Bilaspur, District Bilaspur, HP (Executing Court), vide which objections filed by the present petitioners under Section 47 of the Civil Procedure Code to the Execution Petition filed by the respondents herein, stand rejected.

2. Brief facts necessary for adjudication of the present petition are that respondents herein filed a suit for declaration against the present petitioners, i.e. Civil Suit No. 86-1 of 2007, titled as Smt. Gurdei and another vs. Sh. Bal Ram and others, which stood decreed by the Court of learned Civil Judge (Jr. Divn.), Bilaspur, vide judgment and decree dated 30.12.2015, in the following terms:-

> *"In the light of my findings on above issues, the suit of the plaintiffs is hereby decreed and the plaintiffs are hereby declared entitled to ½ share with the defendants in the baridar rights of their common ancestor late Sh. Jodhu in the offerings of Gugga Ji temple situated at village Bhater Upperli, Tehsil Sadar, Distt. Bilaspur, H.P. Defendants are hereby restrained from interfering with the established rights of the plaintiffs to the extent of ½ share with them in the offerings of the Gugga Ji temple. No order as to costs. Decree sheet be prepared accordingly. The file after due completion be consigned to the record room."*

3. Learned Counsel for the petitioners has fairly submitted that judgment and decree so passed by the learned trial Court has attained finality because the first appeal as also the second appeal filed against the said judgment and decree has been dismissed, so also the review petition filed against the judgment passed by this Court in Regular Second Appeal. He has further fairly submitted that a Special Leave Petition filed by the present petitioners against the judgment and decree passed by this Court in the Regular Second Appeal was also dismissed in limine by the Hon'ble Supreme Court.

4. It appears from the record that as the decree holders were aggrieved by the factum of the judgment and decree not being abided by the judgment debtors (i.e. present petitioners), they filed a Execution Petition. Objections were filed against the same *inter alia* on the ground that the decree was without jurisdiction and was a result of fraud and therefore, the same was not executable by the learned Executing Court.

5. Said objections stand rejected vide impugned order by the learned Executing Court *inter alia* by holding that a perusal of the objections demonstrated that they did not fulfill the essentials as mentioned under Section 47 of the Code. Learned Executing Court also held that the grounds taken in the Objections that the Civil Court had no jurisdiction to pass the decree could not be gone into while deciding said objections because the Executing Court had no jurisdiction to go into the correctness or validity of these findings which stood returned by the Civil Court as the same would amount to judicial impropriety and further amount to commenting upon the findings returned by higher Courts or criticizing their findings. Accordingly, it dismissed the Objections.

6. Feeling aggrieved, the petitioners have filed the present petition.

7. Learned Counsel for the petitioners has argued that the impugned order is not sustainable in law as learned Executing Court has erred in not appreciating that as the judgment and decree, execution of which was being sought by the respondents were a result of fraud and thus was a nullity, therefore the same were not executable and further learned Trial Court was having no jurisdiction to entertain and decide the suit.

8. No other point was urged.

9. Mr. Romesh Verma, learned Counsel for the respondents has argued that once the judgment and decree passed by the learned Trial Court has attained finality, the petitioners cannot rake up the old story of judgment and decree being bad as the same were purportedly obtained by playing fraud upon the Court. He has argued that the judgment and decree passed by the learned Trial Court were unsuccessfully assailed by the present petitioners up to Hon'ble Supreme Court and filing of the Objections against the Execution Petition as also filing of this petition is nothing but abuse of the process of law as the petitioners want to delay the execution of the judgment and decree by prolonging the litigation.

10. Having heard learned Counsel for the parties and having perused the impugned order as also other documents appended with the petition, in my considered view, there is no merit in the present petition. It is not in dispute that the execution petition filed by the respondents is for execution of judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.), Bilaspur, in Civil Suit No. 86/1 of 2007, dated 30.12.2015, wherein learned trial Court *inter alia* had passed a decree restraining the present petitioners from interfering with the established rights of the plaintiffs, i.e. present respondents to the extent of half share with them in the offerings of the *Gugga Ji* temple. The judgment and decree so passed by the learned trial Court has attend finality, as has been discussed in detail in above paragraphs of the judgment.

11. The contention of learned Counsel for the petitioners that the impugned order is not sustainable as learned Executing Court has erred in not appreciating that above-mentioned judgment and decree were not executable as the same has been passed by the learned trial Court without jurisdiction and were vitiated by fraud is without any merit. In my considered view, said issues could not have been gone into by the learned Executing Court and findings returned by the learned Executing Court while dismissing the objections that the learned Executing Court could not be asked to go behind the decree are correct findings. Whether or not, the judgment and decree passed by the Civil Court was bad for want of jurisdiction or was a result of fraud, was a point to be agitated by the Judgment Debtors in exercise of powers of appeal conferred upon them under the provisions of Civil Procedure Code. The factum of the judgment debtors having availed all the appeal opportunities available to them under the provisions of the Civil Procedure Code lead to the conclusion that presumably they raised the issue of jurisdiction and fraud also before the learned Appellate Courts but their pleas did not find favour with the learned Appellate Courts, or said pleas were never taken by the judgment debtors in appeal.

12. Be that as it may, the petitioners cannot be allowed to raise these issues in the objections filed to the proceedings initiated for execution of the judgment and decree so passed by the learned trial Court. This is exactly what has been held by the learned Executing Court while dismissing the objections filed by the petitioners to the Execution Petition seeking implementation of the judgment and decree. Learned Executing Court after discussing the scope and parameters of Section 47 of the Civil Procedure Code has correctly held that neither the objections were within the framework of Section 47 of the Code nor judgment debtors could be allowed to stall the execution of the judgment and decree passed by the Civil Court. This Court concurs with the findings so returned by the learned Executing Court and accordingly, as this Court does not finds any merit in the present petition, the same is therefore dismissed.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Maman Chand Jain ….Petitioner.
Versus
Shri Jeet Singh and another …Respondents.

COPC No. 158 of 2018
Decided on: 16.07.2019.

Contempt of Courts Act, 1971- Section 12– Criminal contempt– Proof of– Petitioner contending criminal contempt on part of respondents as he (Petitioner) despite grant of anticipatory bail by High Court, was got declared by them as proclaimed offender from court of Chief Judicial Magistrate– Held, no allegation that petitioner was arrested by respondents by over reaching order passed by High Court – He did not appear despite service before court of CJM in proceedings before him – For that he was declared proclaimed offender – Passing of order by CJM has got nothing to do with order of bail passed by High Court – No case of contempt is made out – Petition dismissed. (Para 6)

For the petitioner : Mr. Rajnish Maniktala, Sr. Advocate with Mr. Naresh Verma, Advocate.

For the respondents : Mr. Dinesh Thakur, Additional Advocate General with Mr. Amit Kumar Dhumal, Deputy Advocate General and Sunny Datwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this contempt petition, the prayer of the petitioner is for proceeding against the respondents herein under the provisions of Contempt of Courts Act, 1971, on the ground that the said respondents/contemnors have willfully disobeyed the orders passed by this Court on 24.5.2017, in Cr.MMO No. 137 of 2017, titled as Maman Chand Jain Versus State of Himachal Pradesh & Others.

2. The case of the petitioner herein is that in Cr.MMO No. 137 of 2017 supra, on 24.5.2017, this Court while directing the learned Additional Advocate General to produce the record pertaining to the investigation being carried out in the First Information Report, subject matter of the abovementioned petition, had also directed that in the meanwhile, petitioner shall not be arrested. As per the petitioner despite this specific order being there, on 19.12.2017, the Court of learned Chief Judicial Magistrate, Sirmaur at Nahan, in case titled as State of Himachal Pradesh versus Maman Chand Jain, declared the petitioner herein to be a proclaimed offender. As per the petitioner, said order stood passed by the Court of learned Chief Judicial Magistrate, Sirmaur at Nahan on 19.12.2017, because the respondents/contemnors herein willfully concealed from the said Court, the factum of order dated 24.5.2017 having been passed by this Court in Cr.MMO No. 137 of 2017 (supra), which act of the respondents/contemnors, as per the petitioner, was willful disobedience of the Court order. It is in this background that the contempt petition has been filed.

3. Pursuant to issuance of the notice, reply to the contempt petition stands filed by the respondents, who have denied any willful disobedience of the Court order by them as alleged by the petitioner.

4. I have heard learned Counsel for the parties at length and also gone through the record of the case.

5. Learned Senior Counsel appearing for the petitioner has reiterated that the purported contempt committed by the respondents/contemnors is that despite there being an order passed by this Court on 24.05.2017 in Cr.MMO No. 137 of 2017 (supra), wherein the arrest of the petitioner was stayed by this Court. This fact was willfully concealed by the present respondents from the Court of learned Chief Judicial Magistrate, Sirmaur at Nahan, which led to the present petitioner being declared as proclaimed offender.

6. In my considered view, this contempt petition is misconceived. It is not the case of the petitioner that despite his arrest having been stayed by this Court vide order dated 24.5.2017, passed in Cr.MMO No. 137 of 2017, the respondents/ contemnors arrested him by overreaching the order passed by this Court. The contention of the petitioner that he was declared as proclaimed offender on account of the respondents concealing order dated 24.5.2017 having been passed by this Court from the Court of learned Chief Judicial Magistrate, Sirmaur at Nahan, is without any merit. But obvious, it appears that when

despite service, petitioner herein, who was the accused before the Court of learned Chief Judicial Magistrate, Sirmaur at Nahan, did not put in appearance before the said Court, it was in these circumstances, that he was ordered to be declared as a proclaimed offender. Passing of the said order by the Court of learned Chief Judicial Magistrate, Sirmaur at Nahan, has got nothing to do with the order passed by this Court on 24.5.2017, contempt of which is alleged by the petitioner. The order so passed by the Court of learned Chief Judicial Magistrate, Sirmaur at Nahan, was an independent act of its in the facts of the proceedings pending before it. It is not even the case of the petitioner that proceedings pending before the learned Chief Judicial Magistrate, Sirmaur at Nahan, were stayed by this Court in the above mentioned Cr.M.M.O. No. 137 of 2017. That being so, as this Court does not finds any willful disobedience of order dated 24.5.2017 passed by this Court, this petition being mis-conceived is dismissed. Notice discharged.

The contempt petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Smt. Kavita Devi ….Petitioner.
Versus
State of H.P. and others …Respondents.

CWP No.: 2788 of 2016 &
CMP No. 5123 of 2019
Decided on: 17.06.2019.

Constitution of India, 1950 - Article 226 –Writ Jurisdiction – Scope of – Held, while exercising powers under Article 226 of Constitution, High Court can not upset findings returned by quasi– judicial authorities until and unless some perversity on face of record is demonstrated.(Para 10)

Constitution of India, 1950 – Article 226 – Writ jurisdiction against orders of quasi-judicial authorities – Scope - Held, orders of quasi-judicial authorities setting aside appointment of petitioner as Anganwari Helper, are reasoned one – They having considered respective contentions of parties and findings returned are duly substantiated from material on record – Petition dismissed.(Para 11)

For the petitioner	:	Mr. B. N. Mehta, Advocate.
For the respondents	:	Mr. Dinesh Thakur, Additional Advocate General with M/s R.P. Singh and Amit Kumar Dhumal, Deputy Advocate Generals for respondent-State.
	:	Mr. Devender K. Sharma, Advocate vice Mr. C.N. Singh, Advocate for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

CMP No. 5123 of 2019

No order is required to be passed in this application as the petition is being disposed of today itself. The application stands disposed of accordingly.

2. By way of this petition, petitioner has *inter alia* prayed for the following substantive relief:-

> *"(1)). That the petitioner in the facts and circumstances prays that the Civil Writ Petition may very kindly be allowed and this Hon'ble Court may very kindly be pleased to set aside and quashed Annexure P/1, P/2 and P/3 after summoning the relevant record concerning the case before ADC Sirmour and Divisional Commission Shimla and further direction to appoint present petitioner on the post of Anganbari workers in place of Respondent No. 4 who has only joined on 14-10-2016 by the order of Respondent No. 3, otherwise the present Petitioner was working on the post for the last 10 years till 14.-10-2016.*
>
> *(2) That any other orders just and proper in the facts and circumstances of the case may also kindly be passed in favour of the petitioner and against the respondents in the interest of justice, equity and fair play."*

3. Brief facts necessary for adjudication of the present petition are that the petitioner was appointed as an Anganwari Worker at Anganwari Centre Bhajyana-tutab, Tehsil and ICDS Block Pachhad, District Sirmaur, HP, on 14.08.2007. Her appointment as such was assailed by Smt. Anita, present respondent No. 4, *inter alia* on the ground that income certificate submitted by the petitioner was incorrect as on 01.10.2004, i.e. the cut of date envisaged in the Policy issued by respondent-State for the purpose of making appointment to the post of Anganwari Worker.

4. As per respondent No. 4 petitioner was residing in a joint family, headed by Sh. Moti Ram and in the said joint family, Sh. Som Dutt, elder brother of the husband of the present petitioner was also residing and his wife, i.e. wife of Som Dutt, was serving as Tailoring Teacher and her income besides income of other family members, was not disclosed by the petitioner while gaining the appointment as Anganwari Worker.

5. Vide order dated 14.01.2014, the appeal so filed by respondent No. 4 was allowed by the Appellate Authority and the appointment of present petitioner was quashed and set aside by further directing the Child Development Project Officer, ICDS Block, Pachhad, to appoint next eligible person, whose name appeared in the merit list.

6. Feeling aggrieved, the petitioner filed an appeal, i.e. Appeal No. 10 of 2014. Same was rejected by the Second Appellate Authority. By way of a reasoned and speaking order, said Authority upheld the order passed by the Additional District Magistrate, District Sirmaur, at Nahan, dated 14.01.2014, vide which the services of the petitioner were dismissed.

7. Feeling aggrieved, petitioner filed this petition seeking for reliefs already quoted herein-above.

8. I have heard learned Counsel for the parties and gone through the impugned orders as also the record of the case.

9. It is not in dispute that as on 01.01.2004, i.e. the cut of date notified by the Government, the petitioner was residing in a joint family, headed by Moti Ram. It is also not in dispute that wife of elder brother of the husband of the petitioner, who were also residing in the joint family, was working as Tailoring Teacher and her monthly wages were `700/-.

While ascertaining the annual income of an applicant, who applies for the post of Anganwari Worker, it is not as if the solitary income of the applicant has to be taken into consideration. It is the total income of the family of the applicant, which has to be taken into consideration. It is the admitted case of the petitioner that her family had separated as per the provisions of H.P. Panchayati Raj Act, on 07.01.2007. Meaning thereby that as on the cut of date, the family of the petitioner was joint and not separated and in this view of the matter, the annual income certificate submitted by the petitioner was not worthy of reliance as the entire income of the family of the petitioner as on 01.01.2004 was not disclosed by her. This is exactly what was held by the first Appellate Authority while accepting the appeal filed by respondent No. 4 and thereafter by Second Appellate Authority while rejecting the appeal filed by the present petitioner by the Second Appellate Authority.

10. During the course of arguments, learned Counsel for the petitioner could not demonstrate that there was any procedural infirmity with the orders passed by the said Authorities. In other words, it is not the case of the petitioner that principles of natural justice were not followed by the Authorities. Petitioner could also not point out any perversity with the orders passed by the Authorities on the basis of record. In my considered view, while exercising powers under Article 226 of the Constitution of India, in the case of judicial review, this Court cannot upset the findings returned by the quasi-judicial Authorities until and unless some perversity on the face of record is demonstrated. Petitioner has failed to demonstrate the same in this case.

11. A perusal of the orders passed by the quasi-Judicial Authorities demonstrates that the same are reasoned and speaking orders. Said Authorities have taken into consideration the respective contentions of the parties. Not only this, the findings returned are duly substantiated from the material on record. Meaning thereby that the findings are not returned on conjectures and surmises. The factum of the family of Som Dutt having been separated on 07.01.2007 in the meeting of Gram Sabha and entry of the family of the husband of the petitioner in the family Register on 20.08.2007 as separate family has been ascertained by the Authorities from the report of the Panchayat Secretary concerned. The Authorities have also held that there was not even an iota of doubt that till 07.01.2007, families of brothers of husband of the petitioner were living in a joint family, headed by Sh. Moti Ram and the separation of the family of husband of the petitioner from the joint family was only on 07.01.2007, whereas the cut of date was 01.01.2004. These findings, as already mentioned above, are duly borne out from the record of the case, and therefore, the same cannot be said to be perverse at all.

12. In this view of the matter, as this Court does not finds any perversity with the impugned orders, i.e. Order dated 14.01.2014, passed by Additional District Magistrate, District Sirmaur, Nahan (Annexure P/1), Order dated 23.6.2016, passed by Divisional Commissioner, Shimla Division, Shimla-02, (Annexure P/2), and Office Order dated 14.10.2016, passed by Child Development Project Officer, Pachhad, District Sirmaur, HP, (Annexure P/3), the petition is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of.

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

CWP No. 7777 of 2012 a/w CWP No.9966 of 2012
Judgment reserved on: 16.7.2019
Date of decision: 22.7.2019.

Constitution of India, 1950- Article 14- Discrimination between group of employees regarding grant of service benefits pursuant to judgment of court– Permissibility– Held, where judgment of court is in the nature of judgment in rem, obligation is cast upon authorities themselves to extend benefits accruing under it to all similarly situated persons whether they approached court or not– But where judgment is in personam, those who intend to get its benefit must satisfy court that their petition does not suffer from laches, delays or acquiescence. (Para 16)

1. <u>CWP No. 7777 of 2012</u>

Puran Mal and others ...Petitioners.

Versus

M/s Birla Textiles Mills ...Respondent.

2. <u>CWP No. 9966 of 2012</u>

Shyam Lal and others ...Petitioners

Versus

M/s Birla Textiles Mills ...Respondent.

Cases referred:

Amit Attri and others vs. Anil Verma and others, 2015 (2) SLC 846
H.P.University vs. Mohinder Pal and another, LPA No.87/2011, decided on 8.8.2016
Karam Singh Pathania vs. State of H.P. and others, 2015 (6) ILR (HP) 350
Raj Kumar vs. BSNL, 2017 (2) ILR (HP) 101
State of Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, (2015) 1 SCC 347
Sukh Dev Kumar and others vs. State of H.P. and others, 2016 Labour Industrial Cases 3011

For the Petitioners : Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate, in both the petitions.

For the Respondents : Mr. R.L. Sood, Senior Advocate, with Ms. Sanjivini Sood and Mr. Sanjay Kumar, Advocates, in both the petitions.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Both these petitions have been filed for common relief which reads thus:

"(i) That a writ in the nature of certiorari may be issued and the award dated 17.1.2006, Annexure P-1 passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla under reference No. 129/2000 be quashed and set-aside.

(ii) That a writ in the nature of mandamus may be issued directing the respondent to extend the same benefits to the present petitioners also as have been extended to other similarly situated workmen as per the judgment of this Hon'ble Court in LPA No. 69/2008."

2. The issue of progressive deconcentration of population and economic activities within the National Capital Region (Delhi), in terms of Master Plan for Delhi 1962 and National Capital Region Plan-2001, came up for consideration before the Apex Court in W.P. (C) No. 4677 of 1985, titled as M.C. Mehta vs. Union of India and others. Vide judgment dated 8.7.1996, [(1996) 4 SCC 750], Apex Court inter alia held that certain industrial units, including that of the appellant set up under the name of M/s Birla Textile Mills, being a hazardous/noxious/heavy/large industry falling within the category of H(a) and H(b) of the Delhi Master Plan, was to be closed w.e.f. 30.11.1996 and re-located outside Delhi. With regard to the workmen employed by the Industry, following directions pertaining to their rights/benefits were issued:-

> *"28.......*
>
> *(9) The workmen employed in the above mentioned 168 industries shall be entitled to the rights and benefits as indicated hereunder :-*
>
> *(a) The workmen shall have continuity of employment at the new town and place where the industry is shifted. The terms and conditions of their employment shall not be altered to their detriment;*
>
> *(b) The period between the closure of the industry in Delhi and its restart at the place of relocation shall be treated as active employment and the workmen shall be paid their full wages with continuity of service;*
>
> *(c) All those workmen who agree to shift with the industry shall be given one years wages as "shifting bonus" to help them settle at the new location".*
>
> *(d) The workmen employed in the industries which fail to relocate and the workmen who are not willing to shift along with the relocated industries, shall be deemed to have been retrenched with effect from November 30, 1996 provided they have been in continuous service (as defined in Section 25B of the Industrial Disputes Act, 1947) for not less than one year in the industries concerned before the said date. They shall be paid compensation in terms of Section 25-F (b) of the Industrial Disputes Act, 1947. These workmen shall also be paid, in addition, one year wages as additional compensation;*
>
> *(e) The "shifting bonus" and the compensation payable to the workmen in terms of this judgment shall be paid by the management before December 31, 1996.*
>
> *(f) The gratuity amount payable to any workmen shall be paid in addition."*

3. These directions were partly modified by the Apex Court in terms of its order dated 4.12.1996, [M.C.Mehta vs. Union of India and others, (1997) 11 SCC 327], to the extent that words "one year wages" in direction 9 (d) were substituted with "six years wages".

4. The appellant-Company (referred to as the 'management') decided to relocate its mill/unit at Baddi in the State of Himachal Pradesh. With the relocation of the Unit, option to join at Baddi was left to the workmen already employed in Delhi. Certain issues with regard to interpretation of the aforesaid directions crept in between the management and the workmen, which led to filing of various applications, including contempt petitions before the Apex Court and in terms of order dated 18.12.1998, titled as M.C. Mehta vs. Union of India and others, [(1999) 2 SCC 91], they were disposed of with a direction to the management to accept joining of the workmen on 14.1.1999. However, these were applicable but to such workmen who had exercised their option to join at Baddi. The Court reiterated that period between the closure of Mill at Delhi and restart of the same at the place of its relocation shall be treated under active employment and workmen shall be paid full wages

with continuity in service. The workmen were to be treated as if they were in service in Delhi till the time industry was restarted at the relocated place.

5. The issue did not rest there. Workmen through their Unions including, All India Textile Mazdoor Janta Union and the Kapra Mazdoor Lal Jhanda Union, filed another set of applications, including contempt petitions, before the Apex Court on the ground that there was willful disobedience of directions issued by the Apex Court in terms of order dated 18.12.1998 [(1999) 2 SCC 91]. All these applications/petitions came up for consideration before the Apex Court and vide its order dated 24.3.1999, contempt petition were closed with a direction to the management to pay compensation of Rs.30,000/- each to the workmen. It stood clarified that wages payable to the workmen from the date of closure upto 9.4.1999, together with shifting bonus of one year wages plus Rs.500/- towards expense for journey to Baddi, shall be paid to each of the employees who had exercised their option of joining at Baddi.

6. Workmen still felt that the management had failed to comply with the orders/ judgments passed by the Apex Court and as such they filed another set of contempt petition before the Apex Court, which after hearing were dismissed vide order dated 25.11.1999 (in terms of the following order:-

> *"Having gone through the assertions made in the application, we are not persuaded to accept the submission of the learned counsel that there has been any deliberate violation of the court's order dated 8.7.1996 as clarified by order dated 4.12.1996. In that view of the matter, the question of initiating contempt proceedings does not arise. This I.A. is accordingly dismissed."*

7. Despite the same, thereafter workmen through Kapra Mazdoor Lal Jhanda Union, Baddi (referred to as the "Union") got served notice dated 31.1.2000 to the management raising 15 demands. A specific notice for strike dated 10.6.2000 under Sections 22 and 23 of the Industrial Disputes Act, 1947 was also got issued to the Management by workmen through the same Union.

8. The appropriate Government decided to refer the matter for adjudication of the disputes by making the following reference under Section 10 of the Industrial Disputes Act:-

> *"Whether the demand raised by Kapra Mazdoor Lal Jhanda Union (CITU) (Un-registered) Birla Mills, Sai Road Baddi, District Solan, H.P. with the management of M/s Birla Textile Mills, Sai Road Baddi District Solan, H.P. vide their demand charter dated 10.6.2000 read with the demand charter dated 31.1.2000 (copies enclosed) are genuine and justified. If yes, which of their demands should be accepted and from which date?"*

9. The aforesaid reference was answered against the workmen by the Labour Court, Shimla, in terms of award dated 17.1.2006, passed in Ref. No. 129 of 2000, titled as Kapra Mazdoor Lal Jhanda Union vs. M/s Birla Textile Mills. In these proceedings, workmen restricted their claim only with regard to demands No.1, 2 and 10 and the remaining demands were not pressed during adjudication of these proceedings. These demands read as under:-

> *"1. That the decision of the Hon'ble Supreme Court contains clear directions that on transfer of the industry from Delhi to Baddi, H.P., there shall be no change in the terms and conditions of services of workers. It is regretted that you have violated the decision of Apex Court and you are deducting the*

changeable dearness allowance from the salary of all the workers arbitrarily for the past one year which is about 1100-1200 Rupees per month per worker. Hence we demand that dearness allowance may be made applicable and the amount deducted so far may be paid without delay.

2. That illegal and unjustified deduction of 8-8 days wages from the salary of August and September, of the workers may be paid.

10. That the leave of the workers, which is curtailed may be restored"

10. Significantly, the Union challenged the award passed by the Labour Court directly before the Apex Court by way of Special Leave to Appeal (C) No. 16459 of 2006. However, even this petition was dismissed as withdrawn as is evident from the order dated 19.10.2006, which reads as under:

"Learned counsel for the petitioner wants to withdraw the petition. The special leave petition is, accordingly, dismissed as withdrawn."

11. Out of 250 members of the Union, 70 members filed as many as 14 petitions before this Court in their individual capacity and the same was allowed by the learned Single Judge of this Court on 7.5.2008. But the said decision was challenged in a bunch of LPAs filed on behalf of the respondent, the lead being, LPA No. 69 of 2008 titled M/s Birla Textiles Mills vs. Sh. Kalp Nath and others.

12. During the course of LPAs, the learned Division Bench of this Court did not find it necessary to go into the contentions raised in these appeals and passed the following orders:

"24. Considering the various interim orders which were passed in these appeals, the stand now taken by the management, specifically restricting it to the original writ petitioners before us, the affidavits placed on record and the nature of the orders, which we now propose to finally pass, leaving the questions of law open, we do not find it necessary to go into the contentions raised in these appeals.

25. On 15.10.2011, this Court passed the following order:-

"The undisputed factual position shows that the appellant industrial unit in Delhi was closed in November, 1996 and it was relocated and reopened in Baddi in Himachal Pradesh in March, 1999. We are informed that for the interregnum workers were paid their eligible wages as payable in Delhi, though it is disputed. Going through the evidence tendered before the Labour Court there appears to be a factual dispute as to whether the variable Dearness Allowance as prevalent in Delhi up to November, 1999 was also paid or not. The Dearness Allowance is varied according to the price index and it takes normally some time to issue appropriate notification showing the percentage of increase. To this extent we feel that there has to be some clarification from the management. There will be a direction to the appellant(s) to file a statement showing the increase in the variable Dearness Allowance in Delhi, if any, between 1996 to March, 1999, be it notified before 1999 or thereafter. It shall also be clarified in the statement as to whether the same was paid to the workers who were relocated in March, 1999 in H.P., up to March, 1999. Appellant(s) are also free to state any other clarification in this regard which is available to them in the statement. Post on 29.10.2011, at 9.30 a.m."

13. Now, the petitioners, who had earlier not assailed the award dated 17.01.2006 passed by the learned Labour Court, have filed the instant petition for setting aside the award and granting the same benefits as were granted by this Court to the workers as per the judgment passed in LPA No. 69 of 2008.

14. According to the respondent, the judgment passed by this Court is in *personam* and, therefore, the benefit thereunder cannot be extended to the petitioners, who were *fence-sitters.*

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

16. The normal rule is that when a particular set of employees is given relief by Court, all other identically situated persons should be treated alike by extending same benefit since not doing so would amount to discrimination and be violative of Article 14 of the Constitution of India. However, this normal rule is subject to well-recognised exceptions in form of laches, delays and acquiescence which would be valid grounds to dismiss their claim. But the said exception would not apply to those cases where judgment pronounced by Court was judgment in rem with intention to benefit all similarly situated persons irrespective of whether they had approached Court or not. In such situation, obligation is cast upon authorities themselves to extend benefit to all similarly situated persons. But where judgment was in personam, those who intend to get benefit of said judgment must satisfy court that their petition does not suffer from either laches, delays or acquiescence.

17. The law in the subject has been lucidly expounded by the Hon'ble Supreme Court in ***State of Uttar Pradesh and others*** vs. ***Arvind Kumar Srivastava and others (2015) 1 SCC 347,***wherein it was observed as under:

> *"13. In State of Karnataka vs. C. Lalitha (2006) 2 SCC 747**,** which is the next case relied upon by the learned counsel for the respondents, our attention was drawn to the following passage from the said judgment: (SCC p. 756, para 29)*
>
> > *"29. Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I post but the direction to create a supernumerary post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."*
>
> *13.1. We have to understand the context in which the aforesaid observations came to be made. That was a case where the order passed in the first round of litigation between the same parties came up for construction and its effect. The background in which the issue arose was that an amendment made in the reservation policy of the State was challenged in <u>N.T. Devin Katti v. Karnataka Public Service Commission</u> (1990) 3 SCC 157. In that judgment, this Court had declared that the revised reservation policy was not applicable to the*

selections initiated prior thereto. It resulted in the consequential direction to the State Government to appoint N.T. Devin Katti (appellant in that case) on the post of Tehsildar with retrospective effect. At the same time, it was also made clear that for the purposes of seniority such persons would have to be placed below the last candidates appointed in the year 1976 and they would also be not entitled to any back wages. Insofar as, respondent C. Lalitha is concerned, on the basis of revised reservation policy, she was appointed as Tehsildar.

13.2. After the rendition of the aforesaid judgment in N.T. Devin Katti's case (supra), she approached the Karnataka Administrative Tribunal by filing an OA claiming appointment as Assistant Commissioner. The Tribunal dismissed the OA. However, her appeal against the order of the Tribunal was allowed by this Court vide orders dated March 15, 1994, taking note of the fact that she was selected and shown in the first list, which was upheld by the Court in the case of N.T. Devin Katti (supra). Since she had already been promoted to Class I Post of Assistant Commissioner by then, for her appointment the Court directed that if no vacancies are available, the State Government will create a supernumerary post and for the purpose of seniority, she had to be placed below the last candidate appointed in the year 1976 and was not entitled to any back wages. It is clear from these directions that her appeal was allowed giving same directions as given in N.T. Devin Katti (supra). It so happened that though her name was in the first list, which was upheld in N.T. Devin Katti's case (supra), her rank was little below and there were few persons above her. As per her rank in the general merit Category I posts, after taking the opinion of the Public Service Commission, it was decided by the Government to consider her for the post of Assistant Controller of Accounts , a Category I Post, as the marks secured by her were below the marks secured by the candidates selected as Assistant Controller of Accounts. She refused to accept the said post and approached the Tribunal again. The Tribunal dismissed the OA filed by her. Against that order of the Tribunal she approached the Karnataka High Court, which allowed the writ petition directing the State to implement order dated March 15, 1994 which was passed by this Court in the earlier round.

13.3. Against this order of the High Court, the State preferred appeal and it is in this backdrop that effect of the earlier order dated March 15, 1994 came up for consideration. It was argued by the State that effect of the order dated March 15, 1994 was to relegate the parties to the same position as if the reservation policy was not amended and if so construed, the respondent having been placed in the supplementary list could not have been laid any claim for any post in the administrative service. It is this contention which was accepted by this Court noticing another crucial fact that there were many persons who were higher in the merit than the respondent and the effect of the earlier order passed by this Court could not have been to ignore the said merit list and give something to the respondent which was not admissible in law. The Court held that merit should be the sole criteria for selection of candidates and the earlier judgment was to be construed as if it had been rendered in accordance with law. While holding so, the Court also sited many case law to demonstrate that the judgments are not to be read as a statute. It is in the aforesaid context that observations are made in para 29, on which heavy reliance has been placed by the respondent.

13.4. When we understand the impact of the observations contextually, we find that again the issue at hand is totally different.

14. Next case in the line, on which the respondents rely, is Maharaj Krishna Bhatt & Anr. v. State of Jammu & Kashmir (2008) 9 SCC 24. In that case, the appellants and some other Constables approached the Chief Minister of the respondent State for relaxation of rules relating to 50% direct recruitment quota for appointment as Sub-Inspectors of Police (PSI). The Chief Minister's office in turn called for the Director General's recommendations, who recommended the name of one person only, namely, Hamidullah Dar. Hamidullah Dar was accordingly appointed as PSI with effect from April 01, 1987. Thereupon, other persons also approached the Court.

14.1. In the case of one Abdul Rashid Rather, the Single Judge of the High Court allowed his writ petition. The respondent State filed LPA which was dismissed, and subsequently, special leave petition was also dismissed by this Court. Consequently, Abdul Rashid Rather was also appointed as PSI. It would be pertinent to mention that the appellants in the said appeal, along with two others, had also filed the writ petition in the year 1987, which was disposed of on September 13, 1991 and a direction was issued to the Director General of Police to consider their cases for appointment to the post of PSI by relaxing of rules. Pursuant to the said directions, the Director General of Police considered and rejected the cases of the appellants for appointment without giving any reasons. These appellants initially filed the contempt petition, but thereafter preferred fresh writ petition being Writ Petition No. 3735 of 1997.

14.2. This writ petition of the appellants was pending when the orders of appointment came to be passed in the writ petition filed by Abdul Rashid Rather and on the basis of that judgment, Abdul Rashid Rather had been given the appointment with effect from April 01, 1987. In this scenario, when writ petition of the appellants came up for hearing before the Single Judge of the High Court, it was allowed vide judgment dated April 30, 2001 following the judgment in the case of Abdul Rashid Rather, which had been affirmed by this Court as well. However, the State filed appeal thereagainst and this appeal was allowed by the Division Bench of the High Court. Even the review petition filed by the appellants was dismissed by the Division Bench. Special Leave Petition was filed challenging the judgment of the Division Bench, which was the subject matter in the case of Maharaj Krishan Bhatt (supra). Leave was granted and ultimately appeal was allowed holding that the appellants were also entitled to the same treatment. While doing so, the Court made the following observations: (SCC p. 30, para 23)

> *"23. In fairness and in view of the fact that the decision in Abdul Rashid rather had attained finality, the State authorities ought to have gracefully accepted the decision by granting similar benefits to the present writ petitioners. It, however, challenged the order passed by the Single Judge. The Division Bench of the High Court ought to have dismissed the letters patent appeal by affirming the order of the Single Judge. The letters patent appeal, however, was allowed by the Division Bench and the judgment and order of the learned Single Judge was set aside. In our considered view, the order passed by the learned Single Judge was legal, proper and in furtherance of justice,*

equity and fairness in action. The said order, therefore, deserves to be restored."

14.3. No doubt, the Court extended the benefit of the decision in Abdul Rashid Rather's case to the appellants. However, what needs to be kept in mind is that these appellants had not taken out legal proceedings after the judgment in Abdul Rashid Rather's case. They had approached the Court well in time when Abdul Rashid Rather had also filed the petition.

15. The submission of learned counsel for the appellants, on the other hand, is that the respondents did not approach the Court earlier and acquiesced into the termination orders. Approaching the Court at such a belated stage, after the judgment in some other case, was clearly impermissible and such a petition should have been dismissed on the ground of laches and delays as well as acquiescence. It was submitted that in such circumstances this Court has taken consistent view to the effect that benefit of judgment in the other case should not be extended even if the persons in the two sets of cases were similarly situated. Mr. P.N. Misra, learned senior counsel appearing for the appellants, pointed out in this behalf that though the orders were passed by the appellants on June 22, 1987, the respondents have filed their claim petition before the Tribunal only in the year 1996, i.e. after a period of 9 years from the date of passing of the orders.

16. Mr. P.N. Misra drew our attention to the following observations in M/s. Rup Diamonds & Ors. v. Union of India & Ors. (1989) 2 SCC 356 (SCC p. 360, para 8):

"8. Apart altogether from the merits of the grounds for rejection – on which it cannot be aid that the mere rejection of the special leave petitions in the cases of M/s Ripal Kumar & Co., and M/s. H. Patel & Co., could, by itself, be construed as the imprematur of this Court on the correctness of the decisions sought to be appealed against – there is one more ground which basically sets the present case apart. Petitioner are re- agitating claims which they had not pursued for several years. Petitioners were not vigilant but were content to be dormant and chose to sit on the fence till somebody else's case came to be decided. Their case cannot be considered on the analogy of one where a law had been declared unconstitutional and void by a court, so as to enable persons to recover monies paid under the compulsion of a law later so declared void. There is also an unexplained, inordinate delay in preferring this writ petition which is brought after almost an year after the first rejection. From the orders in M/s Ripal Kumar & Co.'s case and M/s H. Patel & Co.'s case it is seen that in the former case the application for revalidation and endorsement was made on March 12, 1984 within four months of the date of the redemption certificate dated November 16, 1983 and in the latter case

> *the application for revalidation was filed on June 20, 1984 in about three months from the Redemption Certificate dated March 9, 1984."*

That case pertains to import facility for import of OGL items available under para 185(3) and (4) of Import – Export Policy, 1982-83 to export houses after discharging export obligation on advance/imprest licence. The petitioners had applied for, and were granted, this imprest licence for the import of uncut and unset diamonds with the obligation to fulfil certain export commitment for the export, out of India, of cut and polished diamonds of the FOB value, stipulated in each of the imprest licences. As per the petitioners, they have discharged their export obligation and, therefore, in terms of para 185(4) of the Import – Export policy, they were entitled to the facility for the import of OGL items. However, they sought revalidation four years after discharge of export obligation and five years after the expiry of the licence. This claim was rejected by the authorities on the ground of delay. Writ petition was filed in this Court one year after such rejection. In these circumstances, the Court dismissed the writ petition for approaching the Court belatedly and refused to follow the orders passed in another petitions by this Court, which was sought to be extended on the ground that the petitions were exactly similar to those petitions which were preferred in another case. No doubt, writ petition was dismissed on the ground of unexplained inordinate delay, but it would be necessary to observe that it was not a service matter. However, the principle of delay and laches would have some relevance for our purposes as well.

17. State of Karnataka & Ors. v. S.M. Kotrayya & Ors.(1996) 6 SCC 267 is, on the other hand, a service matter. Here, the respondents, while working as teachers in the Department of Education, availed of Leave Travel Concession (LTC) during the year 1981-82. But later it was found that they had never utilised the benefit of LTC but had drawn the amount and used it. Consequently, recovery was made in the year 1984-86. Some persons in similar cases challenged the recovery before the Administrative Tribunal which allowed their Applications in August 1989. On coming to know of the said decision, the respondents filed Applications in August 1989 before the Tribunal with an application to condone the delay. The Tribunal condoned the delay and allowed the OAs. Appeal against the said order was allowed by this Court holding that there was unexplained delay in approaching the Tribunal. The Court relied upon the Constitution Bench case in S.S. Rathore v. State of M.P. (1989) 4 SCC 582, which deals with the manner in which limitation is to be counted while approaching the Administrate Tribunal under the Administrative Tribunal Act, 1985. Here again, on the ground of delay, the Court refused to extend the benefit of judgment passed in respect of other similarly situated employees.

18. Both these judgments, along with some other judgments, were taken note of in U.P. Jal Nigam & Anr. v. Jaswant Singh & Anr. (2006) 11 SCC 464. That

was a case where the issue pertained to entitlement of the employees of U.P. Jal Nigam to continue in service up to the age of 60 years. In Harwindra Kumar v. Chief Engineer, Karmik (2005) 13 SCC 300 this Court had earlier held that these employees were in fact entitled to continue in service up to the age of 60 years. After the aforesaid decision, a spat of writ petitions came to be filed in the High Court by those who had retired long back. The question that arose for consideration was as to whether the employees who did not wake up to challenge their retirement orders, and accepted the same, and had collected their post retirement benefits as well, could be given relief in the light of the decision delivered in Harwindra Kumar (supra). The Court refused to extend the benefit applying the principle of delay and laches. It was held that an important factor in exercise of discretionary relief under Article 226 of the Constitution of India is laches and delay. When a person who is not vigilant of his rights and acquiesces into the situation, his writ petition cannot be heard after a couple of years on the ground that the same relief should be granted to him as was granted to the persons similarly situated who were vigilant about their rights and challenged their retirement. In para 7, the Court quoted from M/s. Rup Diamonds & Ors. (supra). In para 8, S.M. Kotrayya (supra) was taken note of.

19. Some other judgments on the same principle of laches and delays are taken note of in paras 9 to 11 which are as follows: (Jaswant Singh case, SCC pp. 469-70)

> *"9. Similarly in Jagdish Lal v. State of Haryana, (1997) 6 SCC 538, this Court reaffirmed the rule if a person chose to sit over the matter and then woke up after the decision of the court, then such person cannot stand to benefit. In that case it was observed as follows: (SCC p. 542)*
>
> *"The delay disentitles a party to discretionary relief under Article 226 or Article 32 of the Constitution. The appellants kept sleeping over their rights for long and woke up when they had the impetus from Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684. The appellants' desperate attempt to redo the seniority is not amenable to judicial review at this belated stage."*
>
> *10. In Union of India v. C.K. Dharagupta, (1997) 3 SCC 395, it was observed as follows: (SCC p.398, para 9)*
>
> *"9. We, however, clarify that in view of our finding that the judgment of the Tribunal in R.P. Joshi v. Union of India, OA No. 497 of 1986 decided on 17-3-1987, gives relief only to Joshi, the benefit of the said judgment of the Tribunal cannot be extended to any other person. The respondent C.K. Dharagupta (since retired) is seeking benefit of Joshi case. In view of our finding that the benefit of the judgment of the*

Tribunal dated 17-3- 1987 could only be given to Joshi and nobody else, even Dharagupta is not entitled to any relief."

11. In Govt. of W.B. v. Tarun K. Roy, (2004) 1 SCC 347, their Lordships considered delay as serious factor and have not granted relief. Therein it was observed as follows: (SCC pp. 359-60, para 34)

"34. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in State of W.B. v. Debdas Kumar, 1991 Supp (1) SCC 138. The plea of delay, which Mr. Krishnamani states, should be a ground for denying the relief to the other persons similarly situated would operate against the respondents. Furthermore, the other employees not being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found to be entitled thereto by a court of law."

20. The Court also quoted following passage from the Halsbury's Laws of England (para 911, p.395): (Jaswant Singh case, SCC pp. 470-71, para 12)

"12..... 'In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii)any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or whereby his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

21. Holding that the respondents had also acquiesced in accepting the retirements, the appeal of U.P. Jal Nigam was allowed with the following reasons: (Jaswant Singh case, SCC p.471, para 13)

> *"13. In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"*

18. It is on the basis of the aforesaid judgments that the Hon'ble Supreme Court thereafter summed up the legal principles as under:

> "22.1. *Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.*
>
> *22.2. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.*

22.3. However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma & Ors. v. Union of India (supra). On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence.

19. Similar reiteration of law can be found in number of judgments of this Court and some of which are as under:

1. *Raj Kumar vs. BSNL, 2017 (2) ILR (HP) 101.*
2. *H.P.University vs. Mohinder Pal and another, LPA No.87/2011, decided on 8.8.2016.*
3. *Karam Singh Pathania vs. State of H.P. and others, 2015 (6) ILR (HP) 350.*
4. *Sukh Dev Kumar and others vs. State of H.P. and others, 2016 Labour Industrial Cases 3011.*
5. *Amit Attri and others vs. Anil Verma and others, 2015 (2) SLC 846.*

20. Admittedly, the instant petition has been filed on September 12, 2012 assailing the award passed by Labour Court dated 17.01.2006 and seeking extension of similar benefits as flow out from the judgment passed in LPA No. 69 of 2008, decided on 27.4.2012 and having been filed belatedly, would normally be covered under principle 22.2 (supra) and the petition filed would be liable to be dismissed and the only exception where this petition can be saved from the rigors of delays, laches and acquiescence etc. would be in the event the case is covered under principle 22.3 (supra) casting a burden upon the petitioners to prove that the judgment pronounced by this Court in LPA No. 69 of 2008 was a judgment in rem with the intention to give benefit to all similarly situated persons, whether they approached the court or not. If however it is proved that the judgment was in personam then the benefit of the said judgment shall accrue only to the parties before the court and obviously then the benefit cannot be extended to the petitioners.

21. Unfortunately, the petitioners, save and except, claiming that the judgment in LPA No.69 of 2008 should have been applied qua all the similarly situated persons by the respondent, have not been able to show how the judgment passed by this Court in LPA is a judgment in rem. On the other hand, it is the specific case of the respondent that the

judgment in LPA was a judgment in rem and, therefore, the petitioners being *fence-sitters* cannot claim any benefit on the basis of said judgment.

22. The petitioners have not even cared to assail this position by filing rejoinder. Even otherwise the bare perusal of the judgment passed by this Court in LPA No.69 of 2008 (the relevant portion whereof quoted above) only goes to show that the judgment was in personam and not in rem so as to entitle the petitioners to claim any benefit on the basis of the said judgment.

23. Having said so, I find no merit in these writ petitions and the same are accordingly dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

New India Assurance Company Ltd. ....Appellant

Versus

Smt. Poonam Sood & others. ...Respondents

FAO No. 590/2018
Decided on:19.07.2019

Employees Compensation Act, 1923- Section 4– Liability of insurer- Extent of - Held, liability of insurer to indemnify award is only to extent of wages insured under terms of contract– Liability under award over and above that what is insured is to be satisfied by employer– Wages insured under insurance contract were Rs. 4000 p.m.– Liability of insurer can only be to extent of wages insured per month. (Para 5)

Case referred:

Jara Biswal & Ors. vs. branch manager, Iffco tokio General Insurance Company Ltd. & another, 2016 (11) SCC 201

For the appellant: Mr. B.M. Chauhan, Sr. Advocate with
Mr. Amit Himalvi, Advocate.

For the respondents: Mr. Suneel Mohan Goel, Advocate, for respondents No.1 to 5.
Mr. Paras Dhaulta, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J. (oral).

Challenge by the insurer in this appeal is to the award, dated 27.08.2018, passed by the learned Commissioner, Palampur, exercising power under the Employees Compensation Act, 1923, whereby appellant/insurer has been ordered to pay Rs.4,52,172.50/- as compensation alongwith interest @ 12% per annum w.e.f. 12.11.2014, till it's actual realization to the claimants/respondents No.1 to 5.

2. **The insurer in the present appeal, has challenged the impugned award, primarily on the grounds:-**

2(i)Deceased Sh. Ashwani Kumar Sood, did not suffer fatal injuries during the course of his employment. Hence, the insurer could not have been directed to satisfy the liability of paying the awarded amount to the claimants.

2(ii) In any case, in terms of insurance policy, the monthly wages insured by the employer in the instant case are upto Rs.4000/-. Whereas, the award has been passed, taking the monthly salary of the deceased at Rs. 6500/- per month, and liability of insurer to pay the compensation has been calculated by treating the insured wages as Rs. 6500/- per month, which is erroneous being contrary to Insurance Policy.

3. **Case:-** The claimants in the instant case are widow, children and mother of late Sh. Ashwani Kumar Sood. The case as set up by the claimants is that deceased Ashwani Kumar Sood, was employed by respondent No.6, M/s B.K. Enterprises, w.e.f. 28.12.2005. He was sent by his employer/respondent No.6 on official duty on 12.10.2014, from Suka Bag to Palampur for reconciling the accounts of the firm. While going there on scooty with his son as pillion rider, neck of Sh. Ashwani Kumar was struck by a loose rope of truck coming from opposite side near Banuri. As a result of this accident, he suffered fatal injuries and died on 12.10.2014. Notice was served by the brother of the deceased upon the insurer on 12.10.2014. Failing to get any compensation, claim peition was preferred under the Employees Compensation Act, 1923 (EC Act for short), which came to be allowed vide impugned order.

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

5 (i) **Choosing the remedy**:-

Learned counsel for the appellants, has contended that the claimants/respondents No.1 to 5, ought to have filed claim petition under Section 166 of the Motor Vehicles Act, instead of preferring present petition under the Employees Compensation Act. It is the prerogative of the claimants to opt for choosing the remedies available to them. It is not in dispute that filing of petition under EC Act was also one of the remedies available to the claimants.

5(ii) Learned counsel for respondents No.1 to 5, has also given a reasonable explanation, of the accident being a hit and run case with untraced vehicle, for resorting to remedy under EC Act instead of the one available under the Motor Vehicles Act. Therefore, this objection, which was not even taken in the learned Tribunal below, sans merit and is rejected.

5(iii) **Whether death was caused during the course of employment or not:-**

Sh. B.M. Chauhan, learned Senior Counsel for the appellant, has vehemently contended that deceased did not suffer fatal injuries during the course of his employment and therefore, the impugned award fastening the liability to pay compensation upon the insurer, is bad in eyes of law. In support of his contention, learned Senior Counsel for the appellant, has drawn attention to following:-

5(iii)(a) The fateful day i.e. 12.10.2014, was a Sunday. It being a holiday, the deceased could not be expected to be discharging his duty on a Sunday.

5(iii)(b) Deceased had met with an accident while riding a scooty with his son as a pillion rider. Therefore, the necessary inference can be drawn that he was not travelling in discharge of his duties.

5(iii)(c) The attendance register of employees Ext.R-1 to R-10, reflects that deceased used to be on holiday on every Sunday and that it was only on 12.10.2014, wherein, his presence has been marked.

5(iv) Per contra, Sh. Sunil Mohan Goel, learned counsel for the respondent supported the impugned award and has argued that Sh. Ashwani Kumar Sood, had died during the course of his employment.

5(v) It would be appropriate to refer to a decision of the Hon'ble Apex Court in ***2016 (11) SCC 201*** titled ***Jara Biswal & Ors. vs. branch manager, Iffco tokio General Insurance Company Ltd. & another:***

> ***"18*** *The E.C. Act is a welfare legislation enacted to secure compensation to the poor workmen who suffer from injuries at their place of work. This becomes clear from a perusal of the preamble of the Act which reads as under:*
>
> *"An Act to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident."*
>
> *This further becomes clear from a perusal of the Statement of Objects and Reasons, which reads as under:*
>
> > *"……The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, alongwith the comparative poverty of the workmen themselves, renders it advisable that they should be protected, as far as possible, from hardship arising from accidents.*
> >
> > *An additional advantage of legislation of this type is that by increasing the importance for the employer of adequate safety devices, it reduces the number of accidents to workmen in a manner that cannot be achieved by official inspection. Further, the encouragement given to employers to provide adequate medical treatment for their workmen should mitigate the effects to such accidents as do occur. The benefits so conferred on the workman added to the increased sense of security which he will enjoy, should render industrial life more attractive and thus increase the available supply of labour. At the same time, a corresponding increase in the efficiency of the average workman may be expected."*
> >
> > *(emphasis laid by this Court) Thus, the E.C. Act is a social welfare legislation meant to benefit the workers and their dependents in case of death of workman due to accident caused during and in the course of employment should be construed as such.*
> >
> > *Section 3 of the E.C. Act provides for employer's liability for compensation and reads as:*
> >
> > *" 3 (1) If personal injury is caused to a workman by accident arising out of and in the course of his employment his employer shall be liable to pay compensation in accordance with the provisions of this Chapter" (emphasis laid by this Court)*

*"**19.** The liability of the employer, thus, arises, when the workman sustains injuries in an accident which arises out of and in the course of his employment. In the case of **Regional Director, E.S.I. Corporation & Anr. v. Francis De Costa & Anr**., a Three Judge Bench of this Court held as under:*

"In the case of Dover Navigation Company Limited v. Isabella Craig 1940 A.C. 190, it was observed by Lord Wright that-

Nothing could be simpler than the words "arising out of and in the course of the employment." It is clear that there are two conditions to be fulfilled. What arises "in the course of the employment is to be distinguished from what arises "out of the employment." The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment, that is directly or indirectly engaged on what he is employed to do, gives a claim to compensation unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified.

Although the facts of this case are quite dissimilar, the principles laid down in this case, are instructive and should be borne in mind. In order to succeed, it has to be proved by the employee that (1) there was an accident, (2) the accident had a causal connection with the employment and (3) the accident must have been suffered in course of employment."

5(vi) On the basis of the pleadings and evidence on record; there can be no escape from the conclusion that deceased Sh. Ashwani Kumar Sood was an employee of respondent No.6, when he met with the fatal accident on 12.10.2014. The employer, respondent No.1, was though represented by his learned counsel, however, he did not contest the case. No reply was filed. Only document Ext. RA was relied by the employer. Deceased Sh. Ashwani Kumar Sood, had died during the course of his employment. This fact is amply clear from the statement of RW-1, his wife Smt. Poonam Sood; the certificate Mark-X-2 of the employer and the statement of RW-1, Sh. Amar Dass, the manager of the employer, who was brought in the witness box by the insurer itself:-

5(vi)(a) Smt. Poonam Sood, wife of deceased Sh. Ashwani Kumar Sood, while appearing as PW-3, has denied that her husband used to have holiday on Sunday. She has further denied that her husband on the fateful day was going for his personal work. It is her categorical statement that her husband on the day of accident, though a holiday being Sunday, was going to Palampur in respect of the work of reconciling the accounts of Petrol Pump/ firm of respondent No.6.

5(vi)(b) Smt. Poonam Sood, as PW-3, has also amongst other documents, produced Ext. R-A (earlier marked as X-2), which is a certificate issued by the employer, respondent No.6, to the effect that late Sh. Ashwani Kumar Sood was working as a manager with them since 28th December, 2005. It has been certified therein that he met with an accident on 12.10.2014 while on business tour of the organization.

5(vi)(c) Sh. Amar Dass, RW-1, was brought in the witness box by the insurer as its witness. This witness is working as manager of the employer, respondent No.6, w.e.f. 2015 and as per his statement in cross-examination, he had been employed in place of deceased Ashwani Kumar Sood. In his examination-in-Chief, he has produced the attendance register

of late Sh. Ashwani Kumar Sood (referred to earlier), where the deceased was shown to be on duty on 12.10.2014. This witness has further deposed that deceased Sh. Ashwani Kumar Sood used to have holiday on Sunday, yet, he has further elaborated that irrespective of the day being holiday or not, the employees were to discharge their duties even on holidays either in case of the12 reconciling the accounts or in case of arrival of the tanker on a holiday. Thus, even on Sunday, they may have to go to Palampur for reconciling the accounts of the Petrol Pump, for which, they are paid extra.

5(vi)(d) The statement of RW-1, clinches the issue in respect of the deceased being on official duty on Sunday, i.e. on 12.10.2014, while he met with the fatal accident. This witness as observed above, has categorically submitted that workers, especially, those who were involved in reconciling of the accounts, had to be on official duties even on holidays and the accounts had to be reconciled by taking the documents to Palampur. It is this witness who has produced the attendance register Ext.R-1 to R-10, wherein, presence of deceased Sh. Ashwani Kumar Sood, has been marked on 12.10.2014.

5(vi) (e) Ext. R-A, is the certificate issued by the employer to the effect that deceased was on duty on 12.10.2014.

Hence, learned Commissioner while exercising its powers under the Employees Compensation Act, has not committed any error in holding that deceased Sh. Ashwani Kumar Sood, had died while discharging his official duty on 12.10.2014.

5 (vii) **<u>Wages of deceased</u>:-**

Learned Senior Counsel has disputed the monthly wages of deceased calculated at Rs. 6500/- per month.

It is borne out from the record that monthly wages of deceased Sh. Ashwani Kumar were Rs.6500/- per month:-

i) It has been so stated by Smt. Poonam Sood, wife of Sh. Ashwani Kumar Sood, in her examination-in-chief as well as in cross-examination;

ii) The present appeal does not specifically disputes the wages of deceased Sh. Ashwani Kumar as Rs. 6500/- per month. Though, in Paragraph-4 of the grounds of instant appeal, an objection has been taken that the learned Commissioner erred in taking the monthly salary of the deceased at Rs. 6500/- for the purpose of calculating the compensation, however, reading of the entire para, makes it clear that this objection has been taken in respect to the maximum cap fixed by the Insurance Company for covering the wages at Rs.4000/- per month, and not for disputing the actual wages of deceased in the instant case, Rs. 6500/-per month. The wages of deceased @ Rs. 6500/- per month were not disputed by the insurer. In any case, Paragraph 5 of the claim petition, puts the wages of deceased Sh. Ashwani Kumar Sood, to Rs. 6500/- per month. The fact has not been controverted by the employer. Even though, the present appellant disputes the wages, yet, the employer having not disputed this fact, therefore, wages of the deceased have to be taken as Rs.6500/- per month.

Therefore, the monthly wages of deceased Sh. Ashwani Kumar Sood, have rightly been taken as Rs. 6500/- per month, by learned Commissioner below.

Extent of wages covered under Insurance Policy:-

5 (vii) (a). The contention of learned Sr. Counsel, for the appellant, is that in terms of Insurance Policy Ext.R-X, the maximum insured monthly wages are upto Rs. 4000/-, therefore, in any case, the liability of the insurer will only be for the wages up to Rs. 4000/- and not for Rs.6500/- per month. Learned Commissioner has erroneously treated entire monthly wages of deceased i.e. Rs.6500/- as wages insured by employer and fastened liability upon the insurer.

5 (vii)(b). As against the above contention, learned counsel for claimants contended that in terms of amendment carried out in Sub-Section (1B) of Section 4 of the Employee's Compensation Act on 31.05.2010, the statutory limit of cap on wages, has been raised from Rs.4000/- to Rs. 8000/- per month, therefore, learned commissioner,rightly treated Rs. 6500/- per month as the wages insured by the insurer and determined the liability accordingly.

5 (vii)(c). The Insurance Policy Ext. R-X, clearly points out that appellant/insurer and insured/employer had entered into contract of Insurance on 23.08.2014 whereby maximum wages insured were upto Rs.4000/- per month. Premium was paid by employer only on insured wages upto Rs.4000/- per month. Neither wages exceeding Rs. 4000/- per month were insured nor any premium for wages in excess of Rs. 4000/- per month was paid.

Therefore, even though, under the amended EC Act w.e.f. 31.05.2010, specified monthly wages have been enhanced to Rs. 8000/- per month, yet in the instant case, the wages insured under the terms of contract (Ext. R-X) were Rs. 4000/- per month and not Rs. 6500/- per month. Therefore, liability of the appellant/insurer is only to the extent of wages insured by it i.e. Rs. 4000/- per month. Liability on account of balance wages i.e. Rs.2500/- per month, has to fall on employer/respondent No.6, who has not disputed monthly wages of deceased @ Rs. 6500/- per month. Point is answered accordingly.

6. **Liability:-**

6(i) In terms of above discussion, the liability of appellant/insurer to satisfy the award in terms of Section 4 of EC Act, is calculated as:-

Rs.2000 (half of Rs. 4000) x 139.13 (relevant factor)= Rs.2,78,260/-

6(ii) In terms of above discussion, the liability of employer/respondent No.6, to satisfy the award in terms of Section 4 of EC Act, is calculated as:-

Rs.1250 (half of Rs.2500) x 139.13 (relevant factor)= Rs. 173912.5/-

Total: Rs. 4,52,172.50/-

6(iii) Interest payable on above determined liabilities will be as per impugned award.

7. In view of the above discussion, present appeal is partly allowed. Accordingly, the impugned award passed by learned Commissioner is modified to the extent indicated above.

The appeal is disposed of along with pending application(s), if any.

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

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

Cr. Appeal No. 690 of 2008
Reserved on: 16.07.2019
Decided on: 25.07.2019

Indian Penal Code, 1860 - Sections 279 and 337- Rash and negligent driving – Proof – Appeal against acquittal by State – Prosecution coming with case that accused by his rash driving caused head on collision resulting in injuries to complainant and other occupants of car – Held, prosecution case that after collision vehicle of accused stopped at 24 feet from place of collision , inherently improbable – Complainant got medically checked up after about four hours of accident – Inference can be drawn that complainant and other occupants were drunk and for that reason their medical examination was delayed – Spot position as reflected in site plan disturbed and reorganized to show occurrence of head on collision – Mechanical examination of vehicles by expert suspicious – Prosecution case extremely doubtful – Appeal dismissed. (Paras 10 & 11)

Cases referred:
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
T. Subramanian vs. State of Tamil Nadu, (2006) 1 SCC 401

For the appellant: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General.
For the respondent: Mr. Nimish Gupta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/State, laying challenge to judgment dated 26.07.2008, passed by learned Judicial Magistrate 1st Class, Joginder Nagar, District Mandi, H.P., in Police Challan No. 342-2 of 2003, whereby the accused/respondent (hereinafter referred to as “the accused”) was acquitted for the commission of the offences punishable under Sections 279 and 337 of Indian Penal Code, 1860 (hereinafter referred to as “IPC”).

2. The key facts necessary for adjudication of this appeal can tersely be summarized as under:

As per the prosecution story, on 07.09.2003, Shri Puran Chand (complainant), was coming to JoginderNagar from Padhar in his vehicle, i.e., Alto Car having registration No. HP29-1100 and three more occupants were sitting in the said vehicle. At

place Himgallu, near Urla on Mandi-Pathankot Highway, Jitender Kumar (accused) was driving Mahindra Pickup, having registration No. HP02M-3514, on the wrong side and in a rash and negligent manner. The accused rammed his vehicle with the vehicle of the complainant and in the said accident both complainant and the accused sustained injuries and the vehicle of the complainant was damaged. On the telephonic information by the complainant, police entered a *rapat* and proceeded to the spot. Subsequently, FIR was registered and Investigating Officer drew the spot map and also recorded the statements of the witnesses. Police also got clicked the photographs of the spot of accident and both the vehicles were impounded. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as eleven witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he pleaded not guilty. In defence, the accused examined only witness.

4. The learned Trial Court, vide its judgment dated 26.07.2008 acquitted the accused under Sections 279 and 337 IPC, hence the present appeal is preferred by the appellant/State.

5. I have heard the learned Additional Advocate General for the State, learned counsel for the respondent and carefully gone through the records in detail.

6. Mr. Shiv Pal Manhans, learned Additional Advocate General, has argued that the learned Trial Court acquitted the accused without appreciating the evidence and law correctly and just on the basis of surmises and conjectures. He has further argued that the learned Trial Court did not appreciate the fact that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. He has argued that due to the rash and negligent driving of the accused the accident occurred, so the appeal be allowed, and the judgment of the learned Trial Court be set aside and the accused be convicted. On the other hand, Mr. Nimish Gupta, learned Counsel for the respondent/accused argued that the learned Trial Court rightly acquitted the accused, as the prosecution has miserably failed to prove the guilt of the accused. He has further argued that thee is no merit in the instant appeal and the same may kindly be dismissed, as the learned Trial Court rightly appreciated the facts and law.

7. In rebuttal, the learned Additional Advocate General, has argued that the evidence, which has come on record, clearly show that due to the rash and negligent driving of the accused the accident occurred. He has argued that after re-appreciating the evidence, which has come on record, the appeal be allowed and the accused be convicted.

8. In the instant case, the complainant and the occupants of the vehicle of the complainant, who were examined as PWs-1, 3, 5 and 10, respectively, supported the prosecution case and as per them the sole reason of the accident was the rash and negligent driving of the accused. PWs 3, 5 and 10, who were occupants sitting in the complainant's vehicle, were well known to the complainant and the complainant had affable relations with them. So, it is safe to hold that PWs 3, 5 and 10, being friendly with the complainant Rest of the prosecution witnesses are official witnesses.

9. The complainant, in his statement recorded under Section 154 Cr.P.C., specifically stated that he and all other occupants of his vehicle got injured in the alleged accident. PWs 3, 5 and 10, who were the occupants of the vehicle of the complainant, also deposed that they received injuries in the said accident, but surprisingly, except complainant none of the occupants of the vehicle of the complainant were medically examined. The prosecution has, in fact, failed to give any plausible explanation for not

getting medical examination conducted on the alleged injured occupants of the vehicle of the complainant. This makes the prosecution story doubtful, as the accused took the defence of faulty and partial investigation. The accused further took the defence that all the occupants of the complainant's vehicle, including the complainant, were drunk and due to the rash and negligent driving of the complainant the accident took place. Thus, it can be safely said that Investigating Officer did not deliberately get the occupants of the vehicles of the complainant medically examined. Further, as per the prosecution story, the alleged accident occurred at 3:45 p.m., but the complainant reached the hospital at 08:00 p.m. The distance between the spot of occurrence and the hospital is only 19 kms, so the complainant could have reached the hospital by 04:30 p.m. Therefore, this delay in reaching the hospital also seems deliberately, so as to cause disappearance of elements and symptoms of alcohol. In the wake of the above, the statement of the Medical Officer, who conducted the medical examination of the complainant assumes more significance. PW-9, Dr. Raj Kumar, could satisfactorily answer that whether the complainant was inebriated. PW-9 simply deposed that police did not ask him to opine whether the complaint was drunk or not. PW-9 also conducted the medical examination of the accused and he specifically deposed that he did not notice any smell of alcohol. From the statement of PW-9 and medical records, it is not discernible that what prevented PW-9, Dr. Raj Kumar, to make general observations qua the fact whether the complainant was drunk or not.

10. The accused also took the defence that after the accidence the complainant and his friends (occupants of the car) made to station his vehicle on the road as per their choice and also assaulted him. Understandably, the prosecution witnesses, including the Investigating Officer, in one voice denied that the accused was assaulted or he complained that he had been assaulted by the complainant and the occupants of the car. Admittedly, there was head on collision and the car was badly damaged, whereas the bumper of the vehicle of the accused was slightly pressed. The driver of the vehicle, in head on collision, bashes against the dashboard or windscreen of the vehicle and right driver's side of his body often received injures, as the driver sits on the right side of the vehicle. In the instant case, the complainant sustained injures on his right side, but the accused sustained injures on his left side. This aspect has to be seen with the alleged fact that there was head on collision of the vehicles and in that collision the accused should have sustained injures on his right side of the body, but the accused sustained injuries on his left side. So, this fortifies the defence of the accused that he was assaulted by the complainant and other occupants of his car after the accident. Be that as it may. The overall material, which has come on record, creates a doubt about the veracity of the prosecution story and makes it unbelievable.

11. PW-4, Shri Rajinder (Photogapher), deposed in the Court that he clicked some photographs depicting skid mark of the tires of the vehicles. This witness, also saw the photographs in the Court and specifically stated that no tire marks are shown in these photographs. No doubt, the tire marks would have clearly shown the position of the vehicles and the manner they collided, but for the reasons best known to the prosecution, the photographs showing the tire marks were withheld. Investigating Officer (PW-11) feigned ignorance to the photographs showing the tire marks. Thus, depositions of Photographer and Investigating Officer qua the photographs having tire marks also create a doubt qua the genuineness of the prosecution story. In fact, this Court could easily hold that that present is a case of partial investigation and it seems that police deliberately roped in the accused in the instant case. Further the available photographs clearly show that there was dent on the right side of the car, so there was no head on collision. Thus, it also seems that the vehicles had not collided in the manner as portrayed by the prosecution. The vehicles seem to have been intentionally parked in to take photographs and show the rash and negligent act of the

accused. The photographs show that after the accident the jeep went 24 feet ahead and the accident occurred in a sliding manner. Had the jeep hit the car head on, the accident could have resulted in major injuries to the occupants of the car and the jeep could not have travelled 24 feet more after the head on collision. Thus, all the above facts, only point out that in order to rope in the accused the police cooked the evidence and deliberately tried to portray that the accident was due to the rash and negligent driving of the accused.

12. The accused took the defence that the police did not conduct fair and impartial investigation and deliberately made him accused, whereas due to the fault of the complainant the accident took place. The complainant received serious injuries in the accident and despite that he remained on the spot for long and after four hours he went to the hospital. The complainant took active part in the investigation. The Investigating Officer called the photographer from Mandi, which is a distant place, and did not bother to call a photographer from Jogindernagar, which was near to the spot of accident. Photographer deposed that he was called on the same day from Mandi and he came on the request of National Insurance Company. So, it is not clear that who called the photographer on the spot.

13. The story of the prosecution further gets stained from the deposition of PW-7, HC Daya Ram, who mechanically examined both the vehicles, as the complainant specifically deposed that on the same day when the accident occurred he brought his vehicle, but PW-7, deposed that on 08.09.2003, i.e., on the subsequent day, he conducted mechanical examination of both the vehicles on the spot. Thus, the depositions of complainant and PW-7 further create doubt in the prosecution story.

14. As noticed above, there are many lacunae in the prosecution story and it seems that police tried hard to wrongfully rope in the accused in the instant case. No doubt the vehicle of the accused was involved in the alleged accident and the accused was driving the same, but in order to hold him guilty this Court has to see whether the accused was driving the vehicles in rash and negligent manner. The prosecution has failed to prove that it was the accused who caused the accident and he driving his vehicle rashly and negligently. So, after re-appreciating the evidence and law this Court finds that the prosecution could not establish the guilt of the accused and merely the accused could not be held guilty as there are possibly two views qua the guilt of the accused.

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. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***1. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***2. The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an***

appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

3. ***Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***

4. ***An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.***

5. ***If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."***

17. In view of the settled position of the law as discussed hereinabove and also the testimonies of the key prosecution witnesses, which are marred with contradictions and discrepancies, it would be more than safe to hold that the prosecution story is full of lacunae and doubts, so the prosecution could not cogently and convincingly establish the guilt of the accused. Thus, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Therefore, the findings of acquittal, as recorded by the learned Lower Appellate Court do not suffer from any infirmity. This Court sees no ground to overturn the findings of acquittal of the learned Trial Court.

18. The appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending miscellaneous application(s), if any, shall stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, CJ AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Ram Lal …….Petitioner.

Versus

State of HP and others …Respondents.

CWPNo. 921 of 2019.
Judgment reserved on 16.7.2019
Decided on: 25.7.2019

Himachal Pradesh Panchayati Raj Act, 1994 (Act) Section 122 (1)(c)- Encroachment over govt land – Disqualification to contest election of Panchayati Raj Institutions (PRIs') – Meaning and Scope – Encroachment by grandfather(s) of winning candidate – Effect – Election of petitioner set aside by SDO(C) and his appeal against that order dismissed by Commissioner on ground of encroachment over Govt. land– Petition against – Petitioner contending that he had separated from grandfather(s) and never shared encroached land with them and Section 122(1)(c) of Act had no applicability – Held, purpose of Section 122 (1)(c) of Act is to prevent encroacher and their progenies from contesting election, irrespective of whether progenies are severed from umbilical cord or not – Separation of petitioner from his grandfather(s) inconsequential - Act does not exempt persons living separately from applicability of Section 122 (1)(c). (Paras 30 to 34)

Himachal Pradesh Panchayati Raj Act, 1994 (Act) – Section 122 (1)(c) and (2) **Himachal Pradesh Land Revenue Act, 1954 (Revenue Act) -** Section 163 – Whether Authorized Officer under the Act, has jurisdiction to decide whether someone is encroacher over government land or not or there must be an order of Revenue Officer under Section 163 of Revenue Act declaring such a person as an encroacher over government land before he could be declared as ineligible to contest election ? Held, during election process, Authorized Officer has the jurisdiction to decide the question of disqualification of a candidate to contest election including question of his encroachment over Govt land- whereas Section 163 of Revenue Act simply deals with prevention and removal of encroachment over Govt. land and it has nothing to do with disqualification of person to contest election to panchayats (Para 25)

Cases referred:

Janabai vs. Additional Commissioner, 2018 (9) JT 217

Mehar Chand vs. Taro Devi and others, 2014 CC OnLine HP 3422

State of H.P. and others vs. Surinder Singh Banolta, (2006) 12 SCC 484

For the petitioner:	Mr. Shrawan Dogra, Sr. Advocate with M/s Harsh Kalta and Deven Khanna, Advocates.
For the respondents:	Mr. Ashok Sharma, Advocate General, with M/s J.K. Verma, Ashwani Sharma, Adarsh Sharma and Nand Lal Thakur, Addl. Advocate Generals for respondents/State.
	Mr. Surinder Prakash Sharma, Advocate, for respondent No.2.
	Mr. B.C. Negi, Sr. Advocate with Mr. P.P. Singh,Advocate, for respondent No.3.
	Mr. Sanket Sankhyan, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Aggrieved by the order of the Sub Divisional Officer (Civil) setting aside his election as member of the Block Development Committee and the order of the Deputy Commissioner confirming the same on appeal, the petitioner has come up with the above writ petition.

2. Heard Mr. Shrawan Dogra, learned Senior Counsel for the petitioner, Mr. Ashok Sharma, Advocate General, for the State, Mr. Surinder Prakash Sharm, learned counsel for respondent No.2, Mr. B.C. Negi, learned Senior Counsel for respondent No.3 and Sanket Sankhyan, learned counsel for respondent No.6.

3. In the elections held on 5.1.2016, the petitioner was elected as a member of the Block Development Committee, Ward Panvi, Tehsil Nichar, District Kinnaur. Challenging his election, the second respondent herein filed an Election Petition in Election Petition No. 4/2016 under Sections 122, 163 and 175 of the Himachal Pradesh Panchayati Raj Act, 1994 (hereinafter referred to as the 1994 Act). The only ground on which the election of the petitioner was challenged by the second respondent herein was that the petitioner had suffered a disqualification in terms of Section 122 (1) (c) of the 1994 Act, inasmuch as his grandfather had encroached upon a land belonging to the State Government. The Sub Divisional Officer (Civil),who is the Authorised Officer under the 1994 Act, after an elaborate inquiry, allowed the Election Petition and set aside the election of the petitioner on the ground that the petitioner's grandfather had admittedly encroached into a Government land.

4. Challenging the order of the Sub Divisional Officer (Civil), the petitioner filed a statutory appeal under Section 181 of the 1994 Act before the Deputy Commissioner. The Deputy Commissioner, Kinnaur, by a decision rendered on 8.4.2019, dismissed the appeal thereby confirming the order of the Original Authority. It is against these concurrent orders that the petitioner has come up with the above writ petition.

5. Before we record the grounds of challenge to the impugned orders, we are obliged to keep in mind the limited role that this Court has to play in a writ petition under Article 226 of the Constitution, especially when the challenge in the writ petition is to the orders of an Election Tribunal. Section 163 (1) of the 1994 Act enables any elector of a Panchayat to present an Election Petition challenging the election of any person, on one or more of the grounds specified in Section 175 (1). The Election Petition is to be presented to the "Authorized Officer." The contents of such petition are regulated by Section 164. The procedure to be followed by the Authorized Officer for inquiring into the election petition, is stipulated in Section 167. Sub-Section (2) of Section 167 makes the provisions of the Indian Evidence Act, 1872 applicable to the trial of an Election Petition subject to the provisions of the Act.

6. Section 175 (1) lists out four grounds on which an election may be declared to be void. Under Clause (a) of sub-Section (1) of Section 175 an election can be declared as void, if the Authorized Officer is of the opinion that on the date of his election, the elected person was not qualified or he was disqualified to be elected under the Act.

7. Section 122 (1) of the Act enlists several contingencies under which a person shall be disqualified for being chosen as an office bearer of a Panchayat. One of the contingencies stipulated in sub-Section (1) of Section 122 relates to encroachment upon any land belonging to the Government. This is traceable to Clause (c) of sub-Section (1) of Section 122. Section 122 (1)(c) together with the Explanation thereunder reads as follows:

> *"**122. Disqualifications** :-(1) A person shall be disqualified for being chosen as, and for being, an office bearer, of a Panchayat-*
>
> *(a) & (b)….. …….*
>
> *c) if he or any of his family member(s) has encroached upon any land belonging to, or taken on lease or requisitioned by or on behalf of, the State Government, a Municipality, a Panchayat or a Co-operative Society unless a period of six years has elapsed since the date on which he or any of his family*

member, as the case may be, is ejected therefrom or ceases to be the encroacher.

***Explanation**.- For the purpose of this clause the expression "family member" shall mean grandfather, grandmother, father, mother, spouse, son(s), unmarried daughter(s)"*

8. In fact Clause (c) of sub-Section (1) of Section 122 was made more elaborate by way of an amendment under Act No. 17 of 2005. The Explanation under Clause (c) which was originally restrictive, was amplified by a further amendment under Act No. 15 of 2015. Persons such as grand father and grand mother were brought within the definition of the expression "family member" under the Explanation to Clause (c), only by the Amendment Act No. 15 of 2015.

9. The cumulative effect of Section 122(1)(c), Section 175(1)(a) and Section 163(1) is that if a person was disqualified to be elected, his election is liable to be challenged by an elector on such a ground. The power to declare an election to be void is conferred upon the Authorized Officer. The expression "Authorized officer" is defined in Section 159(b) to mean the Officer Authorized under Section 161 to hear Election Petitions. Section 161 empowers three different officers, namely, the Sub Divisional Officer, the Deputy Commissioner and the Commissioner to hear and decide Election Petitions, respectively in the case of (i) Gram Panchayats and Panchayat Samitis (ii) members of Zila Parishads; and (iii) Chairman and Vice-Chairman of Zila Parishads. Section 181 provides for an appeal against the orders of the Authorized Officer (i) to the Deputy Commissioner, in case the order impugned was passed by the Sub Divisional Officer (ii) to the Divisional Commissioner in case the order impugned was passed by the Deputy Commissioner; and (iii) to the Financial Commissioner (Appeals), in case the order impugned was passed by the Divisional Commissioner.

10. Keeping in mind the broad Scheme of the 1994 Act, let us now come back to the facts of the present case. The election of the petitioner was challenged by the second respondent primarily on the ground that the petitioner's grandfather had encroached upon a Government land and that therefore, the petitioner had suffered disqualification in terms of Clause (c) of sub-Section (1) of Section 122, read with the Explanation thereunder. The second respondent had pleaded in his Election Petition specifically that two persons by name Sang Dass and Mal Sukh, both of whom are the grand fathers of the petitioner had admittedly encroached into the Government land comprised in khewat/Khatoni No. 115 min/335 khasra Nos. 312, 445, 509, 510, 520, 521, 947, 958 and 1196 kita 9 total measuring 00-57-36 hect., situated in Up-Muhal Panvi, Tehsil Nichar, District Kinnaur, HP and khewat No. 45/137, khasra Nos. 162, 163 and 165 kita 3, total measuring 00-30-51 hect., situated in Up Muhal Faktowar Dhar, Tehsil Nichar, District Kinnaur.

11. It is seen from the order of the Authorized Officer that the petitioner herein did not file a reply in the first instance to the Election Petition but filed a petition under Section 164(1)(c) and 165 of the Act for the dismissal of the petition. After nearly two years, the petitioner filed a reply to the main Election Petition. Interestingly, the stand taken by the petitioner before the Authorized Officer was that he had been living separately since 1991 and that since no proceedings for removal of encroachment were initiated against his grand father under the Himachal Pradesh Land Revenue Act, 1954 (hereinafter referred to as "the Revenue Act, 1954"), he cannot be said to have suffered a disqualification under Section 122(1)(c). In other words, the petitioner did not go before the Authorized Officer with a plea that his grand father never encroached upon any Government land. All that the petitioner stated was (i) that till his grand father is declared as an encroacher under Section 163 of the

Revenue Act, 1954 and an order of eviction passed under the Act, he cannot be taken to be disqualified; and (ii) that in any case he has been living separately from 1991 and hence the allegations of encroachment cannot be put against him.

12. Before the Authorized Officer, the second respondent herein who was the Election Petitioner, produced certain documents. They were, (i) the copy of application from Sang Dass and Mal Sukh for regularization of encroached land which was assigned an Unique No.T-480102 dated 10.8.2002 by the office of the Tehsildar Nichar (ii) the certificate issued by the Patwari Panvi indicating that there was an unauthorized occupation by Mal Sukh and Sang Dass, (iii) the Jamabandies indicating encroachment upon two Upmuhals, i.e. Panvi and Factowar Dhar; and (iv) the Pariwar Registers showing the relationship between Sang Dass and Mal Sukh on the one hand and the petitioner herein on the other hand (as common grand fathers under polyandry system)

13. The second respondent herein also examined five witnesses, two of whom were Patwaries and one Panchayat Secretary of Panvi. These witnesses spoke about the relationship between the petitioner and the encroachers. They also spoke about the land being Government land and the encroachment made by the two grand fathers of the petitioner.

14. Therefore, it was established before the Authorized Officer on evidence that the grand fathers of the petitioner had encroached upon the Government land. The initial onus of proving the disqualification suffered by the petitioner, was thus duly and properly discharged by the second respondent by adducing, both oral and documentary evidence.

15. Instead of demolishing or rebutting the evidence so produced by the Election Petitioner, the petitioner herein merely produced documents to show that he was living separately. This was despite the fact that the 1994 Act does not exempt those living separately, from the application of Section 122(1)(c).

16. Therefore, the Authorized Officer, on a due consideration of (i) the pleadings and; (ii) the oral and documentary evidence on record, came to the conclusion that the petitioner was disqualified. Accordingly, he set aside the election.

17. The Appellate Authority found that documents Ext. PW-2/A, Ext. PW-1/A and Ext. PW-1/B (Missal Kabza Najayaj) were duly brought on record as per procedure and that the very application of the grandfather of the petitioner for regularization made it an open and shut case. Therefore, he dismissed the appeal.

18. Keeping the above facts in mind, let us now come to the grounds of attack to the impugned orders. The grounds of challenge to the impugned orders are, (i) that the Authorized Officer nominated under Section 161 of the 1994 Act is not competent and does not have the jurisdiction to decide whether someone is an encroacher or not, as the task of deciding the question of encroachment and ordering the eviction is conferred upon some other authority under Section 163 of the Revenue Act, 1954 (ii) that since no proceedings were initiated against the grand father of the petitioner and no order of eviction was ever passed against him, under Section 163 of the Revenue Act, 1954, the petitioner cannot be said to have suffered a disqualification under Section 122(1)(c) of the 1994 Act, (iii) that in view of the decision of the Supreme Court in ***Janabai*** vs***. Additional Commissioner 2018 (9) JT 217,*** the petitioner should have been found to have shared the land with the encroacher, so as to invoke Section 122(1)(c); and (iv) that when the petitioner had specifically pleaded that he had separated in the year 1991 and that he was no more part of the same family, the Authorized Officer could not have invoked Section 122(1)(c) especially

in view of the judgment of this Court in ***Mehar Chand*** vs. ***Taro Devi and others 2014 CC OnLine HP 3422.***

19. We have carefully considered the above submissions.

20. The first ground of attack to the impugned order is that the Authorized Officer nominated under Section 161 of the 1994 Act is not competent and does not have the jurisdiction to decide whether someone is an encroacher or not, as the task of deciding the question of encroachment and ordering the eviction is conferred upon some other authority under Section 163 of the Revenue Act, 1954.

21. But the above contention is completely misconceived. Section 122 (1) not only enlists the types of disqualifications that a person may suffer, but also provides a clue in sub-Section (2) of Section 122 as to who is competent to decide the question of disqualification. Section 122 (2) of the 1994 Act read as follows:

> ***"Section 122(2)*** *The question whether a person is or has become subject to any of the disqualifications under sub-section (1), shall after giving an opportunity to the person concerned of being heard, be decided-*
>
> *(i) if such question arises during the process of an election, by an officer as may be authorized in this behalf by the State Government, in consultation with the State Election Commission; and*
>
> *(ii) if such question arises after the election process is over, by the Deputy Commissioner."*

22. In the case on hand, the second respondent who filed the Election Petition, made a specific averment in his petition that even at the time of scrutiny of nomination papers he raised the question of disqualification of the petitioner herein and that the Assistant Returning Officer (5th respondent to the Election Petition) did not hear the objections. Once the Assistant Returning Officer failed to consider the objections relating to the validity of a nomination filed by a candidate, the only remedy open to the objector is to file an Election Petition. What was omitted to be considered by a Returning Officer can certainly be considered by an Election Tribunal.

23. If the Authorities constituted under the Revenue Act 1954 alone are competent to decide the question of encroachment, Section 122 (2) of the 1994 Act could not have conferred powers upon an Officer authorized by the State Government to consider the question of disqualification.

24. Once it is found that Section 122 (2) of the 1994 Act confers power upon an Officer authorized by the State Government to decide the question of disqualification that arises during the process of an election, there is no use in the petitioner contending that the authorities constituted under the Revenue Act, 1954 alone could decide the question of encroachment.

25. Section 163 of the Revenue Act, 1954 speaks only about the removal of encroachment and prevention of encroachment. It has nothing to do with disqualification of a person to contest elections. If and when a proceeding is initiated under the Revenue Act, 1954, then the Officer conferred with the power under Section 163 alone can order eviction. But when a question of disqualification in terms of Section 122(1)(c) arises, the Officer authorized by the Government under section 122(2) of the 1994 Act alone will be empowered to decide the question. Upon his failure to do so, the Election Tribunal will take care of the same. Therefore, the first ground of attack raised by the learned Senior Counsel for the petitioner to the impugned order is liable to be rejected outright.

26. The second ground of attack to the impugned orders is that since no proceedings were initiated against the grandfather of the petitioner and since no order of eviction was ever passed against him under Section 163 of the Revenue Act, 1954, the petitioner cannot be said to have suffered a disqualification under Section 122(1)(c) of the 1994 Act.

27. But the above contention over looks the nature of the language employed in Section 122(1)(c). Section 122 (1)(c) does not speak about a person declared as an encroacher under the relevant Statute. It merely speaks about a person who has encroached upon a Government land.

28. Interestingly, Section 122(1)(c) also carves out an exception to the Rule. If a person who was once upon a time an encroacher, had been ejected from the land or had ceased to be an encroacher and a period of six years had elapsed from the date of the happening of the said event, the disqualification under Clause (c) will not arise. Therefore, it is only in cases where a person claims to fall under the exception to the Rule that an order for the removal of encroachment under the Revenue Act, 1954 will be of relevance. We must remember that while talking about certain other types of disqualifications, Section 122(1) recognizes the role played by the other authorities. For instance while talking about certain offences, Section 122 (1) speaks only about the conviction by a Criminal Court. Therefore, wherever the nature of the disqualification is such that the same cannot be decided by an Officer authorized under sub-section (2) of Section 122, sub-section (1) has inbuilt safe guards.

29. Hence the contention that until proceedings for eviction are initiated and declaration is made, against the grandfather of the petitioner, the petitioner cannot be said to be disqualified, is completely contrary to the Scheme of the Act.

30. The third ground of attack to the impugned orders is that in view of the decision of the Supreme Court in ***Janabai*** vs***. Additional Commissioner 2018 (9) JT 217,*** the petitioner should have been found to have shared the land with the encroacher, so as to invoke Section 122 (1) (c).

31. We do not know how the decision of the Supreme Court in ***Janabai*** would go to the rescue of the petitioner. In fact, ***Janabai*** is a case where the encroachment was by the father-in-law and the husband of the elected member of the Gram Panchayat. Section 14 of the Maharashtra Village Panchayat Act did not employ the same language as employed in Clause (c) of sub-Section (1) of Section 122 of the 1994 Act. A provision similar to the Explanation under Section 122(1)(c) was also not there in the Maharashtra Act. Despite this, the Supreme Court, by a purposive interpretation, made the elected member responsible for the encroachment made by a family member, on the ground that she shared the encroached property by residing there.

32. In other words even while interpreting a Statute which did not make the encroachment by family members as a disqualification, the Supreme Court read into the provisions of such statute, such a disqualification by invoking the theory of purposive interpretation. Therefore, more than supporting the case of the petitioner, the decision in ***Janabai*** supports the case of the respondent. Hence third ground of attack is also liable to be rejected.

33. The last ground of attack is on the basis of the decision of this Court in ***Mehar Chand vs. Taro Devi and others.*** The said decision was rendered before the amendment of the Explanation to Section 122 (1) (c). Still this Court held that a widow was part of the family. This Court did not lay down any rule in **Mehar Chand** that unless the son

or grand son who contested the election is found to be part of the family, the disqualification under Section 122(1)(c) will not apply. To hold that the contesting member should be part of the same joint family or co-parcenery, along with the encroacher, so as to attract the disqualification, would be to do violence to the plain language of Section 122(1)(c). This provision does not concern itself with a family feud or united or divided families. The provision under Section 122 (1) (c) is to prevent encroachers and their progenies from contesting an election, irrespective of whether the progenies are severed from the umbilical cord or not. Therefore, the last ground of attack should also fail.

34. Relying upon the decision of the Supreme court in ***State of H.P. and others*** vs. ***Surinder Singh Banolta (2006) 12 SCC 484,*** it was contended by the learned Senior Counsel for the petitioner that a declaration that a person is an encroacher, is *sine qua non* for attributing the disqualification. But we do not think so. Section 122 (1) (c) merely speaks about encroachment and not about either the removal of encroachment or the declaration of encroachment. They are extraneous to Section 122 (1) (c). The language employed in clause (c) of sub-section (1) of section 122 is "has encroached upon". The section does not use the expression "has been declared to be an encroacher".

35. Therefore, in fine, we find that all the grounds of attack to the impugned orders are wholly unsustainable. Two authorities have reached concurrent findings on a question of fact. This question of fact has clearly led to the legal conclusion that the petitioner is disqualified. We find no scope for any interference with the orders of these quasi judicial authorities under Article 226 of the Constitution. Hence the writ petition is dismissed, along with pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, CJ AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Aditya Nath Sharma and another ....Petitioners.
Versus
State of HP and others ...Respondents.

CWPNo. 1323 of 2019.
Judgment reserved on 11.7.2019
Decided on: 25.7.2019

Himachal Pradesh Liquor Licence Rules, 1986– Rule 19-A– Para 12.39 (c) of Announcements for Allotment of Retail Excise Vends by Renewal for year 2019 -2020– Grant of Form L-10 BB Licence- Requirement of having premises of stipulated area– Applicability- Held, excise policy requiring minimum floor area with applicant for grant of from L-10 BB licence has been made applicable for financial year 2019 -2020 starting from 1.4.2020 – It has no applicability to existing licences – Licence to respondent No. 5 granted on 15.3.2019 was not covered by said policy – Grant of licence cannot be availed on ground of licences was not having requisite floor area. (Para 29)

Himachal Pradesh Liquor Licence Rules, 1986 – Notification 7-832/2018 – EXN – 10188 – dated 11.4.2012 – Grant of Form L -10 BB licence – Requirement of applicant having turnover of more than 2 crore in a financial year 2019-2020- Held, this requirement is for grant of licence and not for renewal of existing licence. (Para 31)

Himachal Pradesh Liquor Licence Rules, 1986 – Grant of Form L-10-BB licence – Requirement of maintaining distance from other liquor vends having Form L-2 licence– Held, there is no rule prohibiting grant of Form L-10 BB licence for a departmental store located at particular distance from L-2 vend. (Para 35)

For the petitioners: Mr. Karan Singh Kanwar, Advocate.

For the respondents: Mr. Ajay Vaidya, Senior Additional Advocate General with M/s J.K. Verma, Ritta Goswami, Adarsh Sharma and Ashwani K. Sharma, Additional Advocate General for respondents No. 1 to 4.
Mr. Anup Rattan, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging the grant of a L-10 BB license dated 15.3.2019 in favour of the 5th respondent and the renewal of the same by proceedings dated 12.6.2019, the petitioner who holds a L-2 licensee to vend Indian Made Foreign Liquor has come up with the above writ petition.

2. Heard Mr. Karan Singh Kanwar, learned counsel for the petitioners, Mr. Ajay Vaidya, learned Senior Additional Advocate General and Mr. Anup Rattan, learned counsel for respondent No.5.

3. The second petitioner holds a L-2 license to retail vend Indian Made Foreign Liquor and it is claimed by the petitioners that the shop is being run in the name of the first petitioner.

4. According to the petitioners, they are obliged to pay excise duty to the tune of Rs.12,76,00,000/- (rupees twelve crores seventy six lacs only), as per the terms of the L-2 license and that they have been running the shop for the past several years.

5. The case of the petitioners is that the 5th respondent was granted a license in Form L-10 BB by the proceedings dated 15.3.2019, for the period from 14.3.2019 to 31.3.2019 for the year 2018-2019. But the license was suspended by the Commissioner of State Taxes and Excise by a subsequent proceeding dated 23.3.2019 on the ground that the Model Code of Conduct issued by the Election Commission of India was in force at that time. Eventually, license issued on 15.3.2019 to the 5th respondent was cancelled by the proceedings dated 26.4.2019.

6. Challenging the order of cancellation dated 26.4.2019, the 5th respondent came up with a writ petition in CWP No. 971/2019. After notice, it was reported by the learned Senior Additional Advocate General that the cancellation order dated 26.4.2019 was withdrawn by the competent Authority subsequently. Therefore, recording said fact, CWP No. 971/2019 was ordered to be closed. However, this Court left it open to the respondents to consider the application filed by the 5th respondent for renewal of his license for the year 2019-2020.

7. Thereafter a license in Form L-10 BB was granted to the 5th respondent on 12.6.2019. Challenging the same, the petitioners have come up with the above writ petition.

8. The attack of the writ petitioners in this writ petition, is to two proceedings, one dated 15.3.2019 and another dated 12.6.2019. While the proceedings dated 15.3.2019 is the grant for the year 2018-2019, the proceedings dated 12.6.2019 is renewal of the said grant for the year 2019-2010.

9. The license as well as renewal are assailed by the petitioners primarily on the following grounds:

(i) That in terms of the policy of the State Government for the allotment of retail excise vends for the year 2019-2020, L-10 BB licenses can be granted for urban areas only to departmental stores having a minimum floor area of 1000 square feet, but the 5th respondent does not have such a floor space;

(ii) That under the policy of the State for the grant/renewal of license for the year 2019-2020, L-10 BB licenses shall be granted in urban areas only to those departmental stores having an annual turnover of not less than Rs. 2 crores, but the 5th respondent does not have so much of a turnover;

(iii) That the Excise Policy for the year 2019-2020 also mandates certain distance parameters to be maintained between an existing L-2 vend and the departmental store which applies for L-10 BB licenses, but these parameters have not been followed; and

(iv) That when the license was granted on 15.3.2019, the Model Code of Conduct issued by the Election Commission of India was in force and hence, the grant was illegal.

10. In response, it is contended by the learned Additional Advocate General and the learned counsel for the 5th respondent- (i) that the prescriptions regarding the floor area of 1000 square feet and the minimum turnover of Rs.2 crores, will not apply to existing licensees; (ii) that the distance parameters were taken into account before the grant of the license; (iii) that the proceedings dated 15.3.2019 were first kept in abeyance due to the Model Code of Conduct being in force and the same were later withdrawn on 26.4.2019, but a renewal was granted on 12.6.2019 after the elections were over and (iv) that therefore, there was no illegality in the matter of grant/renewal of license in favour of the 5th respondent.

11. We have carefully considered the above submissions.

12. Before consider the rival contentions, a brief prelude may be necessary. Till Himachal Pradesh became an independent State, the law relating to import, export, transport, manufacture, sale and possession of intoxicating liquor was governed by the Punjab Excise Act, 1914 (Punjab Act of 1914). After the re-organization of the States, the provisions of the same Act were adopted.

13. Section 58(1) of the Punjab Excise Act, 1914 confers power upon the State Government to make Rules for carrying out the provisions of the Act. Section 58 (2) (f) of the Act indicates that the procedure to be followed for the grant of a license for the retail vend of liquor, is one of the matters about which provision can be made in the Rules framed by the Government.

14. In exercise of the powers so conferred by the aforesaid provisions, the State issued a set of Rules known as "Himachal Pradesh Liquor License Rules, 1986". These Rules were divided into several parts, with part A dealing with classes of licenses and the authorities empowered to grant and renew licenses. Part 'B' contains regulations governing the grant and renewal of licenses.

15 Part 'A' deals with:

(i) Foreign liquor;
(ii) Country spirit;
(iii) Denatured spirit;
(iv) Rectified spirit;
(v) Country fermented liquor and Country spirit prepared from fruits; and
(vi) Special items.

16. Part 'A' of the aforesaid Rules contemplates the grant of different types of licenses.

17. We are concerned in this litigation with the grant of a L-10 BB license in favour of 5th respondent. The challenge to the grant is at the behest of a person having a L-2 license. In other words, the writ petition is by persons having competing business interests.

18. As per the table contained in part 'A' of the Rules, a L-2 license is for the retail vend of foreign liquor to the public only and whole sale vend to certain types of licensees.

19. In contrast, a L-10 BB license is for the retail vend of beer, wine, cider and ready to drink beverages by departmental stores etc. for consumption off the premises.

20. Rule 19-A stipulates the conditions to be fulfilled by a person who seeks a license in Form L-10 BB. In fact, Rule 19-A was inserted only by a Notification dated 31.3.2001. The conditions stipulated in Rule 19-A appear to have undergone several modifications and amendments ever since the year 2001. These modifications and amendments were primarily based upon the Excise Policy announced annually, year after year.

21. In the year 2011, the State of Himachal Pradesh got its own enactment known as "Himachal Pradesh Excise Act 2011 (HP Act No. 33 of 2012). By Section 82 of HP Act No. 33 of 2012, all the provisions of the Punjab Excise Act, 1914, except a few such as Section 58, got repealed. It may be recalled that the Rule making power is conferred upon the State Government only under Section 58 of the Punjab Excise Act, 1914. This Section 58 of the Punjab Excise Act, 1914 is not repealed by the HP Act 33 of 2012, as could be seen by Section 82 (1) of Himachal Pradesh Act No. 33 of 2012.

22. Even under the Himachal Pradesh Act No. 33 of 2012, the State Government is conferred with Rule making powers under Section 80 (1). The matters in respect of which the State Government may make rules, are also enlisted in sub-Section (2) of Section 80 of HP Act No. 33 of 2012. Clauses (i) and (j) of sub- Section (2) of Section 80 read as follows:

> ***"80(2) (i).*** *regulating the periods and localities for which, and the persons, or classes of persons, to whom, licenses, permits and passes for the vend by wholesale or by retail of any liquor may be granted and regulating the number of such licenses which may be granted in any local area;*
>
> ***(j)*** *providing for the procedure to be followed and the matters to be ascertained before any license is granted for the retail vend of liquor for consumption on the premises;"*

23. It is interesting to note that Clauses (i) and (j) of sub-Section (2) of Section 80 of HP Act No. 33 of 2012 are in *pari-materia* with Clauses (e) and (f) of sub-Section (2) of Section 58 of the Punjab Act of 1914.

24. Therefore, it appears that the Rule making power for the government of HP flows both out of Section 58 of the Punjab Excise Act, 1914 and out of section 80 of the HP Act No. 33 of 2012.

25. We do not know why Section 58 of the Punjab Excise Act of 1914 was not repealed, especially when identical provisions are incorporated in Section 80 of the HP Act No. 33 of 2012.

26. Be that as it may, the Government of Himachal Pradesh do not seem to have framed a new set of Rules in exercise of the powers conferred by Section 80 (1) of HP Act No. 33 of 2012. Therefore, as on date, Himachal Pradesh Liquor License Rules, 1986 issued in exercise of the power conferred by Section 58 (1) of the Punjab Excise Act 1914 continue to be in force.

27. As we have pointed out earlier, Rule 19-A lists out conditions to be fulfilled for the grant of a license in Form L-10 BB. These conditions are changed from time to time depending upon the Excise Policy announced by the Government year after year. But many a time, the conditions stipulated in the Excise Policy of a particular year are not carried into effect by making an appropriate amendment to the rules (especially Rule 19-A). This has to be specifically taken note of, in view of Section 58 (3) of Punjab Act No. 1 of 1914 which mandates that the power conferred by the Section for making Rules is subject to the condition that the Rules be made after previous publication. Though the proviso to sub-Section (3) of Section 58 of the Punjab Act No. 1 of 1914 enables the State Government to make Rules without previous publication, if the Government considered that they should be brought into force at once, the requirement to make amendment to the Rules in tune with the change of policy, year after year is not to be dispensed with.

28. Keeping the above Scheme of the Rules in mind, if we come back to the contentions on the basis of which the petitioners have sought the cancellation of the license granted to the 5th respondent, it may be seen that the first contention relates to the non-availability of required floor area in the departmental store run by the 5th respondent. The requirement of a floor area of 1000 square feet for a departmental store, to be eligible for the grant of a license in Form L-10 BB was stipulated in Para 12.39(c) of the"Announcements for the Allotment of Retail Excise Vends by Renewal for the Year 2019-2020". But the said condition reads as follows:

> *"The L-10BB license shall in future be granted/renewed in Urban areas only to the departmental store with minimum floor area of 1000 square feet and the condition of minimum floor area will not apply to the existing licenses."*

29. It is clear from the above provision that the stipulation of a minimum floor area of 1000 square feet, will not apply to existing licenses. Admittedly, the policy under which the above stipulation was inserted was for the financial year 2019-2020. The financial year 2019-2020 commenced only on 1.4.2019. The petitioner was granted a license on 15.3.2019. Therefore, he was an existing licensee, when the proceedings were issued on 12.6.2019. In such circumstances, the first ground of attack of the petitioners cannot hold good.

30. The second ground of attack to the grant of license to the 5th respondent is that the 5th respondent does not have an annual turn over of not less than rupees 2 crores

as prescribed by the policy for the year 2019-2020. But this prescription regarding the minimum annual turn over was also inserted in Rule 19-A, only by way of an amendment Notification bearing No. 7-832/2018-EXN-10188 dated 11.4.2019. The newly inserted sub-Rule reads as follows:

> *"(i) The L-10BB licenses shall be granted in urban areas to departmental stores having annual turnover of not less than Rs. 2 Crores. The registration fee of L-10BB licenses is fixed at Rs. 2 lacs per annum."*

31. It is relevant to note that the above Rule inserted by way of a Notification dated 11.4.2019 speaks only of "the grant of L-10BB license". It does not speak of renewal. Therefore, the notification dated 11.4.2019 cannot be applied for the renewal of an existing license. According to the official respondents, the case of the 5th respondent was one of renewal and not of a grant for the first time. Therefore, the Rule could not have been applied to a renewal.

32. Interestingly, the prescription regarding the minimum floor area of 1000 square feet was also incorporated only under the amendment Notification dated 11.4.2019. The Rule regarding minimum floor area reads as follows:

> *"(ii) The L-10BB license shall in future be granted/renewed in Urban areas only to the departmental store with minimum floor area of 1000 square feet and the condition of minimum floor area will not apply to the existing licenses."*

33. It may be seen from the above rule prescribing a minimum floor area that it speaks both about the grant and about the renewal. That is why the last line of the above Rule says that the condition will not apply to the existing licenses. Since the Rule relating to minimum annual turn over speaks only about the grant and not about the renewal, there was no necessity for incorporating in the Rule relating to minimum annual turn over, a prescription as found in the last line of the Rule relating to minimum floor area. Therefore, the second ground of attack to the impugned order should also fail.

34. The third ground of attack to the impugned grant/renewal is that the distance parameters prescribed in the Excise Policy for the year 2019-2020 are not followed. The distance parameters found in the amendment Notification dated 11.4.2019, which now forms part of Rule 19-A read as follows:

> "*(vi) No person to whom a license in form L-10BB is granted shall establish the vend at a distance of not less than 100 (one hundred) metres from any recognized educational institutions and 30 (thirty) metres from place of worship by public at large, inter district Bus Stands, cremation or burial grounds falling in the limits of Municipal Corporation, Municipal Committee and Notified area Committee which are Urban areas having concentration of population. However, the distance of liquor vends from prominent places of worship by public at large i.e. Jakhoo Temple and Sankat Mochan Temple in Shimla district, Chintpurni Temple in Una district, Jwala Ji Temple in Kangra district and Shree Naina Devi Ji Temple in Bilaspur district must not be less than 500 metres.*
>
> *In so far as areas other than those mentioned in the foregoing paragraphs are concerned, the distance for establishing liquor vends shall not be less than 100 (one hundred) metres from any recognized educational institution and 60 metres (sixty metres) from any place of worship by public at large, inter district Bus Stand, cremation or burial grounds.*

No license for L-10BB shall be granted at a site if,

(i) such site is situated within 220 meters from the outer edge of any National or State Highway or of a service lane along such highway:

(ii) such site is situated within 500 meters but above 220 meters from the outer edge of any National or State Highway or of a service lane along such highway except in areas comprised in local bodies with a population of 20,000 people or less.

Provided that the distance mentioned above shall be measured along the road which is walkable/motorable.

Provided further that the above restrictions shall not apply to sites located within municipal areas."

35. The grievance of the writ petitioners is not that the departmental store of the 5th respondent is located within the prohibited distance from a recognized educational institution, or a place of worship or an inter-District Bus Stand or cremation or burial grounds etc. The only grievance of the petitioners as seen from the averments contained in para 17 of the writ petition is that it is very close to the L-2 vend of the petitioners and is located just 25 meters from the vend of the petitioners. No Rule is brought to our notice that there is a prohibition for the grant of L-10BB licenses for a departmental store located at a particular distance from a L-2 vend. Unless the petitioner is able to plead and establish that the grant/renewal was in violation of the distance parameters stipulated in the amended Rule 19-A, the third ground of attack cannot be accepted.

36. The last ground of attack to the impugned grant/renewal is that on the date on which a license was granted on 15.3.2019, the Model Code of Conduct issued by the Election Commission of India was in force. But this ground of attack is like flogging a dead horse. Immediately after the grant of license on 15.3.2019, the Commissioner of State Taxes passed an order dated 20.3.2019 suspending the same on the very same ground. Thereafter an order of revocation was passed on 26.4.2019. After the Model Code of Conduct was lifted, the revocation order dated 26.4.2019 was withdrawn. Therefore, the issue with regard to the grant of license during the subsistence of the Model Code of Conduct has already been dealt with in accordance with law and closed. Hence the same cannot any more be a ground of attack.

37. As we have pointed out at the beginning, the petitioners have a L-2 license. The challenge to the license granted to the 5th respondent, though couched in legal terms, is actually based upon business rivalry. Competitions in commercial ventures are to be fought and settled only in the market place.

38. We find none of the grounds of attack to the impugned grant/renewal legally sustainable and hence the writ petition is dismissed alongwith pending applications, if any. There will be no order as to costs.

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

The Editor, Divya Himachal and others .....Appellants.

Versus

Dr. Sukhdev Sharma and another ......Respondents

RSA No.311 of 2018.
Judgment reserved on: 17.07.2019.
Date of decision: 25th July, 2019.

Constitution of India, 1950 - Article 19 (1) (a) - Right to speech and expression of editors, news reporters etc. - Held, a newspaper has no additional privilege beyond privilege of any other member of society in commenting upon any issue of public interest. (Para 27)
Tort– Publication in newspaper– Suit for Damages- Duty of Editor– Held- Editor of newspaper is duty bound to verify the correctness of information supplied to him before publishing it in his newspaper especially when material has the defamatory tendency- Editor is responsible for defamatory material published in his newspaper (Para 28)

Cases referred:
D.F.Marion vs. Davis, 55 ALR 171 (1927)
G.Chandrasekhara Pillai vs. G. Raman Pillai, 1964 K.L.T. 317 at p. 330
Harijai Singh and another , (1996) 6 SCC 466)
Khair-ud-din vs. Tara Singh, AIR 1927 Lah. at pp. 22-23
Kiran Bedi vs. Committee of Inquiry, (1989) 1 SCC 494
Langlands vs. John Leng Ltd., 1916 S.C.(H.L.) 102 at p. 110
Mehmood Nayyar Azam vs. State of Chhattisgarh, (2012) 8 SCC 11
Mitha Rustomji Murzban vs. Nusserwanji, AIR 1941 Bom. 278 at p. 283
Om Prakash Chautala vs. Kanwar Bhan and others, (2014) 5 SCC 417
Rajendra Sail vs. M.P. High Court Bar Association, (2005) 6 SCC 109)
Rustom K. Karanjia v. Krishnaraj M.D. Thackersey, AIR 1970 Bom. 424 at p. 433)
Sewakram Sobhani vs. R.K. Karanjiya, Chief Editor, Weekly Blitz and others, AIR 1981 SC 1514
Subramanian Swamy vs. Union of India, Ministry of Law and others, (2016) 7 SCC 221
Umesh Kumar vs. State of A.P., (2013) 10 SCC 591
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal, (2012) 7 SCC 288

For the Appellants : Mr. K.B. Khajuria, Advocate.
For the Respondents : Mr. Rajneesh K. Lal, Advocate, for respondent No.1.
None for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The appellants are the defendants, who have suffered a decree at the hands of the learned trial Court, which in turn, has been affirmed by the learned first appellate Court, constraining them to file the instant appeal.

2. The parties shall be referred to as the 'plaintiff' and 'defendants'.

3. The plaintiff filed a suit for libel claiming therein damages to the tune of Rs.10,00,000/-. It was averred that the plaintiff remained posted as District Ayurvedic Officer, Kangra at Dharamshala till March, 2007 and had many friends and relations in the said Division and he retired as District Ayurvedic Officer in March, 2007 and also being a

permanent resident of Village and Post Office Dhaliara, Tehsil Dehra, District Kangra, H.P. enjoyed high respect and great reputation in the society. The defendants, who are the Editor, Publisher, Printer and Correspondent of 'Divya Himachal', respectively, on 31.01.2007, falsely and maliciously printed and published a news item under the heading of "*SWARAN BHASAM KAND MAIN CHHEH NILAMBIT*" and thereby projected that the plaintiff along with others has been suspended, whereas, no such order of suspension was passed against him or any other person.

4. As per the plaintiff, not even a show cause notice was given to him by his Department, Central Government and no inquiry was pending against him and moreover he was also not served with any suspension order. It was also averred that the plaintiff after going through the news item published on 31.01.2007 went to the office of the defendants to apprise them that wrong news has been published and it was assured by the defendants that they will tender unconditional apology in the newspaper, but they again falsely and maliciously printed and published the news item on 01.02.2007 with the heading that "*AFSARO KE NILAMBAN SE AYURVEDIC VIBHAG MEHARKAMP*".

5. According to the plaintiff, by such wrong imputations published in the newspaper, he was made to understand by the defendants that he was an incompetent, useless and dishonest District Ayurvedic Officer, who committed criminal offence while in service and thereby he has been greatly injured in his credit and reputation and has been brought in public odium and contempt and by this act of the defendants, he has also suffered mental pain, agony, discomfort, humiliation, financial, physical and mental hardship and this even led to the breaking of marriage of his son.

6. It was also averred that by such imputations, the status of the plaintiff has been lowered down in the eyes of general public. The plaintiff after retirement on 31.03.2007 started private practice at Dhalilara, but his practice suffered badly due to the news published by the defendants and this also has lowered the moral and intellectual character of the plaintiff in the estimation of others. Hence, the suit.

7. The defendants contested the suit by filing two sets of written statements, one by defendant No.4 and other by defendants No.1 to 3. In both the written statements, common preliminary objections have been raised qua non maintainability of the suit, estoppel, no cause of action, improper valuation of the suit for the purpose of court fee and jurisdiction, plaintiff not approaching the court with clean hands and suppression of material facts. However, in the written statement filed by defendants No.1 to 3, certain other legal objections qua locus standi and non-joinder of necessary parties have also been raised. On merits, defendants No.1 to 3 averred that there was no news item against the plaintiff and whatever news item was given by the correspondent and published by the defendants, was in the public interest and on the basis of the information supplied to the correspondent and the same was neither intentional nor deliberate.

8. It was further averred that in fact "SWARAN BHASM" is a metallic gold preparation which is costly medicine valued for Rs.14,000/- to Rs.4,00,000/- per Kg in the open market and the same is not only a health tonic but also a preventive and curative medicine for various ailments and on account of its highly effective properties, it was used by higher-ups in the society. The defendants also averred that the story of such medicine relates back to the year 1984 when Ayurvedic College, Paprola initially purchased such medicines under the then purchasing committee, despite the fact that the State Ayurvedic Association was opposed to such purchase as it alleged that the costly medicines are being purchased not for tribals or dispensaries, but for use of Officers/Officials of the Government, who are allergic to allopathic medicines. As per defendants, the purchase

came under the scanner as there was no testing of medicines and it was given to 12 firms, who did not fulfill the G.N.P. Rules and violated the goods manufacturing price rules. In 2005, the process of purchase of such metallic preparation was initiated by the Central Government when it sent Ayurvedic medicines to the State Government to demand the listed medicines. As per letter No.280/4/1/2005/HP/Cell dated 28.12.2006, huge funds to the extent of 276.25 lakh were released to the State Government for purchase of medicines.

9. It was further averred that the Central Government took serious note of the news item dated 28.12.2006 published in the 'Divya Himachal' and the 'AAYUSH' Department (Ayurvedic Yunani Sidha Homeopathy System of Medicines) inspected many Ayurvedic dispensaries and took their records. The team was accompanied by the plaintiff, who was representing the medicines purchase committee and the said news was published in 'Divya Himachal' on 25.01.2007 which inter alia provided that action may be taken against the members of purchasing committee with reference to distribution process. It was found that the State Purchasing Committee had purchased the medicines worth about Rs.3 crore from the same old 12 companies which were banned on the protest of State Drug Manufacturing Association because such companies were violating the Goods Manufacturing Pricing Rules and the G.N.P. Rules. It was also the stand of defendants No.1 to 3 that even the then Hon'ble Chief Minister had taken exception to that and thereafter on 30.01.2007, at Hamirpur, directed before the general public to suspend all the members of the purchasing committee which included the plaintiff, Dr. R.P. Sood, Ayurvedic Director, Dr. B.C. Katoch, Dr. Subhash Sharma, the then District Ayurvedic Officer, Shimla, Dr. Premi and Dr. Rathore and this news was published by 'Divya Himachal', 'Punjab Kesari' and 'Amar Ujala' in their edition of 31.01.2007 and the version of the plaintiff was also given in the said news.

10. It was also averred that there was turmoil in the Department and such news item was published in 'Divya Himachal' on 01.02.2007. It was under pressure and to save the skin of some officers and as a measure to lessen the loss of reputation of the Department that the Secretary Ayurveda changed his version and took a 'U' turn to save the Department. The news dated 31.01.2007 was given after investigation and on the basis of statements of Chief Minister and Divya Himachal Team of Shimla and Dharamshala Bureau, carried both the news dated 31.01.2007 and 01.02.2007 and published on same grounds honestly and in good faith and in public interest without any malafide intention or on account of any personal vendetta.

11. It was further averred by the defendants that there was no false, malicious imputation against the plaintiff nor there was any deliberate motive and intention to defame the plaintiff. Moreover, no moral or intellectual character of the plaintiff was imputed or lowered down and the defendants still hold plaintiff in high esteem.

12. The factum with regard to plaintiff approaching the office of the defendants and refusing to take any legal notice has been denied. The factum with regard to defendants No.1 to 3 publishing the news item in connivance with defendant No.4 and also at her instance has also been denied. No news item was published in issue of 25.01.2007 knowingly or with any malafide intention to lower down the reputation of the plaintiff and it has also been denied that any harm was caused to the plaintiff in the estimation of others or his moral and intellectual character has been lowered down in the eyes of others. As per the defendants, they did not mean that the plaintiff was an incompetent, useless District Ayurvedic Officer, who had committed any criminal offence. Any injury to the plaintiff due to publishing of such news and any harm having been caused to his reputation or any humiliation having been caused to him, besides grave financial, physical and metal hardship to the plaintiff have been specifically denied. The factum with regard to

breakdown of marriage of the son of the plaintiff due to publication of the news item has also been denied. In fact, the plaintiff is not entitled for any damages and his private practice has not been affected.

13. Defendant No.4 in his separate written statement has specifically denied that she falsely and maliciously printed and published the news item in the edition of 31.01.2007 of 'Divya Himachal'. It was averred that from the perusal of the news item, it is clear that defendant No.4 has nothing to do with the same and the present suit has been filed by the plaintiff merely on conjectures and surmises and that too without verifying the true facts. The factum of approaching the plaintiff, office of 'Divya Himachal' and the defendants assuring him for tendering unconditional apology in the newspaper has been denied. As per defendant No.4, she never submitted any news item as published in the issue of 01.02.2007 of 'Divya Himachal'. The news items submitted by various correspondents are edited and reconstructed by the Editor or Chief Editor of the newspaper and the same are published on their recommendations. The news item published on 01.02.2007 was wrongly reconstructed and reproduced in the newspaper concerned and defendant No.4 has nothing to do with the same and she reserved his right to initiate appropriate legal proceedings against the erring newspaper officials. Lastly, the defendants prayed for dismissal of the suit.

14. Plaintiff filed replications to both the written statements reasserting and reiterating the averments made in the plaint while denying the averments raised in the written statements.

15. On the basis of the pleadings of the parties, the learned trial Court on 01.10.2010 framed the following issues:-

"1) Whether plaintiff is entitled for recovery of Rs.10,00,000/-as prayed for? OPP.

2) Whether suit of the plaintiff is not maintainable? OPD.

3) Whether plaintiff is estopped from filing the suit by his act and conduct? OPD.

4) Whether suit is bad for non-joinder of necessary parties? OPD.

5) Relief."

16. After recording evidence and evaluating the same, the learned trial Court decreed the suit of the plaintiff by awarding damages to the tune of Rs.3,00,000/- along with interest at the rate of 6% per annum.

17. Aggrieved by the judgment and decree passed by the learned trial Court, the defendants filed appeal before the learned first appellate Court, whereas, the plaintiff filed Cross Objections, both of which were dismissed by the learned first appellate Court on 09.06.2017, constraining the defendants to file the instant appeal.

18. It is vehemently argued by Shri K.B.Khajuria, Advocate, for the appellants/defendants that the plaintiff has failed to prove that the news item published was defamatory and further failed to prove that such statement exposed the plaintiff to hatred, contempt or ridicule which were pre-requisite for maintaining a suit for defamation. The sum and substance of his arguments is that the findings recorded by the learned Courts below are perverse and, therefore, liable to be set aside.

19. On the other hand, Shri Rajneesh K. Lal, Advocate, for respondent No.1, would argue that the findings recorded by the learned Courts below are in accordance with

law and rather the damages as awarded by the learned trial Court are on the lower side taking into consideration the fact that the plaintiff has since retired.

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

20. The moot question is whether the news item is in fact defamatory. Before going into the factual matrix of the case, it would be necessary to understand as to what exactly is defamation.

21. Winfield has defined defamation as follows:-

> *"Defamation is the publication of statement which tends to lower a person in the estimation of right thinking members of society generally or which tends to make them shun or avoid that person. It is libel if the statement be in permanent form and slander if it consists in significant words or gestures."*

22. In view of the above definition of defamation, following are the essential ingredients of the tort of defamation:-

1. Malice. The words must have been published maliciously.
2. They must be defamatory.
3. The words must have reference to the plaintiff.
4. They must be published.

23. Meaning of the term "defamation" has been elaborately considered by the Hon'ble Supreme Court in its decision titled Subramanian Swamy vs Union ***of India, Ministry of Law and others, (2016) 7 SCC 221*** wherein it was observed as under:

> ***"23. Meaning of the term "defamation"***
>
> *23.1. Salmond & Heuston on the Law of Torts, 20th Edn., Bata India Ltd. v. A.M. Turaz & Ors., 2013 53 PTC 536; Pandey Surindra Nath Sinha v. Bageshwari Pd.., 1961 AIR (Pat) 164, define a "defamatory statement" as under:*
>
> > *"A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right thinking member of society"*
>
> *23.2. Halsburys Laws of England, 4th Edn. Vol. 28, defines "defamatory statement" as under:*
>
> > *"10.Defamatory Statement-*
> >
> > *A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."*
>
> *23.3. The definition of the term has been given by Cave, J. in Scott v. Sampson, (1882) LR 8 QBD 491(DC) as a "false statement about a man to his discredit."*

23.4. "Defamation", according to Chambers Twentieth Century Dictionary, means to take away or destroy the good fame or reputation; to speak evil of; to charge falsely or to asperse. According to Salmond:

> *"The wrong of defamation, consists in the publication of a false and defamatory statement concerning another person without lawful justification. The wrong has always been regarded as one in which the Court should have the advantage of the personal presence of the parties if justice is to be done. Hence, not only does an action of defamation not survive for or against the estate of a deceased person, but a statement about a deceased person is not actionable at the suit of his relative. "Gatley's Libel and Slander (6th Edn., 1960) also Odger's Libel and Slander (6th Edn., 1929)".*

23.5. Winfield & Jolowics on Torts (Sweet and Maxwell, 17th Edn., 2006) defines "defamation" thus:

> *"Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person."*

23.6. In the book The Law of Defamation, (Richard O'Sullivan, QC and Roland Brown), the term "defamation" has been defined as below:-

> *"Defamation may be broadly defined as a false statement of which the tendency is to disparage the good name or reputation of another person."*

23.7. In Parmiter v. Coupland(1840) 6 M&W 105: 151 ER 340, "defamation" has been described as:-

> *"…..A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule…….."*

23.8. The definition of "defamation" by Fraser was approved by McCardie, J in Myroft v. Sleight (1921)90 LJ KB 883: 37 TLR 646. It says:

> *"a defamatory statement is a statement concerning any person which exposes him to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or trade."*

23.9. Carter Ruck on Libel and Slander (Manisha Koirala v. Shashi Lal Nair, 2002 SCC Online Bom. 827 : (2003) 2 Bom.CR 136) has carved out some of the tests as under: (Manisha Koirala Case, SCC Online Bom. para 23)

> *"(1) a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, professional or trade.*
>
> *(2) a false statement about a man to his discredit.*
>
> *(3) would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?"*

24. It is more than settled that a newspaper is in no different position from an individual and it cannot give currency to a defamatory statement and escape upon the ground itself that it did not believe in what it had published. This ground may have some bearing on the question of damages but not upon the question of liability. The responsibility

in either case is the same. The degree of care and attention is in no way less in the case of newspaper publications than that required from an ordinary individual.

25. There can be no doubt that fair comments upon any matter of public interest which are included in the publications in a newspaper are protected publications in the absence of malice.

26. As per Lord Shaw: "A newspaper has the right and no greater or higher right to make comment upon a public officer or a person occupying a public situation than an ordinary citizen". ***(Langlands v. John Leng Ltd., 1916 S.C.(H.L.) 102 at p. 110)***.

27. A newspaper has no privilege beyond any other member of the community in commenting upon any matter of public interest and no privilege whatsoever attaches to its position. When the defendant in a case for damages, takes the plea of fair comment, he is not required to justify the comment and it is sufficient for him if he can satisfy the Court that it is a "fair"comment. If the words complained of, are justified as comment and the words also contain allegations of fact, the defendant is required to prove that such allegations of fact are true and it is not sufficient for him to plead that he bonafide believed them to be true. In other words, the distinction between comment and allegations of fact must always be borne in mind in determining whether the plea of fair comment can be sustained.

28. As regards the publication by the editor, printer and publisher, it is the duty of an editor of a newspaper to check up the news of the information that is supplied to him, before publishing the same in his paper, especially when the news might be defamatory. The editor would be responsible for publishing any defamatory material in his paper.

29. As regards the publisher, he would be liable for every publication, wherein any imputation concerning another person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of the other person, has been made. For such publications, the publisher would be guilty of defaming the other person.

30. Coming to the duties and rights of the journalists, the journalist like any other citizen has the right to comment fairly and if necessary, severely on a matter of public interest, provided that the allegations of facts he has made are accurate and truthful, however defamatory they may be otherwise. Since his right to comment on matters of pubic interest is recognized by law, the journalist obviously owes an obligation to the public to have his facts right. Where the journalist himself makes an investigation, he must make sure that all his facts are accurate and true, so that if challenged, he would be able to prove the same, so that the public interests are better served in that way. ***(****Rustom K. Karanjia v. Krishnaraj M.D****. Thackersey, AIR 1970 Bom. 424 at p. 433)***

31. Now as regards proof in case of a journalist, to bring publication of a scandalous imputation under the penal law, it is not necessary to prove that it was done out of any ill-will or malice or that the complainant had actually suffered from it. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant. Every sane man is

presumed to have intended the consequences, which normally follow his act. ***(G.Chandrasekhara Pillai vs. G. Raman Pillai, 1964 K.L.T. 317 at p. 330)***

32. The newspapers are subject to the same rules as for other media, and have no special right or privilege, and in spite of the latitude allowed to them, it does not mean that they have any special right to make unfair comments, or to make imputations upon the character of a person, or imputations upon or in respect of a person's profession or calling. ***(****Mitha Rustomji Murzban vs. Nusserwanji****, AIR 1941 Bom. 278 at p. 283)***

33. It is the duty of a journalist to only publish complaints which he is satisfied are true. If he publishes complaints of a defamatory nature, which are not true he must suffer the consequences. A journalist who publishes a statement about an individual is in the eyes of law precisely in the same position as is any other person. He is not specially privileged as to what he may say. But, on the other hand, he undoubtedly has a greater responsibility to guard against untruths; for the simple reason that his utterances have a far larger publication, than the utterances of an individual, and they are more likely to be believed by the ignorant by reason of their appearing in print. ***(Khair-ud-din vs. Tara Singh, AIR 1927 Lah. at pp. 22-23)***

34. It is the legitimate function of all newspaper in a democratic set up to act as champions of a clean administration and sentinels of public interest, and as such they are well within their rights to expose and bring to the notice of the general public any lapse or malpractice in the administration including that of nepotism and favouritism. Where there is a genuine case of favouritism and nepotism, a newspaper by bringing it to the notice of the general public would be acting for the public good.

35. It is thus needless to emphasize that a free and healthy press is indispensable to the functioning of a true democracy. In a democratic set up there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. To achieve this objective the people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and viewpoints on such matters and issues and select their further course of action. The primary function, therefore, of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilizing role to play. It plays an important role in molding public opinion and can be an instrument of social change. It may be pointed out here that Mahatma Gandhi in his autobiography has stated that one of the objectives of the newspaper is to understand the proper feelings of the people and give expression to it; another is to arouse among the people certain desirable sentiments; and the third is to fearlessly express popular defects. It therefore turns out that the press should have the right to present anything which it thinks fit for publication. But it has to be remembered that this freedom of press is not absolute,

unlimited and unfettered at all times and in all circumstances, as giving an unrestricted freedom of speech and expression would amount to an uncontrolled license. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the journalists. In an organized society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of law. The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reasons that these utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for the preservation of the freedom of the press itself. To quote from the report of Mons Lopez to the Economic and Social Council of the United Nations "If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation and discipline." It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression. ***(See In Re: Harijai Singh and another , (1996) 6 SCC 466)***

36. A large number of people tend to believe as correct that which appears in the print or electronic media and for these reasons alone, the mass media has to be circumspect while dealing with news. ***(**Rajendra Sail vs. M.P. High **Court Bar Association, (2005) 6 SCC 109)***

37. It cannot be denied that over the years, the newspapers have reached people of all categories irrespective of age, literacy and their capacity to understand. The impact of what is published therein on the society is phenomenal. Unfortunately, this uncontrolled or unedited telecast or propagation of news is resorted to in the name of exercise of the right to freedom of speech and expression, or freedom of press and it is for this précise reason that the Press Council of India on 21.1.1993 had issued the following guidelines for guarding against the commission of the following journalistic improprieties and un-ethicalities:

> "1. Distortion or exaggeration of facts or incidents in relation to communal matters or giving currency to unverified rumours, suspicions or inferences as if they were facts and base their comment, on them.
>
> 2. Employment of intemperate or unrestrained language in the presentation of news or views, even as a piece of literary flourish or for the purpose of rhetoric or emphasis.
>
> 3. Encouraging or condoning violence even in the face of provocation as a means of obtaining redress of grievance whether the same be genuine or not.

4. While it is the legitimate function of the Press to draw attention to the genuine and legitimate grievance of any community with a view to having the same redressed by all peaceful, legal and legitimate means, it is improper and a breach of journalistic ethics to invent grievances, or to exaggerate real grievances, as these tend to promote communal ill-feeling and accentuate discord.

5. Scurrilous and untrue attacks on communities, or individuals, particularly when this is accompanied by charges attributing misconduct to them as due to their being members of a particular community or caste.

6. Falsely giving a communal colour to incidents which might occur in which members of different communities happen to be involved.

7. Emphasizing matters that are apt to produce communal hatred or ill-will, or fostering feelings of distrust between communities.

8. Publishing alarming news which are in substance untrue or make provocative comments on such news or even otherwise calculated to embitter relations between different communities or regional or linguistic groups.

9. Exaggerating actual happenings to achieve sensationalism and publication of news which adversely affect communal harmony with banner headlines or distinctive types.

10. Making disrespectful, derogatory or insulting remarks on or reference to the different religions or faiths or their founders."

38. In India, since we have a written constitution, it is recognized that freedom of speech is not an absolute unlimited right. Article 19(2) provides reasonable restrictions on what is guaranteed by Article 19(1)(a). Therefore, the mass media must maintain high professional standards and are obliged to verify the correctness of the news disseminated. Publication of false news cannot be regarded as a public service, but as a disservice to the public. Publication of every bit of news does not necessarily serve the public interest.

39. Bearing in mind the aforesaid exposition of law, it would now be necessary to set out the articles that were published in the daily 'Divya Himachal' on 25.01.2007, 31.01.2007 and 01.02.2007 to find out whether the same are defamatory or not and the English translation whereof reads as under:-

"JANUARY 25, 2007.

RAID ON DISPENSARIES BY CENTRAL GOVERNMENT.

For making inquiry into alleged distribution of 'Swaran Bhasam' medicine without any test, the team of AYUSH department reached Himachal Pradesh.

Manjeet Chauhan

Shimla- The Central Government has taken stringent cognizance of the distribution of 'Swaran Bhasm' medicine in the Dispensaries, without any test. Taking note of the news published on 28th December in "Divya Himachal", the AYUSH department of the Centre has reached in the State to inspect dispensaries and has already conducted raid on many dispensaries. The AYUSH team has visited the State to check the usage of grant provided by the Central Government for the purchase of medicine and the distribution

system of these medicines. The committee will inspect the effect and distribution of these medicines in the hospitals at Dharamshala, Kangra, Dehra and that in the Ayurvedic Department and will prepare the record and then it will thereof submit its report to the Central Minister of AYUSH. Due to this reason, the team of experts from Ministry of AYUSH has reached Himachal to investigate in the matter of distribution of medicine. This is for the first time that when the AYUSH department has taken the initiative for inspection of the distribution of medicines purchased out of the grant released by the Central Government for the purchase of these medicines.

The official sources of the department have stated that after 1984, this year seven different types of medicines made up of 'SWARAN BHASAM', were purchased by the Ayurvedic Department. Despite of this, these medicines were distributed without any tests, in the area of Rohru and other far-flung tribal areas of this State. The sources have disclosed that these medicines were provided to those Officers, in the higher rank of the State, who are allergic to allopathic medicines. These medicines were purchased from not only the Pharma Companies of the Himachal but also from that of other States. Purchasing Committee and the Ayurvedic Department were hesitating to openly disclose as to how much medicines have been distributed to the dispensaries of the various districts of the State. However, as are being stated, out of the so purchased seven types of medicines comprising of 'SWARAN BHASAM', not even one type of medicine, could reach all of the 1150 Ayurvedic Dispensaries. Dr. Sukhdeep, one of the members of Medicine Purchasing Committee from Dharmashala and Expert of department, who accompanied the AYUSH team during its visit to the various dispensaries of District Kangra, has stated that the AYUSH team has reached here to inspect the process of distribution of medicines. After inspecting the record, AYUSH team will submit its report to the Central Ministry.

Stringent view of the Centre on the news published in 'Divya Himachal'

Enquiry record will be submitted to the Central Ministry.

These are the medicines containing 'SWARAN BHASAM'

Aforesaid action was taken for the distribution of the above mentioned medicines purchased by the Ayurvedic Department that include Basant Kusmakur Ras, Yogendar Ras, Swarn Parpati, Varhidvad Chittamani Ras, Swarn Bsant Malti Ras, Sidh Sagar Dhwaj. All these medicines contains 'SWARAN BHASAM' and were distributed without any test.

These officials will face the brunt.

The departmental sources have stated that due to the dispute arisen on account of purchase and distribution process of medicine, the Purchasing Committee as well as some other officers of the Department can face the brunt. As per the information received, the Purchasing Committee include Dr. Sukhdeep, District Ayurvedic Officer, Dharamshala, SDMO Katren, Professor of Paprola College, Dr. Subhash Sharma and officers of Aayurvedic Department.

Dated: 31.01.2007

Six suspended in “SWARAN BHASAM KAND”

Ayurvedic Medicine Purchasing Committee found guilty in Centre Probe.

Shimla, Dharamshala- Members of the Purchase Committee are facing the brunt for alleged purchase of medicines in the State Ayurvedic Department without any test. Centre Government has directed the State Government to suspend all the members of the Purchase committee. 'Divya Himachal' in its edition published on 28th December and 25th January unearthed that Ayurvedic department had violated all the norms while purchasing the "SWARAN BHASAM" medicine and same were purchased from those twelve firms, which do not fulfill GNP Rules. All the members of purchasing committee which included Sh. R.P. Sood, Ayurveda Director, Dr. B.C Katoch, Ayurvedic officer, Shimla, Dr. Subhash Sharma, Dr. Sukhdev, Ayurvedic officer of District Kangra, Dr. Premi, SDMO, District Kullu and Dr. Rathore, Paprola College, were directed to be suspended. Centre Government has initiated these proceedings on the recommendation of Ayush Department, which had recently visited the State. The funds of around 3 crores were released to the Ayurveda Department for the purchase of medicines. However, despite of disapproval by the Hon'ble Chief Minister Sh. Virbhadra Singh, the department purchased the medicines from firms which do not fulfill the terms and conditions. It is significant to mention here that Doctors' Medical Association had submitted a complaint to the Hon'ble Chief Minister that medicines are being purchased without adhering to the rules. After 1984, this year seven types of medicines containing "SWARAN BHASAM" were purchased by the Ayurvedic Department and without testing these medicines, they distributed them in the different hospitals of the State. Not only this, the medicine containing "Bhasam" was even distributed amongst the Higher Officials of the department. However, Dr. Sukhdev Sharma, the Ayurvedic Officer, Kangra, showed his ignorance about the suspension of the members of the Purchasing Committee.

TURMOIL IN THE AYURVEDIC DEPARTMENT DUE TO SUSPENSION OF OFFICERS.

"BHASAM" costs upto Rs four Lakh per k.g

Sanjay Sharma

Paprola- The 'SWARAN BHASAM', which has put the future of Ayurvedic Officers in jeopardy, is not only precious, but also has the qualitative medicinal properties. The cost of these 'BHASAMS' range from fourteen thousand to four lakh rupees per kg. Due to which, higher ups in the society keep their vigil on these precious 'BHASAMS'. The 'BHASAMS', due to which Ayurvedic Officers have been suspended, include 'Basant Kusumakar Ras' which costs around Rs. 250/- per gram. The 'Yogender Ras' is the costliest amongst them. It costs around Rs. 400/- per gram. The cost of 'Swaran Parpati' is 250/- per gram, Vrihdvad Chitamani costs Rs 250/- per gram; Swaran Basant Malti cost Rs. 28.50 per gram and cost of Sidh Makardhwaj is Rs 15/- per gram. All these 'BHASAMS' were distributed amongst those higher officials/officers who were allergic to allopathic medicines. 'Yogendar Ras is beneficial for curing diseases like Arthritis, Polymorphous, hysteria and 'Alppit'. Basant kusumakar is beneficial for Tuberculosis, 'Leprosy', Swarn Parpati is beneficial in 'Sagrahani' and Tuberculosis; Vrihdvad Chitamani is beneficial in Arthritis, Dysentery; Swarn Basant Malti is beneficial in Tuberculosis, Malaria, chronic fever, whereas Sidh Makardhwaj is full of medicinal qualities.

The procurement process of these medicines was started in the year 2005.

Manjeet Chauhan

Shimla- There has been a turmoil in the Ayurvedic department due the suspension of six officers in the alleged scam of procurement of 'SWARAN BHASAM' medicines. It is for the first time when the suspension orders of six higher officers have been issued by the Central Ministry in a single go. The procurement process of the 'SWARAN BHASAM' medicines was started in the year 2005, when the Central Government had sent the list of Ayurvedic medicines to the State Government and informed the Government that it can demand any of the listed medicines. However, In February, 2006, the State Medical Purchase Committee gave priority to the 'SWARAN BHASAM' medicine worth rupees three crores. Although, the indents of medicines were used to be called from the different Ayurvedic Dispensaries of the State, so that information could be drawn as to what type of drugs and how much are being consumed in the State and what type of medicines will be supplied to an area. The official sources have stated that for the last many years, the State Purchasing Committee is taking decision at their own level in respect of the supply and types of medicines. Due to which, 'Swaran Bhasam' medicines wroth crores of rupees were ordered in the State and which were later procured from those 12 pharma companies, which were banned by the State Government on the demand of the State Drugs Manufacturing Association as these companies do not fulfill the Goods Manufacturing Prices Rules. For the last many years, Ayurvedic Department has been procuring the medicines from these companies only. On the basis of which, the union had made a request to the Chief Minister for procuring the medicines from some other companies except these companies. The medicines containing 'Swaran' have the properties of health tonic. Instead of Ayurvedic dispensaries, these medicines were supplied to the higher dignitaries for providing them health benefits. In a haste, these medicines were sent to the Ayurvedic dispensaries without conducting any test. The department has no record as to how much medicine was supplied to which dispensary. Divya Himachal had unearthed the news regarding the procurement, distribution and testing of 'Swaran Bhasam' medicines, However, after conducting the raid and taking the record in its possession, the Central Ministry had issued the order of suspension of six higher officers of the department. Rumours are there that the chairman of the Medical Purchase Committee is being shielded, whereas he is a Chairman of a Purchasing Committee.

Instead of dispensaries, the medicine were distributed amongst the rich people of the State.

SCAM WAS ALSO BROUGHT TO LIMELIGHT IN 1984

Prior to this, in the year 1984, the then Director has also been suspended by the department in the 'Swaran Bhasm' scam. This post was converted in to non-technical category from technical category. Previous to 2006, the State have received the 'Swaran Bhasm' medicines in the year 1984."

40. A perusal of the news item published on 25.01.2007 (Ex. PW-1/A) goes to show that the Central Government had raided some of the Ayurvedic Dispensaries in the State of H.P. and in pursuance whereof action against the plaintiff amongst others is inevitable. Further, vide news item dated 31.01.2007 (Ex. PW-1/B), it has been published that the plaintiff along with other officials was suspended for ignoring the rules for purchasing 'Swaran Bhaskar Churan'. Following this, another news item was published on

01.02.2007 stating that the future of the suspended officials is in peril and the purchase was made to facilitate the higher officials.

41. When confronted with the correctness of these news items, the learned counsel for the appellants/defendants was not in a position to support or justify their contents as being factually correct as he failed to produce any material on record whereby it could be shown that the plaintiff was suspended from job on account of any irregularity made by the purchasing committee for procuring 'Swaran Bhaskar Churan' of which he was a member. His only contention was that the news had been published as such as was supplied by the correspondent Smt. Manjeet Chauhan, defendant No.4. But, then in case the written statement filed on behalf of defendant No.4, more particularly, para-4 thereof, is adverted to, it would be noticed that the said defendant has categorically denied that she ever submitted any news item as published in the newspaper, rather she has gone to the extent of stating that the news item has been wrongly reconstructed by the Editor and the Chief Editor of the appellants' newspaper. Unfortunately, defendants No.1 to 3 have failed to lead any evidence to show that the news item was supplied to them by correspondent-defendant No.4.

42. Thus, it stands established on record that the publications made in the newspaper are nothing but the handy-work of defendants No.1 to 3 themselves and having published scandalous imputations against the plaintiff, they have to pay the price for the same. Every sane person is presumed to have intended the consequences which normally follow from his act. But, Journalists of some standing can very well be presumed to know or to have reason to believe that the imputations published by him would harm the complainant's reputation.

43. In ***Sewakram Sobhani*** *vs.* ***R.K. Karanjiya, Chief Editor, Weekly Blitz and others, AIR 1981 SC 1514*** while considering the privileges of Journalists, the Hon'ble Supreme Court held that Journalists do not enjoy any special privilege and have no greater freedom than others to make any imputations or allegations, sufficient to ruin the reputation of a citizen. Journalists are in no better position than any other person.

44. In Re ***Harijai Singh and another (supra)***, the Hon'ble Supreme Court observed as under:

> "*10. But is has to be remembered that this freedom of press is not absolute, unlimited and unfettered at all items and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled license. If is were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. Infact, the element of responsibility must be present in the conscience of the journalists. In an organized society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuse its liberty it must be punished by Court of Law. The Editor of a Newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself. To quote*

from the report of Mons Lopez to the Economic and Social Council of the United Nations "If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation and discipline". It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression.

11…….The editor and publisher are liable for illegal and false matter which is published in their newspaper. Such an irresponsible conduct and attribute on the part of the editor, publisher and the reporter cannot be said to be done in good faith, but distinctly opposed to the high professional standards as even as slightest enquiry or a simple verification of the alleged statement about grant of Petrol outlets to the two sons of a senior Judge of the Supreme Court, out of discretionary quota, which is found to be patently false would have revealed the truth. But it appears that even the ordinary care was not resorted to by the condemners in publishing such a false news items. This cannot be regarded as a public service, but a dis-service to the public by misguiding them with a false news. Obviously, this cannot be regarded as something done in good faith."

45. It is then argued by Shri K. B.Khajuria, Advocate, for the appellants that the amount of Rs.3,00,000/- could not have been awarded as damages for defamation and token damages should have been awarded.

46. In ***Vishwanath Agrawal*** *vs.* ***Sarla Vishwanath Agrawal**, **(2012) 7 SCC 288**,* while dealing with the aspect of reputation, the Hon'ble Supreme Court observed as under:

> *"55…..reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."*

47. In ***Kiran Bedi*** *vs.* ***Committee of Inquiry**, **(1989) 1 SCC 494**,* the Hon'ble Supreme Court reproduced the following observations from the decision in ***D.F.Marion*** *vs.* ***Davis**, **55 ALR 171 (1927)*** which read as under:

> *"25……. 'The right to the enjoyment of a private reputation,unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property.'"*

48. In ***Mehmood Nayyar Azam*** *vs.* ***State of Chhattisgarh**, **(2012) 8 SCC 11**,* the Hon'ble Supreme Court ruled that:

> *"1…….The reverence of life is insegregably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary*

spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of 'creative intelligence'. When a dent is created in the reputation, humanism is paralysed."

49. Dealing with reputation as a cherished right, the Hon'ble Supreme Court in ***Umesh Kumar*** *vs.* ***State of A.P., (2013) 10 SCC 591***, observed as under:

"18……Personal rights of a human being include the right of reputation. A good reputation is an element of personal security and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. Therefore, it has been held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution. The International Covenant on Civil and Political Rights, 1966 recognises the right to have opinions and the right to freedom of expression under Article 19 is subject to the right of reputation of others."

50. In ***Om Prakash Chautala*** *vs.* ***Kanwar Bhan and others***, ***(2014) 5 SCC 417***, the Hon'ble Supreme Court observed as under:

"*1…..Reputation is fundamentally a glorious amalgam and unification of virtues which makes a man feel proud of his ancestry and satisfies him to bequeath it as a part of inheritance on posterity. It is a nobility in itself for which a conscientious man would never barter it with all the tea of China or for that matter all the pearls of the sea. The said virtue has both horizontal and vertical qualities. When reputation is hurt, a man is half-dead. It is an honour which deserves to be equally preserved by the downtrodden and the privileged. The aroma of reputation is an excellence which cannot be allowed to be sullied with the passage of time. The memory of nobility no one would like to lose; none would conceive of it being atrophied. It is dear to life and on some occasions it is dearer than life. And that is why it has become an inseparable facet of Article 21 of the Constitution. No one would like to have his reputation dented. One would like to perceive it as an honour rather than popularity….."*

51. Thus, it is more than settled that reputation of a person is priceless. No amount of money is sufficient to compensate the mental loss, agony and sufferings which the plaintiff underwent on account of defamatory publications. Therefore, a paltry sum of Rs.3,00,000/- awarded by the learned Courts below can only be taken to be a token amount towards damages, warranting no interference by this Court.

52. No question of law, much less any substantial question of law, arises for determination in this appeal.

53. In view of the aforesaid discussion and for the reasons stated above, there is no merit in this appeal and the same is accordingly dismissed, along with pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of H.P. ……Appellant.
Versus
Asha Gupta & another ……Respondents.

Cr. Appeal No. 220 of 2011
Date of decision: 7.5.2019

Narcotics Drugs and Psychotropic Substances Act, 1985- Section 22– **Drugs and Cosmetics Act**, **1940**- Section 18 (c) – Recovery of 741 capsules of 'Spasmo Proxyvon capsules' – Whether offence is under Act of 1985 or Act of 1940 ? Held, Spasmo Proxyvon capsules containing Dextroproxypene will fall under Act of 1985 only if quantity of salts is more than 135 mgs of Dextroproxypene per capsule – Otherwise offence will fall under Act of 1940. (Para 15)

Cases referred:
Chandrappa & ors. vs. State of Karnataka, (2007) 4 SCC 415
Rajiv Kumar vs. State of Punjab, Recent Cr. Reports 1997(4) 846

For the appellant	:	Mr. J.S.Guleria, Dy. Advocate General.
For the respondent(s)	:	Mr. Rohit Sharma Advocate and Mr. Anuj Gupta, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

The respondents herein are accused. Charge under Section 22 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act) and 18 (c) of Drugs and Cosmetics Act was framed against each of them on the allegation that 741 capsules of "Spasmo Proxyvon" kept in a plastic bag under gas stove in their residence, namely, Roshan Lal building near Chajju Ram Mohan Singh building Bye Pass, Kather, District Solan were recovered during the search conducted consequent upon search warrants obtained by the police. Learned Special Judge (II), Solan after holding full trial and on appreciation of the evidence has arrived at a conclusion that the recovery of capsules from the exclusive and conscious possession of the accused persons though stand proved, however, the drugs so recovered do not fall under the mischief of ND & PS Act with further observation that for the contravention of the provisions of Drugs and Cosmetics Act, 1940, if any, the prosecution may be launched against them by the Drug Inspector. Both of them were accordingly acquitted of the charge framed against each of them vide judgment dated 31.3.2011 in Sessions Trial No. 18-S/7 of 2010, which is under challenge in the present appeal.

2. Since the part of the prosecution case i.e. recovery of contraband spasmo proxyvon capsules 741 in number have been held to be proved, therefore, in the present appeal, the findings to the limited extent that no offence under the provisions of ND & PS Act is made out against the respondents-accused have been assailed in the present appeal on the grounds inter alia that such findings have been recorded by learned trial Court on hypothetical reasoning, surmises and conjectures. The evidence available on record has not been appreciated in its right perspective. The prosecution allegedly has proved its case beyond all reasonable doubt that spasmo proxyvon capsules recovered from the accused

were sample of Dextropropoxyphene synonymous to Propoxyphene Napsylate hence a narcotic drug as described at Sr. No. 33 of the notification issued under Section 2 of the ND & PS Act and also that as per Sr. No. 239 of the said table any mixture or preparation with or without a neutral material of above drug is a narcotic drug within the meaning of ND & PS Act. Learned trial Court, therefore, has allegedly wrongly acquitted both the accused of the charge framed against each of them under Section 22 of the Act. The impugned judgment as such, has been sought to be quashed and set aside and the accused convicted for the commission of the offence punishable under Section 22 of the Act.

3. The prosecution case as disclosed from the report under Section 173 Cr. P.C and the documents annexed therewith in a nut shell is that on 23.7.2009, PW-12 Nishchint Negi, Dy. S.P Solan was directed by Superintendent of Police Solan to check illicit trafficking of intoxicated drugs in the area. He received secret information that accused are involved in the business of intoxicants in the accommodation they hired in the building, namely, Roshan Lal near Chajju Ram Mohan Singh building Bye Pass, Kather. Therefore, search warrant Ext. PW-12/A was obtained from the Chief Judicial Magistrate, Solan. A raiding party comprising PW-12 DSP Nishchint Negi, PW-13 ASI Kedar Nath, PW-15 Const. Chhabil Kumar, PW-11 Bhupinder Singh and Const. Ajay Kumar was formed. Two independent persons, namely PW-9 Kailash Chand and PW-10 Raman Singh were also associated in the raiding party. The police party went to the hired accommodation of the accused and knocked at the door. Accused Asha Gupta came out and told that her husband accused Prem Gupta was away to Delhi. The search warrant Ext. PW-12/A was shown to her. She was also apprised about her legal right to give her search either before a Magistrate or Gazetted Officer vide memo Ext. PW-9/A. She allegedly consented to be searched by the police vide memo Ext. PW-9/B. Thereafter all the persons of the raiding party offered their search first to her vide memo Ext. PW-9/C. Nothing incriminating could, however, be recovered from them. It is thereafter the house of the accused was searched in the presence of independent witnesses. On the search of their house, 741 **spasmo proxyvon** capsules were recovered from a polythene packet kept in a plastic container in the kitchen. The accused Asha Gupta failed to produce the documents authorizing them to retain the capsules with them in their house. The sampling and seizure process had taken place thereafter and the recovered capsules were seized on the spot after drawing sample. The identification memo Ext. PW-9/D was prepared. It is thereafter, rukka Ext. PW-2/A was prepared and sent to Police Station for registration of the case through PW-11 Const. Bhupinder Singh. Consequently, FIR Ext. PW-2/B came to be recorded in the Police Station. Further investigation was conducted and completed on the spot. The spot map Ext. PW-12/B was also prepared. The statements Ext. PW-12/F and Ext. PW-9/H of independent witnesses PW-10 Raman Singh and PW-9 Kailash Chand were recorded as per their version. The case property duly sealed was brought to Police Station and deposited in the malkhana after the same having been resealed by PW-2 ASI Lajja Ram. The opinion Ext. PW-4/A of PW-4 Sunny Kaushal, Drug Inspector and Ext. PW-5/A of PW-5 Ravinder Kumar Chaudhary, Asstt. Drug Controller were obtained. Special report Ext. PW-1/A was delivered to the Superintendent Solan who had perused the same and made the endorsement Ext. PW-1/B. The report of Forensic Science Laboratory Ext. PX and PY were obtained and on completion of the investigation, challan prepared and filed in the Court.

4. Learned trial Judge, on consideration of the police report and documents annexed therewith has found a prima-facie case under Section 22 of the ND & PS Act and Section 18 (c) of the Drugs and Cosmetics Act made out against both the accused and charge against them framed accordingly. The accused, however, pleaded not guilty. The prosecution, therefore, examined 16 witnesses in all. The material prosecution witnesses are PW-9 Kailash Chand and PW-10 Raman Singh, the independent witnesses. PW-4 Sunny

Kaushal, Drug Inspector has issued Ext. PW-4/A. PW-5 Ravinder Kumar Chaudhary is Asstt. Drug Controller, Solan. His opinion as to whether the recovered substance was a drug within the meaning of ND & PS Act was sought. He has issued the certificate Ext. PW-5/B stating therein that the same falls under the category of narcotic and psychotropic substance. PW-11 Const. Bhupinder Singh is a witness of the spot. He has supported the prosecution case qua the recovery of the capsules and also the sampling/sealing process. He has also supported the prosecution case qua its seizure and thereafter he had taken the rukka to the Police Station for registration of the case. PW-12 Nishchint Negi is also a material prosecution witness as it is he who being Dy. SP was head of the police party raided the house of the accused persons. PW-13 ASI Kedar Nath has investigated the case. PW-15 Const. Chhabil Kumar was also one of the persons of the raiding party.

5. The remaining prosecution witnesses are formal because PW-1 Yadan Chand was working as Asstt. Reader to Superintendent of Police. He has proved the special report Ext. PW-1/A. PW-2 ASI Lajja Ram was officiating SHO, Police Station Solan on that day. He has registered the FIR. He has also supported the prosecution case qua the case property produced before him and deposited in malkhana after having resealed the same. PW-3 ASI Sunil Kumar was posted as MHC in Police Station Solan. He has also supported the prosecution case qua the case property handed over to him for safe custody in the malkhana and later on samples thereof sent for obtaining the expert opinion. PW-6 HC Chander Mohan had entered the FIR Ext. PW-2/A and also daily diary No. 53 Ext. PW-6/B. PW-8 HC Prem Singh had taken the case property to FSL, Junga on 25.7.2009 and deposited there. PW-16 HC Vikram Singh has also conducted the investigation partly as he had recorded the statement of HC Hardev Singh and Const. Chabil Kumar, as per their version.

6. On the other hand, both the accused in their statements recorded under section 313 Cr.P.C. have denied the prosecution case either being wrong or for want of knowledge. In their defence, it is pleaded that accused Prem Gupta is running a shop of hardware at Kather bye pass road Solan. HC Raj Kumar had purchased articles from his shop and he had certain disputes with said Raj Kumar regarding payment of articles so purchased by him. The accused, as such, were falsely implicated by the police in this case.

7. As pointed out at the outset, learned trial Court on appreciation of the entire evidence has concluded that the recovery of 741 capsules from the exclusive and conscious possession of the accused stands established, however, the same were not found to be narcotic and psychotropic substance under the ND & PS Act. It was left open to the Drug Inspector to file a complaint against the accused persons in the Court of competent jurisdiction.

8. Mr. J.S.Guleria, learned Dy. Advocate General, has strenuously contended that certificates Ext. PW-4/A and PW-5/A as well as FSL report Ext. PX, prove beyond all reasonable doubt that the capsules recovered from the accused persons were narcotic drug/ psychotropic substance. The complaint, therefore, is that the accused persons have been wrongly acquitted of the charge under Section 22 of the ND & PS Act.

9. On the other hand, Mr. Rohit Sharma and Anuj Gupta, Advocates have not repelled the submissions so made on behalf of the accused and rather also argued that the findings qua recovery of the contraband allegedly spasmo proxyvon were not at all proved to be recovered from the conscious and exclusive possession of the accused and as such, allowing the prosecution to file a complaint against them under the provisions of Drugs and Cosmetics Act, 1940, are not legally and factually sustainable. It has been urged that in the present appeal against acquittal of the accused, they have the legal right to assail the

findings so recorded by learned trial Court against them even without filing an independent appeal. Support in this regard has been sought to be drawn from the provisions contained under Section 377 (3) of the Code of Criminal Procedure.

10. Learned Dy. Advocate General, however, has vehemently opposed the arguments so addressed on the grounds that there is no provision in the Code of Criminal Procedure providing for challenging any observation in the judgment against them by the accused in an appeal preferred by the State against their acquittal. According to learned Dy. Advocate General under Section 377(3) Cr.P.C., they however, are entitled to argue for their acquittal in an appeal filed by the State against the sentence on the grounds of its inadequacy.

11. In view of the rival submissions, we deem it appropriate to first set at rest the points raised by Mr. Rohit Sharma, Advocate, learned defence counsel. The question, therefore, arises that in an appeal filed by the State against the acquittal, the accused has a right to file appeal against the findings which are against them or not. In order to answer the same, it is desirable to reproduce here the provisions contained under Section 377 (3) of the Code of Criminal Procedure, which reads as follows:

> "377(3). When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence."

12. The bare perusal of the above provisions make it abundantly clear that accused has right to argue for his acquittal in an appeal preferred by the State for enhancement of the sentence. Learned counsel Mr. Rohit Sharma in order to substantiate the submissions he made, has placed reliance on the judgment of the Apex Court in ***Chandrappa & ors. Vs. State of Karnataka,*** reported in ***(2007) 4 SCC 415,*** however, unsuccessfully for the reason that nothing of the sort came to be decided in the judgment ibid and the ratio thereof rather is that the appellate Court has all powers, including, power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. Meaning thereby that in an appeal against acquittal of the accused, the Code of Criminal Procedure puts no limitation, restriction or condition on exercise of such power by the appellate Court on the evidence before it and may reach at its own conclusion, both on question of law and facts. This judgment, therefore, is of no help to the defence.

13. Admittedly, in the Code of Criminal Procedure, there is no provision providing for challenging the findings/observations against the accused in a judgment whereby he/she has been acquitted. Of course, in a case of conviction where the judgment is challenged by the State on the question of inadequacy of the sentence imposed, the accused is entitled to argue for his acquittal. In the absence of any provision in the Code of Criminal Procedure, this Court is of the firm opinion that the accused are not entitled to argue against the observations in the impugned judgment that 741 spasmo proxyvon capsules have been recovered from the conscious and physical possession of the accused. Otherwise also, said observations will be of some consequence in case any case is found to be made out against them under the provisions of Drugs and Cosmetics Act and the Drug Inspector chosen to file a complaint against them. We are also not satisfied with the submissions that in a judgment of acquittal, the accused is remediless and cannot challenge the observations of this nature against him in the impugned judgment for the reason that even if the remedy of appeal is not available to the accused, they may have resorted to other and further remedy available to them in accordance with law, including the writ jurisdiction

of this Court as the point so raised is pure and simple and legal in nature. Therefore, we find no substance in the arguments that the accused has right to challenge the observations against them in the impugned judgment without filing appeal and resorting to any other and further remedy available to them. Such submissions, therefore, have been made merely for rejection.

14. The prosecution case that the spasmo proxyvon capsules recovered from the accused is a drug under the provisions of ND & PS Act, we are not in agreement with learned Dy. Advocate General in this regard for the reason that the certificate Ext. PW-4/A issued by PW-4 Sunny Kaushal, Drug Inspector is hardly of any help to the prosecution case as nothing of the sort has come therein that spasmo proxyvon capsule is a drug falling within the mischief of the ND & PS Act. This witness has rather formed the opinion on the basis of the salt of the recovered capsules on its strip/wrapper that the same contains Propoxyphene Napsylate which is synonymous to Dextropropoxyphene.

15. Now, if coming to the opinion of PW-5 Ravinder Kumar Chaudhary, Asstt. Drug Controller, he has also taken into consideration the contents of each capsule as per the detail given on the strip/wrapper. According to him, Dextropropoxyphene and Propoxyphene Napsylate fall under the category of ND & PS Act, however, how and in what manner his opinion Ext. PW-5/B is silent. Even, if it is believed that spasmo proxyvon contains Propoxyphene Napsylate and that the same is synonymous to Dextropropoxyphene, though Dextropropoxyphene finds mention at Sr. No. 94 of the Notification No. 527 (E) dated 16.7.1996 and its salts, preparations, admixtures and other substances except preparations for oral use containing not more than 135 mgs of Dextropropoxyphene, do not contain any substances controlled under the Convention of Psychotropic Substances, 1971, hence not narcotic drug or substance under the ND & PS Act. It is only the quantity of above stated salts if more than 135 mgs of Dextropropoxyphene in the drug only then falls within the mischief of the ND & PS Act. In the case in hand, the report Ext. PX received from the State Forensic Laboratory reveals that in the sample of capsules of **spasmo proxyvon** on analysis in the laboratory, Propoxyphene Napsylate was found to be 99.97 mg per capsule i.e. less than 135 mg. Therefore, the submissions that learned trial Court has not appreciated the evidence in its right perspective made on behalf of the prosecution hardly finds any substance. Learned trial Judge, while placing reliance on the judgment of the Punjab and Haryana High Court in ***Rajiv Kumar vs State of Punjab***, ***Recent Cr. Reports 1997(4) 846*** has rightly held that the presence of 135 mg of Dextropropoxyphene hydrochloride based per unit is exempted from the ambit of manufactured drugs. Therefore, the capsules recovered from the accused do not fall within the mischief of the ND & PS Act. We, therefore, find no substance in this appeal and the same is accordingly dismissed and the impugned judgment is upheld. As a consequence thereof, personal bonds executed by each of the accused will stand cancelled and surety discharged.

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

Anil Kumar .....Petitioner
Versus
Prakash Viz and others ...Respondents.

CMPMo No.190 of 2019.
Date of decision: 04.07.2019

Code of Civil Procedure, 1908-Order XXVI Rule 9– Appointment of local commissioner for demarcation of land– Sustainability– Plaintiff alleging encroachment over his land by defendant– Held– Land of third party situated between land of plaintiff and defendant- No boundary dispute inter se parties exists– No material suggesting that plaintiff ever approached revenue authorities for demarcation of land and they refused his request- Local commissioner cannot be appointed to ascertain possession of party and collect evidence for it– Order of trial court dismissing application seeking appointment of local commissioner, upheld– Petition dismissed. (Paras 9 to 11)

For the petitioner : Mr. Sanjay Kumar, Advocate.
For the respondents : Mr. Neeraj Gupta, Sr. Advocate, with Mr. Ajeet Jaswal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

By way of this petition, the petitioner has challenged the order passed by the Court of learned Civil Judge (Junior-Division), Court No.3, Shimla, District Shimla, H.P., in C.M.A. No. 9003752/2018, dated 18.3.2019, vide which an application filed by the present petitioner under Order 26, Rule 9 of the Civil Procedure Code, for appointing a Local Commissioner to demarcate the suit land to ascertain as to whether the suit land stands encroached upon by the defendants or not, stands rejected by the learned Court below.

2. Record demonstrates that the petitioner herein has filed a suit for permanent prohibitory injunction, praying therein that the defendants be restrained from interfering with the suit land and that a decree of mandatory injunction be passed, directing the defendants to remove the encroachment made by the defendants upon the suit land.

3. It is borne out from the record that application under Order 26, Rule 9 of the Civil Procedure Code was filed by the present petitioner for demarcation of the suit land as far back as in the month of October, 2015, i.e. the stage when the plaintiff had not even led their evidence. Learned counsel for the petitioner has submitted that the application was kept pending by the learned trial Court by observing that the prayer made in the same shall be considered at an appropriate stage as the same at that stage was premature.

4. As per learned counsel, in view of the order earlier passed by the learned trial Court on the application so filed under Order 26, Rule 9 of the Civil Procedure Code, on 20.4.2016, the act of the learned trial Court of rejecting the prayer so made by the present petitioner is *per-se* bad and not sustainable in the eyes of law because once the application filed by the petitioner was kept pending, it was incumbent upon the learned Court to have had allowed it and had the suit land demarcated in the interest of justice.

5. On the other hand, learned Senior Counsel for the respondent has argued that though, it is a matter of record that the application filed under Order 26, Rule 9 of the Civil Procedure Code by the present petitioner was kept pending by the learned trial Court, however, there was no assurance given by the learned trial Court that at a subsequent stage, the same shall be allowed. All that the Court observed vide order dated 20.4.2016 was that the application shall be considered at an appropriate time and appropriate adjudication on the same will be made. He has further argued that a perusal of the order passed by the learned trial Court dated 18.3.2019, which stands impugned by way of this petition, demonstrates that the same is a reasoned and speaking order and learned trial Court has

assigned valid and cogent reasons as to why the application filed by the present petitioner has not been allowed by it. Learned Senior Counsel has argued that learned trial Court has rightly held that it was an established principle that the Local Commissioner cannot be appointed for the purpose of determining possession nor it was the duty of the Court to collect evidence on behalf of either of the parties. He has thus prayed for dismissal of this petition.

6. He has also argued that even otherwise also in the facts of the case, there was no need for appointment of a Local Commissioner in terms of order 26, Rule 9 of the Civil Procedure Code, because in between the plot of the petitioner and the respondents, there is another plot and therefore, it cannot be said that the dispute between the parties is a boundary dispute.

7. I have gone through the impugned order and have also gone through the documents appended with the petition. I have also heard learned counsel for the parties at length.

8. The allegation of the petitioner against the present respondents is that of encroachment. It is settled principle of law that he who alleges has to prove. Meaning thereby, that if it is the case of the petitioner/plaintiff that the suit land stands encroached upon by the respondents/defendants, onus is upon the petitioner to prove the said fact by bringing on record cogent evidence. As this Court has earlier also held, Order 26, Rule 9 of the Civil Procedure Code is not a provision, which any party is entitled to invoke to fill up lacuna in its by attempting to bring on record such evidence, which otherwise, it has failed to.

9. During the course of argument, this aspect of the matter could not be disputed by learned counsel for the petitioner that there is a plot of the person from whom the land has been purchased by the present petitioner between the plot of the petitioner and the respondents.

10. As I have already observed above, as it is the allegation of the petitioner that respondents have encroached upon the government land, it is for the petitioner to prove this fact and for this purpose, Local Commissioner cannot be appointed by the Court to collect evidence for either parties.

11. There is noting on record to demonstrate that the petitioner approached the Revenue Authorities for demarcation of the suit land subject matter of the dispute, however, the Revenue Authorities did not entertain the request of the petitioner for demarcation of the land.

12. In these circumstances, this Court does not finds any perversity with the order passed by the learned trial Court which stands impugned in this petition, whereby the application filed by the petitioner for appointment of a Local Commissioner has been dismissed. This Court concurs with the findings returned by the learned trial Court, that Local Commissioner cannot be appointed for determining the possession, nor it is the duty of the Court to collect evidence on behalf of either of the party.

13. At this stage, learned counsel for the petitioner has placed reliance upon reported judgment passed by the Coordinate Bench of this Court in *CMPMO No.261 of 2017 titled as Kangru Ram* Versus *Sriram, dated 21.3.2018*.

14. I have carefully perused the judgment passed by the Hon'ble Coordinate Bench of this Court. In my considered view, the judgment passed by the Hon'ble Coordinate Bench of this Court is of no assistance to the petitioner as the said judgment was passed in

the facts of the said case. In the present case, the factual position is completely different. Neither the petitioner has placed anything on record to demonstrate that he has acted vigilantly by approaching the Revenue Authorities for demarcation of the land, yet no action has been taken by the Revenue Authorities and further it is borne out from the record that the dispute between the petitioner and respondents is not a boundary dispute because there is the land of a third party between the properties of the petitioner and the respondent.

15. In view of the findings returned hereinabove, as this Court does not finds any merit in the present petition, the same is accordingly, dismissed. Pending miscellaneous application(s), if any,shall also stand disposed of.

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

Joginder Pal & another …… Petitioners.

Versus

Bishambhari Devi & others …… Respondents.

CMPMO No.51 of 2019
Date of decision: 15.07.2019

Code of Civil Procedure, 1908- Order XXI Rule 32 (3)- Decree of permanent prohibitory injunction– Execution– Attachment of immovable property– Held, when decree holder has filed application for sale of attached land within statutory period of six month from date of attachment and disobedience of decree continues, the judgment debtor cannot seek release of said land. (Para 3)

For the petitioners : Mr. Adarsh K. Vashishta, Advocate.
For the respondents : Ms. Hem Kanta Kaushal, Advocate, vice Mr. Naresh K.Sharma, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

By way of this petition, the petitioners have challenged order dated 19.11.2008, passed by the Court of learned Senior Civil Judge, Court No.1, Ghumarwin, District Bilaspur, H.P., in C.M.A. No.1-10 of 2017, titled as Bishambhari Devi Versus Joginder Pal & others, vide which the application filed by the present petitioners under Order 21, Rule 32 (3) of the Code of Civil Procedure, for release of their property, which was ordered to be attached by the Court on the plea that no application for sale of the same was filed within the statutory period by the Decree Holder before the learned Executing Court, stands dismissed by the learned Executing Court, by holding that there was an application duly filed by the Decree Holder and that too, within the statutory period.

2. I have heard learned counsel for the parties and have also gone through the record as also the impugned order.

3. A perusal of the order, which is under challenge, demonstrates that pursuant to the order of attachment passed by the learned Executing Court dated 1.9.2016, application was filed for the sale of the said property by the Decree Holder within six months, on 27.2.2017, which is duly registered as application No.2-10/2017. That being the factual position, there is no perversity with the impugned order because when there already was an application filed by the Decree Holder, for sale of the attached property within the statutory period, but obvious, the learned Executing Court was bound to dismiss the application so filed by the present petitioners, under Order 21, Rule 32 (3) of the Code of Civil Procedure.

4. In view of the above discussion, as there is no merit in the present petition, the same is accordingly, dismissed. Interim order stands vacated. Pending miscellaneous application(s), if any, stand disposed of.

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

Deepak Sood ..... Petitioner.
Versus
Parmod Sood and others ...Respondents.

CMPMO No. 442 of 2017.
Date of decision: 02.07.2019

Himachal Pradesh Urban Rent Control Act, 1987 –Code of Civil Procedure, 1908 - Order 1 Rule 10– Eviction suit– impleadment of co-owner as co-petitioner at belated stage- Permissibility– Held – a co-owner of rented premises can file eviction suit against tenant for and on behalf of other co-owners without impleading them as co-petitioners – Rent suit filed in 2011, whereas application for his impleadment as co-petitioner filed by another co-owner in 2017 almost after six years of institution of eviction suit– No explanation given for delay of six years in moving such application– Application appears to have been filed by co-owner to help the tenant - Order of Rent controller dismissing such application upheld – Petition dismissed. (Paras 10 & 12)

For the petitioner : Mr. Gaurav Sharma, Advocate.
For the respondents : Respondent No.1 proceeded ex-parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

As per the report of the Registry, respondent No.1 has been duly served. As none has put in appearance on his behalf, the said respondent is ordered to be proceeded against ex-parte.

Further as per report of the Registry, fresh steps as also the correct address for the service of respondent No.2 have not been filed. At this stage, learned counsel for the petitioner submits that respondent No.2 has left the premises in issue. As there is a stay operating against the proceedings pending before the learned Rent Controller since 6.10.2017, therefore, learned counsel for the petitioner was heard on merit.

By way of this petition, the petitioner has assailed order dated 23.9.2017, passed by the Court of learned Rent Controller, Court No.3, Shimla, in a miscellaneous application filed by the present petitioner under Order 1, Rule 10 of the C.P.C., wherein a prayer was made before the learned Rent Controller to implead the present petitioner as a party petitioner in the Rent Petition.

2. Brief facts, necessary for the adjudication of the present petition are that the present petitioner and respondent No.1 are relatives. There is property owned by them within the limits of Municipal Council, Shimla, in which respondent No.2 at one point was inducted as a tenant.

3. In the year 2011, respondent No.1 Parmod Sood filed a petition for eviction of the said tenant before the Court of learned Rent Controller, Shimla.

4. In the year 2015, an application was filed under Order 1, Rule 10 of the C.P.C. by the present petitioner for being impleaded as petitioners/landlord in the rent petition inter alia on the ground that he was a co-owner of the demises premises and in fact, it was he who had inducted respondent No.2 as tenant in the demises premises.

5. The application was opposed by respondent No.1 herein inter alia on the ground that the application was not filed by stating proper facts and there was suppression of material facts. It was further mentioned in the reply that there were litigations going on between them and the petitioner herein was trying to help the tenant. It was also the case of respondent No.1 that the application was filed at a belated stage. The rent petition was filed in the year 2011 and present petitioner was aware about the factum of the pendency of the same, yet he filed the application only in the year 2017. It was further the stand of the said respondent that it was settled law that any co-owner can file a petition for eviction of the tenant.

6. Vide impugned order, the application has been dismissed by the learned Rent Controller. It rejected the contention of the present petitioner that he was a necessary party for the adjudication of rent petition, by holding that as the rent petitioner was a landlord as defined in Section 2(d) of the Act, therefore, he was competent to file and maintain the petition on behalf of all concerned.

7. Learned Court further held that even if the petition for eviction was allowed, the question as to who ought to receive the possession would be decided inter-se the co-owners of the property whenever said issue arose. On these basis, it held that the present petitioner was not a necessary party.

8. I have learned learned counsel for the petitioner and have also gone through the impugned order as well as the documents appended with the petition. It is not in dispute that the petitioner herein and respondent No.1 are relatives and the demises property is co-owned by them. It is also not in dispute that respondent No.2 herein was inducted as tenant in the said premises and it is for the eviction of the said tenant that the petition stood filed by present respondent No.1 before the learned Rent Controller as far back as in the year 2011.

9. Section 2 (d) of the H.P. Urban Rent Control Act, 1987 defines the landlord as under:-

> "Landlord" means any person for the time being entitled to receive rent in respect of any building or rented land whether on his own account or on behalf, or for the benefit, of any other person, or as a trustee, guardian, receiver, executor or administrator for any other person, and includes a

> tenant who sublets any building or rented land in the manner hereinafter authorised, a specified landlord, and every person from time to time deriving title under a landlord"

10. The definition *per-se* provides that landlord means any person for the time being entitled to receive rent in respect of any building or rented land whether on his account or on behalf of the other person including every person from time to time derives title under a landlord. The definition thus clearly contemplates that if there are more than one co-owners, it is open for any one co-owner, to file a petition for eviction of a tenant under the provisions of the H.P. Urban Rent Control Act. It has not been disputed before me that respondent No.1 is a landlord in terms of Section 2(d) of the Act. However, the contention of learned counsel for the petitioner herein is that he also being a landlord, is a necessary party and he also has a right to be impleaded as petitioner before the learned Rent Controller. In my considered view, the contention of learned counsel for the petitioner sans merits. As has also been held by the learned Rent Controller, it is not necessary that each and every landlord has to be there as a petitioner whenever a rent petition for eviction is filed. One of them is suffice to pursue the matter.

11. As per the findings returned in the impugned order by the learned Rent Controller, the petitioner therein fulfills the definition of landlord provided in Section 2 (d) thereof. These findings in my considered view are correct findings as it is not in dispute that respondent No.1 herein, who is the petitioner before the learned Court below, in fact is a co-owner of the demises premises meaning thereby that he is landlord in respect of the said premises.

12. This Court can also not loose site of the fact that the rent petition was filed somewhere in the year 2011 and the application for impleadment as a party was filed by the present petitioner only in the year 2017. There is no cogent explanation as to what took the present petitioner almost 6 years to move an application to be impleaded as a party. This strengthens the contention of respondent No.1 as taken before the learned Court Below that the application was just filed to help the tenant and harass the rent petitioner.

13. Therefore, as this Court does not finds any infirmity with the findings returned by the learned Court below in order dated 23.09.2017, this petition is dismissed being devoid of any merit.

The interim stands vacated.

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HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Jatinder Kumar ……Appellant.
Versus
State of H.P. ……Respondent.

Cr. Appeal No. 460 of 2017.
Decided on: 24.7.2019.

Indian Penal Code, 1860- Section 376 – Rape- Appreciation of evidence– Principles reiterated, that allegations of rape may not always be correct and sometimes these may have

been leveled falsely for variety of reasons– Where statement of prosecutrix inspires no confidence, conviction cannot be based solely on its basis– On facts, prosecutrix contradicted prosecution case on material particulars- Medical evidence not supporting sexual assault– No other scientific evidence indicating commission of crime – Material witnesses also denying prosecution case– FIR might have been lodged to settle property dispute– Prosecution case doubtful– Appeal allowed– Accused acquitted. (Paras 14 to 25 & 31& 32)

Cases referred:

Ranjit Hazarika vs. State of Assam, (1998) 8 SCC 635

State of Himachal Pradesh vs. Negi Ram, Criminal Appeal No. 481 of 2009 decided on 27th May, 2016

State of Punjab vs. Gurmeet Singh & ors., AIR 1996 SC 1393

Vimal Suresh Kamble vs. Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175

For the appellant : Mr. Dinesh K. Thakur, Advocate.

For the respondent : Mr. Narender Guleria, Addl. Advocate General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J, (Oral).

Appellant Jatinder Kumar (hereinafter referred to as the accused) is convict. He has been convicted for the commission of offence punishable under Section 376 IPC and has been sentenced to undergo simple imprisonment for a period of 10 years and to pay a sum of Rs. 20,000/- as fine.

2. He allegedly subjected none else but his mother 75 years of age to sexual intercourse. As per the application Ext. PW-1/A made by the prosecutrix to the police of Women Police Station Dharamshala, District Kangra on 15.7.2015, at 9:00 AM, the accused locked her in his own room. He opened her salwar forcibly and did wrong act with her. When she raised alarm, the mason, namely, Bahadur and a lady worker, namely, Rekha (PW-4) came there. They made efforts to open the door from outside but of no avail. At that very time, her daughter-in-law Chandresh Kumari (PW-10) (alleged wife of the accused) came there. She asked the accused to open the door. On this, he opened the same. Her grandson Rahul (PW-5) called her daughter Sangeeta (PW-9) over telephone to their house. Sangeeta (PW-9) reached there and after that the prosecutrix accompanied by Sangeeta (PW-9) and daughter-in-law Chandresh Kumari (PW-10) went to Women Police Station Dharamshala. On the basis of the statement Ext. PW-1/A, FIR Ext. PW-15/A was recorded. The investigation was taken in hand by PW-15 S.I. Kiran Bala, the then Station House Officer, Women Police Station Dharamshala.

3. The victim PW-1 was taken to Zonal Hospital, Dharamshala. PW-15 S.I. Kiran Bala made application Ext. PW-15/B for medical examination of PW-1. She was examined by Dr. Jyoti Gupta (PW-11) and issued MLC Ext. PW-11/A. PW-1 also handed over two parcels addressed to RFSL, Dharamshala. PW-15 S.I. Kiran Bala had deposited the same with PW-6 HC Satya Devi, Women Police Station Dharamshala. The inspection of the place of occurrence was conducted. Mattress covers (Ext. P-2 and P-3) were taken into possession from the room where the prosecutrix was assaulted sexually vide recovery memo Ext. PW-1/B in the presence of PW-8 Jawahar Lal and PW-2 LHC Anjana. Spot map of the

place of occurrence Ext. PW-15/C was prepared. The proceedings were photographed vide DVD Ext. B-1.

4. On finding evidence against the accused, he was arrested. The application Ext. PW-15/D was made for his medical examination. He was medically examined by PW-12 Dr. Satish Kanwar. MLC Ext. PW-12/A was issued by the Doctor and supplied to the I.O.

5. On 16.7.2015, the statement Ext. PW-16/C of the prosecutrix was got recorded under Section 164 Cr.P.C. in the Court of PW-16 Ms. Shikha Lakhanpal, JMIC, Court No. 2 Dharamshala. On 17.7.2015, the alleged victim of the occurrence had produced her shirt (Ext. P-5), which was taken into possession vide recovery memo Ext. PW-1/C in the presence of Sangeeta (PW-9) and lady Constable Ramna Devi (PW-3). On the identification Ext. PW-8/A of the spot by the accused, the spot map Ext. PW-15/E was prepared. The photographs Ext. C-1 to C-3 were also clicked allegedly with official camera. The statement Ext. PW-15/F of Rekha (PW-4) was allegedly recorded as per her version. On application Ext. PW-14/A submitted to PW-14 Savita Devi, Secretary Gram Panahayat Sakoh, birth certificate of the victim Ext. PW-14/B and that of the accused Ext. PW-14/C and abstract of the Family Register Ext. PW-14/D were obtained. The parcel containing clothes of the victim were sent to RFSL, Dharamshala for analysis. The result Ext. PW-13/A was procured. The final opinion of the doctor Ext. PW-11/B was also obtained.

6. On completion of the investigation, PW-15 S.I. Kiran Bala had prepared the final report and presented in the Court.

7. Learned Trial Judge, on appreciation of the report filed by the police and the documents annexed thereto and on prima-facie finding a case under Section 376 IPC made out against the accused has framed the charge against him accordingly. He, however, pleaded not guilty to the charge. The prosecution, therefore, examined 16 witnesses in all in support of its case against the accused.

8. The material prosecution witnesses, as noticed hereinabove, are the victim/complainant herself (PW-1), labourer Rekha (PW-4), Rahul (PW-5) grandson of the prosecutrix, PW-8 Jawahar Lal her son-in-law, Sangeeta (PW-9) her daughter and daughter-in-law Chandresh Kumari (PW-10). The remaining prosecution witnesses PW-2 LHC Anjana is a witness to the recovery of Mattress covers (Ext. P-2 and P-3) whereas PW-3 LC Ramna Devi is a witness to the recovery of Shirt (Ext. P-5) of the prosecutrix. PW-6 HC Satya Devi is MHC who has been examined to prove the prosecution case qua deposit of the case property with her in the malkhana. PW-7 HHC Karan Singh had taken the case property to RFSL, Dharamshala vide RC No. 24/21. He deposited the same in the laboratory and handed over the receipt on RC to PW-6 MHC Satya Devi. PW-11 Dr. Jyoti Gupta has medically examined the prosecutrix whereas PW-12 Dr. Satish Kanwar has examined the accused. PW-13 Dr. Surinder Kumar Pal is Asstt. Director Biology and Serology, RFSL Dharamshala. He has proved the report Ext. PW-13/A. PW-14 Savita Devi, is the Secretary Gram Panahayat Sakoh. She issued the date of birth certificate Ext. PW-14/B and Ext. PW-14/C and also the abstract of pariwar register Ext. PW-14/D. PW-15 S.I. Kiran Bala is the I.O. in this case. She has investigated the case in the manner as discussed hereinabove. PW-16 Ms. Shikha Lakhanpal, JMIC, Court No. 2 Dharamshala has recorded the statement Ext. PW-16/C of the prosecutrix under Section 164 Cr.P.C.

9. The accused in his statement recorded under Section 313 Cr.P.C. has denied all the incriminating circumstances appearing against him in the prosecution evidence either being wrong or for want of knowledge. He, however, opted for not producing any evidence in his defence. Learned trial Judge, on appreciation of the evidence and hearing

learned Public Prosecutor as well as learned defence counsel concluded that the prosecution has proved its case against the accused beyond all reasonable doubt. He has, therefore, been convicted and sentenced as pointed out at the very outset.

10. The appellant-accused has assailed the impugned judgment on the grounds inter alia that the same is against law and also facts of the case. Learned trial Judge has misread and mis-appreciated the evidence produced by the prosecution, therefore, a grave injustice has been caused to him on account of such an approach on the part of learned trial Court. The findings allegedly have been recorded on assumptions, presumptions without there being cogent and convincing evidence available on record in support of it. The testimony of the witnesses does not inspire any confidence. The independent witnesses otherwise had also not supported the prosecution case and rather turned hostile. The findings of conviction as such are based on hypothesis, conjectures and surmises. The medical evidence is not suggestive of that the prosecutrix was subjected to sexual intercourse. The impugned judgment, therefore, has been sought to be quashed and set aside.

11. Sh. Dinesh K. Thakur, Advocate, learned counsel representing the appellant-convict has vehemently argued that the present though is a case of no evidence, however, irrespective of it, learned trial Court has recorded the findings of conviction against the accused. According to learned counsel, the present is a case of non-application of mind by learned trial Judge. The entire approach of learned Court below is stated to be whimsical, capricious and farfetched. The contradictions and inconsistencies/improvements in prosecution evidence which according to learned counsel goes to the very root of the prosecution case have been erroneously ignored. The prosecutrix herself has contradicted her version in the application Ext. PW-1/A and while in the witness-box as PW-1 on all material aspects. Rekha (PW-4) and Rahul (PW-5), both have turned hostile and not supported the prosecution case at all. PW-10 Chandresh Kumari, daughter-in-law (wife of accused) is highly doubtful because as per her own version, she never solemnized marriage with the accused and rather she is the wife of someone else. Therefore, according to the learned counsel, the findings of conviction in this case could have not been recorded in any manner, whatsoever.

12. Mr. Narender Guleria, learned Addl. Advocate General though has repelled the arguments addressed on behalf of the accused and also argued that own statement of the prosecutrix supported by Chandresh Kumari (PW-10) and other material available on record is sufficient to bring the guilt home to the accused, however, failed to satisfy the conduct of the prosecutrix who herself contradicted her statement Ext. PW-1/A on all material aspects and that of Rekha (PW-4) and Rahul (PW-5), who turned hostile to the prosecution case. Learned Addl. Advocate General has also failed to satisfy us that the present is not a case of two possible views.

13. It is in this backdrop and also the evidence available on record, we have to ascertain the truth and for that reappraisal of the prosecution evidence is required.

14. The very first version of the prosecution case finds mention in the application Ext. PW-1/A made by the prosecutrix to the police of Women Police Station, Dharamshala. Though, she did not disclose the date, however, it is 15.7.2015 mentioned in Ext. PW-1/A itself recorded on the day of occurrence itself. According to her, at 9:00 AM, the accused took her inside the room, bolted the same from inside and opened her salwar. Thereafter, he subjected her to sexual intercourse. She raised alarm. The mason and labourer, namely Bahadur and Rekha (PW-4) working there had come and tried to got the door opened, however, the accused did not open the door. At that very time, her daughter-in-law

Chandresh Kumari (PW-10) came there. She asked the accused to open the door. He opened the door. Her grandson Rahul (PW-5) informed her daughter Sangeeta (PW-9) over telephone in the house of her in-laws. Sangeeta (PW-9) came there and she accompanied by her as well as her daughter-in-law Chandresh Kumari (PW-10) visited the Police Station. On the application Ext. PW-1/A, FIR Ext. PW-15/A was recorded under Sections 342 and 376 IPC against the accused in Women Police Station Dharamshala. The charge against him has, however, been framed for the commission of the graver offence i.e. under Section 376 IPC.

15. Now, if coming to the prosecution evidence, the prosecutrix while in the witness-box taking "U" turn from the statement Ext. PW-1/A, she made to the police has stated that at 9:00 AM, Bahadur, a mason and Rekha (PW-4), a labourer were working in their house which was under construction. The accused told his son Rahul (PW-5) to prepare Tea for them. Her daughter-in-law Chandresh Kumari (PW-10) also went upstairs. The accused came to her room. He told her for withdrawal of Rs. 10,000/-. He bolted the room from inside. The labourer Rekha (PW-4) bolted the same from outside. The accused thereafter subjected her to sexual intercourse. She raised alarm. Chandresh Kumari (PW-10) came there and asked the accused to open the door. The accused had opened the door. It is Chandresh Kumari (PW-10) and Rekha (PW-4) who informed her daughter Sangeeta and son-in-law PW-8 Jawahar Lal about the incident through the cell phone of Rahul (PW-5). PW-8 Jawahar Lal and Sangeeta (PW-9) reached in her house at 2:00 PM. She narrated the incident to her daughter Sangeeta (PW-9) and thereafter went to Police Station accompanied by Chandresh Kumari (PW-10) here daughter-in-law, Sangeeta (PW-9) and PW-8 Jawahar Lal. She lodged the complaint Ext. PW-1/A.

16. The scrutiny of complaint Ext. PW-1/A and the above stated statement of the complainant while in the witness-box as PW-1 amply demonstrate that she has contradicted the contents of the complaint Ext. PW-1/A. She rather improved her earlier version while in the witness-box. The statement that the accused asked his son Rahul (PW-5) to prepare Tea for the mason and labourer and her daughter-in-law Chandresh Kumari (PW-10) went upstairs, the accused entered in her room and asked for withdrawal of Rs. 10,000/-, nothing of the sort is there in the complaint Ext. PW-1/A. Even as per the complaint, he took her inside his room and bolted the same from inside, whereas, the labourer Rekha (PW-4) bolted the same from outside. When she raised an alarm as per her version in the complaint, Rekha (PW-4) and Bahadur the mason came there and made efforts to get the door opened. She, however, has not stated so while in the witness-box and rather it is her daughter-in-law Chandresh Kumari (PW-10) who got opened the door of the room. As per the complaint Ext. PW-1/A, Sangeeta (PW-9) was called by Rahul (PW-5) by making call to her in-laws house through his cell phone, however, while in the witness-box, it is Chandresh Kumari (PW-10) and Rekha (PW-4) who have called Sangeeta (PW-9) by making call through cell phone of Rahul (PW-5). Such inconsistencies/improvements and contradictions in the evidence as has come on record by way of own testimony of the victim and the complaint Ext. PW-1/A she made to the police goes to the very root of the prosecution case and it is difficult to believe that the alleged sexual assault on the prosecutrix was made by the accused in the manner as claimed by the prosecution.

17. PW-4 Rekha Devi has not supported the prosecution case though as per her version around 9:30 AM - 10:00 AM when she was working along with Bahadur in the upper floor of the house, they heard accused and his mother shouting. She, however, did nothing on hearing their noise nor she went down to the ground floor. She expressed her ignorance as to where the accused was at that time and where was his mother. She also expressed her ignorance as to what the accused did with his mother. She has been cross-examined at

length by learned Public Prosecutor, however, nothing material lending support to the prosecution case could be elicited and rather the suggestions that on 15.5.2015 (it should have been 15.7.2015) while on work with Bahadur, the accused started quarrelling with his mother and dragged her inside the room, bolted the same from inside and that she heard the cries and screams of the mother of the accused from inside the room, irrespective of denied being wrong lead to the only conclusion that the accused and his mother quarreled with each other. The suggestion that she and Bahadur tried to get the door opened but the accused did not open the same has also been denied being wrong. She has also denied that Chandresh Kumari (PW-10) came there and tried to get the door opened and that it is after sometime, the accused opened the door and his mother came out while crying and terrified. She has also denied that the accused had committed rape with her.

18. When further cross-examined by learned defence counsel, she tells us that the accused and his mother used to stay in the house along with Rahul (PW-5) and the wife of the accused. In one portion of the house Santosh Kumari, the sister of the accused was also residing separately. The other portion of the house of the accused was with his mother. It is admitted by this witness that the accused, his mother and sisters used to fight oftenly. The money for payment to them was being given by the prosecutrix to the accused and it is he who used to make the payment thereof to them. After the incident, it is the prosecutrix who had been making payment of their wages to them. She expressed her inability to tell as to who had been crying in the house of the accused.

19. Therefore, the close scrutiny of the evidence as has come on record by way of testimony of Rekha (PW-4) lead to the only conclusion that she has not supported the prosecution case qua the prosecutrix was taken inside the room by the accused, bolted the same from inside whereas by this witness from outside and thereafter the accused subjected her to sexual intercourse. She has also not supported the prosecution case qua she along with Bahadur tried to get the door opened. Though, as per her testimony, the accused, his mother and his sister used to fight with each other, obviously on account of the property disputes as is the plea raised by the accused in his defence.

20. PW-5 Rahul Kumar has also not supported the prosecution case. According to him, either on 15th July or 14th July, 2015, labourer Rekha (PW-4) asked him around 10:00 -10:30 AM to make a call through his cell phone to his Bua (Aunt) Sangeeta (PW-9). He dialed the number of his Bua and handed over the cell phone to Rekha (PW-4). It is Rekha (PW-4), who talked over cell phone with his Bua. Later on, she came to their house along with her husband around 12:30 PM. His testimony in cross-examination that after the construction work of house started, his father (accused), grandmother (the prosecutrix) and Bua, Sangeeta (PW-9) used to quarrel with each other and that his Bua Sangeeta (PW-9) had been asking for her share in the property and that this alone was the cause of quarrel in their house, again substantiate the plea the accused raised in his defence. He, while admitting that Rekha (PW-4) told him to call his Bua Sangeeta (PW-9) in view of the quarrel in the house and that he went to the lintel to Rekha (PW-4) to speak to his Bua corroborate the testimony of Rekha (PW-4) to the extent that Sangeeta (PW-9) was called in view of accused and his mother quarreled with each other by making call to her through cell phone of Rahul (PW-5). Therefore, the statement of Rahul (PW-5) again a witness examined by the prosecution is also not suggestive of that accused subjected the prosecutrix to sexual intercourse. There remains only the sole testimony of the prosecutrix qua assaulting her sexually by the accused which, as already discussed, hardly inspires any confidence.

21. The recovery of the mattress covers (Ext. P-2 and P-3) though stand proved from the testimony of PW-8 Jawahar Lal, none else but the son-in-law of the prosecutrix and

PW-2 LHC Anjana, however, they both are interested witnesses being closely related to the prosecutrix and police official, respectively. Otherwise also, the recovery thereof is of no consequence for the reason that semen or blood could not be detected thereon. It is highly doubtful that the prosecutrix was subjected to sexual intercourse on the mattress of which the covers (Ext. P-2 and P-3) pertain.

22. The recovery of the shirt of the prosecutrix Ext. P-5 even if is believed to be true, is again of no consequence for the reason that blood and semen was not detected thereon also when chemically analyzed in the FSL. The shirt, as per the version of PW-3 LC Ramna Devi, was produced by the prosecutrix before the police in her presence and in that of Sangeeta (PW-9) and taken into possession vide recovery memo Ext. PW-1/C. PW-9 Sangeeta, however, belies the prosecution case in this regard because she has admitted in her cross-examination that this shirt was given to her by the prosecutrix and it is she who handed over the same to the police in the Police Station after two days. Therefore, it is doubtful that the shirt was produced before the police by the prosecutrix and taken into possession in the manner as claimed by the prosecution.

23. If coming to the evidence as has come on record by way of testimony of PW-8 Jawahar Lal, the son-in-law of the prosecutrix and her daughter Sangeeta (PW-9) and if it is believed that they had come to the house of the prosecutrix, it is doubtful that PW-8 Jawahar Lal was apprized about the incident by Rekha (PW-4) over cell phone because Rekha (PW-4) while in the witness-box has denied the suggestion to this effect given to her by learned Public Prosecutor. No doubt, according to her, Rahul (PW-5) connected the cell phone of his Bua and handed it over to her to speak, however, she could not speak anything beyond "Hello-Hello". Therefore, the testimony of PW-8 Jawahar Lal that Rekha (PW-4) talked on his cell phone and told that the accused had dragged the prosecutrix inside the room and bolted the same from inside and also that the prosecutrix was crying is not proved on record. Otherwise also, even if it is believed that any such call was received by this witness over his cell phone, no information was given to him that the accused has assaulted the prosecutrix sexually and the alleged information given to him is confined only to an assault/quarrel between the accused and the prosecutrix. Since Sangeeta (PW-9) was apprized by PW-8 Jawahar Lal about the information whatever he received over his cell phone and as nothing has come in his statement that Rekha (PW-4) told him about the prosecutrix was assaulted by the accused sexually also, therefore, there was no occasion to Sangeeta (PW-9) to have stated while in the witness-box that her husband told her about the accused committed rape also on the prosecutrix. Her testimony to this effect, therefore, beyond the information, whatsoever was given to her husband PW-8 Jawahar Lal over his cell phone cannot be believed to be true. The possibility of she and her husband have engineered the story in connivance with the police to implicate the accused falsely on account of property dispute cannot be ruled out. Interestingly enough, Santosh, the another daughter of the prosecutrix was residing in other portion of that very house, therefore, there was no occasion to have informed PW-8 Jawahar Lal and Sangeeta (PW-9) to come to the house of the prosecutrix. There was no occasion to have waited for their arrival there till 2:00 PM because Santosh Kumari, the another daughter of the prosecutrix and her daughter-in-law Chandresh Kumari (PW-10) were present there. Had the incident been taken place in the manner as claimed by the prosecution, they both could have accompanied the prosecutrix to Police Station and lodged the FIR. There being no explanation as to why it was not done, the story has been fabricated to register the case falsely against the accused at the behest of PW-8 Jawahar Lal and Sangeeta (PW-9) in connivance with the police. The statement of PW-8 Jawahar Lal in his cross-examination that he had put his signature on parcel Ext. P-1 in which cover of mattresses were sealed in the Police Station, lead to the only conclusion that recovery was not effected on the spot as

claimed by the prosecution. He has expressed his ignorance as to where he had put his signatures on the recovery memo Ext. PW-1/B and PW-8/A. This also casts doubt qua the recovery made in this case.

24. PW-9 Sangeeta in the very first sentence of her cross-examination has admitted that on being asked she had taken the shirt of her mother to the Women Police Station, Dharamshala on the next day of lodging the complaint. She also admitted having put her signature on the recovery memo Ext. PW-1/C in the Police Station. There is, therefore, no question of the prosecutrix produced the shirt (Ext. P-5) before the police. As per the prosecution case, Chandresh Kumari (PW-10) is the wife of the accused. The prosecutrix has also mentioned Chandresh Kumari (PW-10) as her daughter-in-law. However, surprising enough Sangeeta (PW-9) while in the witness-box has expressed her ignorance as to since when Chandresh Kumari (PW-10) was residing in their house at Sakoh. Not only this, but as per her further version Chandresh Kumari (PW-10) is not married to the accused and she was staying with him without marriage. Later on, she abandoned the company of the accused. Chandresh Kumari (PW-10) while in the witness-box also tells us that she was not married with accused or stayed with him in his house at Sakoh for 5-6 months. Though, she has supported the prosecution case qua the accused locked his mother inside the room and on hearing cries when she made the accused to open the door, the prosecutrix came out while crying and perturbed, she told that the accused had committed rape on her inside the room. She, in her cross-examination, however, falsified the statement so made in her examination-in-chief because in the very first sentence it is stated by her that on the day of occurrence, she was at the place of her parents at Dhadhoon. Her testimony that Rekha (PW-4) informed over telephone daughter and son-in-law of the prosecutrix, PW-8 and PW-9 to come to Sakoh is also false because Rekha (PW-4) could not speak beyond “Hello-Hello” when the cell phone was handed over to her by Rahul (PW-5). Therefore, this part of the statement of Chandresh Kumari (PW-10) also inspires no confidence.

25. The close scrutiny of the evidence as has come on record by way of testimony of PW-8 Jawahar Lal, Sangeeta (PW-9) and Chandresh Kumari (PW-10), as discussed hereinabove lead to the only conclusion that they are liars. PW-8 Jawahar Lal and Sangeeta (PW-9) may be interested in the success of the prosecution case on account of their demand for property belonging to the prosecutrix and the property dispute with the accused. Had nothing of the sort as claimed by the prosecution been taken place, the another daughter of the prosecutrix, namely, Santosh Kumari admittedly residing in other part of the same house would have come forward to support the prosecution case. She has neither been associated nor cited as a witness by the prosecution to the reasons best known to it.

26. Interestingly enough, the medical evidence is not suggestive of that the prosecutrix was assaulted sexually. MLC Ext. PW-11/A, no doubt records the alleged history of rape, however, by whom, nothing finds mention therein. Normally, in a rape case, the name of the accused is also being reflected by the Medical Officer, while mentioning history in the MLC. The doctor, no doubt, tells us that the name of accused may have been disclosed to her, however, now she could not recollect as to who was the accused nor she mentioned the same in the MLC. The non-mentioning of the name of the accused in the MLC also casts doubt on the prosecution story. Otherwise also, on clinical examination, Dr. Jyoti Gupta (PW-11) could not form any opinion about the alleged sexual assault committed upon and the final opinion was left open to be given on the receipt of the report of FSL.

27. Now, if coming to the report Ext. PW-13/A, proved by PW-13 Dr. Surinder Kumar Pal, blood and semen was not detected on the covers of mattresses, shirt of the prosecutrix, her pubic hair, smegma swab of the accused and his pubic hair. Semen was

also not detected in the vaginal slides of the deceased. Though, semen was detected on the underwear of the accused, however, not the blood. PW-11 Dr. Jyoti Gupta, on having gone through the report Ext. PW-13/A has given the final opinion Ext. PW-11/B. According to her, on the basis of the report, it cannot be commented upon whether the intercourse/rape had occurred. The present to us, is a case where the scientific investigation conducted do not reveal that the prosecutrix was subjected to sexual intercourse because blood and semen was not detected on the covers of mattresses, shirt of the prosecutrix, her pubic hair, smegma swab of the accused and his pubic hair. Even the semen was not detected in vaginal slides of the prosecutrix. Had she been subjected to sexual intercourse, keeping in view that the prosecutrix was examined medically on the same day, if not blood, the semen stains were bound to appear on the above exhibits analyzed chemically in the laboratory. The semen stains, no doubt were detected on the underwear of the accused. He being young man, the presence of such stains on his underwear should not be construed to conclude that such stains occurred as he subjected the prosecutrix to sexual intercourse. The medical evidence, therefore, is also not suggestive of that the prosecutrix has been subjected to sexual intercourse by the accused. The evidence, as has come on record by way of testimony of PW-14 Savita Devi, Secretary, Gram Panahayat Tangroti Khas, is immaterial for the purpose of this case because there is no dispute qua the age of the prosecutrix and that of the accused and also that they both being mother and son in relation were residing in the same house. The evidence as has come on record by way of evidence of official witnesses PW-6 HC Satya Devi and PW-7 HHC Karan Singh, would have been used as link evidence, had the prosecution been otherwise able to prove its case against the accused beyond all reasonable doubt for the reason that PW6 HC Satya Devi has supported the prosecution case qua the deposit of case property with her and she after having made the entries qua the same retained it in her safe custody in the malkhana. Later on, she sent the case property to RFSL, Dharamshala through PW-7 HHC Karan Singh. PW-7 HHC Karan Singh has supported the prosecution case qua taking the case property to the laboratory and depositing the same there. PW-15 S.I. Kiran Bala is the I.O. Though, as per her testimony, it has come in the investigation she conducted that the accused subjected the prosecutrix to sexual intercourse, however, in view of the reappraisal of the prosecution evidence hereinabove, the investigation conducted in this case cannot be said to be fair and impartial. This witness rather to the reasons best known to her has implicated the accused in this case falsely knowing fully well that the relationship of the accused and the prosecutrix being son and mother was very delicate.

28. PW-16 Ms. Shikha Lakhanpal was posted as JMIC, Court No. 2, Dharamshala at the relevant time. She has proved the statement Ext. PW-16/C made by the prosecutrix before her under Section 164 Cr.P.C. The statement Ext. PW-16/C is a piece of evidence and not the conclusive evidence. It, therefore, lies ill that the recording of this statement by the Magistrate is only to establish the charge against the accused.

29. True it is that the accused has not produced any evidence in his defence, however, the trend of cross-examination of the witnesses conducted by learned defence counsel makes it crystal clear that the property dispute was the sole cause of framing him in this case falsely. The plea so raised by him in his defence even finds support from the testimony of Rahul (PW-5) and also Rekha (PW-4). In his statement recorded under Section 313 Cr.P.C. also, he has stated that the prosecution witnesses have deposed falsely against him due to property dispute. Otherwise also, it was for the prosecution to have proved its case against the accused beyond all reasonable doubt. The prosecution, however, has failed to do so.

30. In view of what has been said hereinabove, the prosecutrix and accused seems to have quarreled with each other, may be on account of money required for ongoing construction work, because as per own version of the prosecutrix, the accused asked for withdrawal of Rs. 10,000/-. Since property dispute was there and Sangeeta (PW-9) may also be asking for her share in the property, therefore, taking undue benefit of the situation and knowing fully well that nothing of the sort happened, the allegations not only serious but heinous in nature, have been leveled against the accused qua rape of his own mother by him forgetting the sensitivity of such relations and repercussions of the allegations so raised in the society at large. Neither the I.O. nor the Public Prosecutor have applied the mind and tried to satisfy themselves qua the authenticity and genuineness of allegations so raised and for that matter, learned trial Judge has also failed to apply her mind and swayed by passion believing erroneously that the offence has been committed against a woman.

31. As a matter of fact, all duty holders i.e. the Investigator, Prosecutor and of course, the Adjudicator were expected to be more cautious and deal with this matter by observing all care and caution and circumspection because the allegations of rape were against none else but the son of the prosecutrix. The allegations of rape are not always correct and sometimes levelled falsely also due to variety of reasons. The apex Court in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** has held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in V***imal Suresh Kamble*** Vs. ***Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175***. While placing reliance on this judgment and the law laid down by the Apex Court in the judgment supra, this Court in ***Criminal Appeal No. 481 of 2009*** titled ***State of Himachal Pradesh*** V. ***Negi Ram***, decided on 27th May, 2016 has held as under:

> "15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."

32. It is worth mentioning that as per the ratio of the Apex Court in ***State of Punjab vs. Gurmeet Singh & ors., AIR 1996 SC 1393,*** the own statement of the prosecutrix if inspires confidence is sufficient to bring guilt home to the accused. The present, however, is a case where the statement of the prosecutrix inspires no confidence. She rather has contradicted the prosecution case and while in the witness-box improved her earlier version on all material aspects. The mental agony and trauma, the accused has suffered on account of such heinous allegations leveled against him falsely and subsequently on account of his conviction one can imagine very well. The trial Court, however, has failed to appreciate the same and also the evidence available on record in its right perspective. The impugned judgment, being the result of misreading and mis-appreciation of the prosecution evidence and based upon conjectures, surmises and hypothesis, therefore, cannot be said to be legally and factually sustainable by any stretch of imagination. The same, therefore, deserves to be quashed and set aside and the accused acquitted of the charge framed against him.

33. For all the reasons hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the impugned judgment is quashed and set aside. The accused is acquitted of the charge framed against him under Section 376 IPC. He presently is undergoing sentence, therefore, if not required in any other case, be set free forthwith. The release warrant be prepared accordingly. The fine amount as imposed upon the accused, if deposited, shall be refunded to him against proper receipt.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

State of Himachal Pradesh ...Appellant
Versus
Bhotu & others ...Accused/Respondents

Cr. Appeal No. 150 of 2011
Reserved on: 09.07.2019.
Decided on:26.07.2019

Narcotic Drugs and Psychotropic Substances, Act, 1985– Section 54– **Indian Evidence Act, 1872 –**Section 106 – Presumption of conscious possession, when can be drawn? Held – Recovery of contraband from vehicle in which accused were travelling not in dispute – Onus shifted to accused to prove that it was not in their conscious possession– Accused not furnishing any explanation qua stuff recovered from vehicle in their respective statements recorded under Section 313 of Cr.PC– Possession of accused has to be held as conscious. (Para 11)

Cases referred:

Dharampal Singh vs. State of Punjab, 2010 (9) SCC 608
Gian Chand and others vs. State of Haryana, 2013 (14) SCC 420
Khekh Ram vs. State of H.P., Cr. Appeal No.1110/16
Krishan Chand vs. State of Himachal Pradesh, (2018)1 SCC 222
Krishna Kanwar vs. State of Rajasthan, 2004 (2) SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Prabha Shankar Dubey vs. State of M.P., 2004 (2) SCC 56
State of H.P. vs. Abdul Latif, Cr. Appeal No.159/2012
State of Himachal Pradesh vs. Pawan Kumar, 2005 Cr.L.J. 2208
State of Himachal Pradesh vs. Tharban Lal, 2018 LHLJ, 657

For the appellant : Mr. Narinder Guleria, Additional Advocate General.
For the respondents : Mr. V.S.Rahore and Mr. Lakshay Thakur, Advocates.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

State of Himachal Pradesh is in appeal against the judgment dated 06.12.2010, passed by learned Special Judge, Chamba Division in Sessions Trial No.18 of

2010, acquitting three accused persons namely Bhotu, Jagdish Kumar and Rajeev Kumar from offences under Section 20 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act.

2. Respondent No.3, Rajiv Kumar died during the pendency of the present appeal. The appeal, therefore, has abated against respondent No.3.

3. **<u>The prosecution case is</u>**:-

3(i) On 17.02.2010, ASI Nasib Singh (PW-9), HC Virender Singh (PW-1), C. Surinder Kumar (PW-2) and C. Rajesh Kumar (PW-3), laid a nakka at Village Hutta Chowk, at around 3.20 a.m.

3(ii) The police party was carrying complete I.O. kit containing weights of 2Kg. plus ½ Kg., weighing scale, megha torch, torches, etc.

3(iii) At around 3.30 a.m., vehicle No.HP-01C-0185 came from Telka side towards nakka. The three accused persons were occupants of this vehicle. Accused No.3, Rajiv Kumar, was driving the vehicle. The vehicle was stopped by ASI Nasib Singh (PW-9). He smelled charas from the vehicle and thus, expressed his intention for searching it.

3(iv) Before conducting the search, the accused persons were informed about their legal rights for getting the vehicle searched before a Magistrate or a Gazetted Officer. However, the accused gave their joint consent for getting the vehicle searched by the police party. Accordingly, Memo Ext. PW-1/A, was prepared bearing signatures of all the accused persons. C.Surinder Kumar (PW-2) and C.Rajesh Kumar (PW-3), stood as witnesses. Before conducting the search, the police officials also gave their personal search to the accused persons and took their 'Jama Talashi.' Memo Ext. PW-1/B, was prepared accordingly.

3(v) During the search of the vehicle, a black coloured bag (Ext. P-2) was found beneath the seat, containing another bag (Ext. P-3), which had candle and ball type coloured substance, found to be charas (Ext. P-4). Charas on weighing was found to be 8 Kgs. The articles/bags were placed back, as they were.

3(vi) The bags were packed and sealed in cloth parcel (Ext. P-1) with 5 seals of seal 'H'. Seizure Memo Ext. PW-1/D was prepared. The specimen impression of seal is Ext. PW-1/C and NCB form prepared in triplicate is Ext. PW-8/D. The site plan was prepared as Ext. D-A.

3(vii) Rukka Ext. PW-8/A was prepared by I.O. (PW-9) at the spot and sent to P.S. Kihar through C.Surinder Kumar (PW-2) for registration of the case and copy of the same was also sent to S.P. Chamba through C. Rajesh Kumar (Ext. PW-3) which is Ext. PW-9/D. FIR No.11/2010, Ext. PW-8/B, thus, was registered against the accused persons.

3(viii) Vide Arrest Memo Ext. PW-9/B, the accused persons were arrested. Their personal search was also conducted vide Memo Ext. PW-9/C.

3(ix) The case property (parcel containing recovered charas, sealed with 5 seals of seal 'H' along with specimen seal, NCB form in triplicate, recovery memo etc.) were produced before SHO Pritam Singh (PW-8). PW-8 SHO Pritam Singh, resealed the case property vide reseal Memo Ext. PW-4/A. The specimen resealed impression, is Ext. PW-4/B. The resealing of the parcel was with three seals of seal 'B'. All the codal formalities were completed. After resealing, the parcel was deposited with MHC. The case property was sent for chemical analysis to FSL Junga. As per the report of FSL (Ext. P-A), the contraband was

found containing charas and the resinous substance to the tune of 21.11% w/w. Thereafter, the challan was prepared against the accused persons. The accused were charged for offences punishable under Section 20 read with Section 29 of NDPS Act.

3(x) The accused pleaded not guilty and claimed trial. After the closure of prosecution evidence, wherein, statements of nine witnesses were recorded, the accused examined one witness in defence and also recorded their statements under Section 313 Cr.P.C. The learned Trial Court has acquitted all the accused vide impugned judgment. Hence, aggrieved, the State is in appeal against the judgment of acquittal.

4. We have heard Mr. Narinder Guleria, learned Additional Advocate General, for the State, Mr. V.S. Rathore, learned counsel for the accused persons and have also gone through the record.

5. Learned Trial Court has acquitted the accused persons primarily on the grounds:-

5(i) DW-1, Shiv Kumar had deposed about proximity of his house to Hutta Chowk. However, police has not ensured the presence of independent witnesses from the locality.

5(ii) The I.O.(PW-9) has admitted that a curve on the road has not been reflected in the site plan prepared by him on the spot. Therefore, possibility of losing sight of showing some houses on the spot, cannot be ruled out.

5(iii) All three accused were given joint option for search of vehicle either before a Gazetted Officer or before a Magistrate, whereas, separate option was required to be given and taken from each of the accused.

5(iv) Prosecution witnesses had admitted that all the accused persons disowned the contraband. This, coupled with fact that there was a suggestion from the defence about there being another person in the vehicle, who on seeing the police, ran away and the contraband actually belonged to him; therefore, in such circumstances, it could not be said that prosecution had proved that the contraband was in the joint, exclusive and conscious possession of all the three accused persons or that it was in exclusive possession of anyone of them.

5(v) PW-1 Virender Singh, in his cross-examination had admitted that seals Mark A/1 to A/7, on parcel Ext. P-1, when produced in Court, were not visible and could not be read. Therefore, it cannot be said with certainty that the parcel which was produced in the Court, was the same, which was made on the spot after the recovery of the contraband.

<u>Statements under Section 313 Cr.P.C:-</u>

6. Before discussing the above points, it will be pertinent to notice hereinafter the statements of all the accused persons to questions No.3 & 4, recorded under Section 313 Cr.P.C:-

6(i) *"Q.No.3:- It has further come in evidence against you that at 3.30 A.M., when the police was on Nakka, vehicle No.HP-01C-0185 came from the side of Telka which was being plied by your co-accused Rajeev Kumar, what have you to say?*

Ans. It is correct."

"Q.No.4:- It has also come in evidence against you that the police on Nakka stopped the vehicle in which you alongwith your co-accused were

travelling and enquired as to you and your co-accused were going and the destination disclosed by you and your co-accused was Chamba,, what have you to say?

Ans. It is correct."

6(ii) Question No.24 and it's answer as given by accused Bhotu and Jagdish Kumar, is as under:-

"*Q.No.24:- Have you anything more to say?*

Ans. I am innocent. I along with my brother Jagdish was travelling in the vehicle in question which was being driven by its driver, Rajeev Kumar and I was being taken to Chamba hospital for treatment by my brother Jagdish, since, I was suffering from some stomach pain. The charas was left by a person who on seeing the police party ran away from the vehicle when it was stopped by the police for checking and a false case has been planted against me."

6(iii) The answer to this question, as was given by accused Rajeev is as under:-

"*Ans. I am innocent. I was driving the vehicle in question and was carrying Bhuto in the company of his brother Jagdish to Chamba hospital for treatment since Bhotu was suffering from some stomach pain and being driver I am not supposed to check the luggage etc. of the passengers travelling in my vehicle. The charas was left by a person who on seeing the police party ran away from the vehicle when it was stopped by the police for checking and a false case has been planted against me."*

6(iv) The above extracted statements of accused recorded under Section 313 Cr.P.C are very categorical to the extent:-

(a) that all three accused persons were present at 3.30 a.m., on the spot in the vehicle No. HP-01C-0185;

(b) that the accused persons were there in Vehicle No.HP-01C-0185 , which was coming from Telka side being driven by accused Rajeev Kumar;

(c) that on being asked by the police personnel present on the spot during nakka at 3.30 a.m., the accused persons disclosed Chamba to be their destination;

(d) that the contraband/charas was actually recovered from this vehicle by the police during its search, while the vehicle was in occupation of accused persons.

Independent witnesses:-

7(i) In view of the above admission on the part of the accused persons themselves in respect of charas being there in the vehicle, in which, they were travelling; its recovery by the police after stopping the vehicle during nakka and completing all codal formalities; the incident having occurred at around 3.30 a.m.; it cannot be said that any prejudice has been caused to the accused persons, even if, no independent witness was associated; even if, site plan has not been allegedly correctly drawn; even if joint option/consent was given/taken from the accused persons for the search of the vehicle; since, it is a case, where recovery of contraband from the vehicle at 3.30 a.m., during nakka has been admitted by the accused persons themselves.

7(ii) Even otherwise, recovery was admittedly effected at around 3.30.A.M., i.e., the dead of night at an isolated place. At this hour, it cannot be expected from the police

officials to associate independent witnesses. Though, as per DW-1, there were two houses near the spot, even then, case of the prosecution cannot become weak merely on the ground of non-association of independent witnesses, especially, when recovery of contraband itself is admitted by the accused persons.

7(iii) Reliance by learned defence counsel on ***(2018)1 Supreme Court Cases 222,*** titled as ***Krishan Chand vs. State of Himachal Pradesh***, to contend that failure to associate independent witnesses at the time of recovery will create a dent in the prosecution case, is misplaced. In this very case, it has also been observed that:

> *"**26.** It is settled law that the testimony of official witnesses cannot be rejected on the ground of non-corroboration by independent witness……."*

Each case is to be decided on its own facts. In our view, in the facts and circumstances of the case, present is not that a case, where non-association of independent witnesses will efface the reliability of the prosecution evidence. Reference in this regard can be made to ***2018 LHLJ 657***, in ***State of Himachal Pradesh*** *vs.* ***Tharban Lal:-***

> ***"8.*** *There is no dispute with regard to case law cited by learned Additional Advocate General in pronouncement of the Apex Court in cases titled* ***State of Haryana versus Mai Ram, son of Mam Chand, reported in (2008) 8 to Supreme Court Cases 292; State of Punjab versus Nirmal Singh, reported in (2009) 12 Supreme Court Cases 205; State of Punjab versus Leela, reported in (2009) 12 Supreme Court Cases 300; State of Punjab versus Surjit Singh and another, reported in (2009) 13 Supreme Court Cases 472; and Kulwinder Singh and another versus State of Punjab, reported in (2015)6*** *Supreme Court Cases 674, wherein it has been held that in absence of any infirmity in the evidence of official witnesses,conviction can be based on the testimony of official witnesses only and there is no legal bar to convict an accused in absence of independent witnesses only on the basis of statements of official witnesses unless there is material to discredit their statements or some infirmity is pointed out in their evidence as trustworthy, credible and unimpeachable evidence of official witnesses beyond reproach is sufficient to convict an accused for the reason that it is the quality, not the quantity, which matters."*

8. **Non-visibility of Seals:-**

8(i) While supporting the judgment of learned Trial Court, it has been contended by the learned defence counsel that seal of impression 'B' put by PW-8 as well as seal affixed by I.O. (PW-9) on parcel Ext.P-1, when produced during trial were either not readable or not visible. Therefore, it cannot be said with certainty that parcel produced in Court was the same which was made on the spot.

It has come in the record that parcel Ext. P-1, was taken to FSL in accordance with procedure, was kept in safe custody in FSL, examined there and was dispatched with the endorsement. The report of Chemical Officer, Ext.P-A, is already on record of the case. The observations of learned Trial Court that because of this, it cannot be said with certainty that parcel produced in the Court was the same which was made on the spot after recovery of charas, loosing its relevance, more so, in view of the admission of the accused persons themselves in their statements under Section 313 Cr.P.C to the effect that

charas was actually recovered from the vehicle. However, it will be profitable to refer para to ***2018 LHLJ, 657*** *in* ***State of Himachal Pradesh*** *vs.* ***Tharban Lal****:*

> **"22.** *There is no dispute with regard to contention of learned Additional Advocate General canvassed by relying upon pronouncement of Apex Court in case titled as* ***State represented by Inspector of Police, Chennai versus N.S. Gnaneswaran, reported in (2013) 3 Supreme Court Cases 594; and judgment, dated 1st September, 2016, rendered by this Court in Criminal Appeal No. 201 of 2016, titled as State of Himachal Pradesh versus Kishori La****l, that nonproduction of original seal in the Court is not fatal to the prosecution case unless it is established on record that such nonproduction has caused serious prejudice to the accused ...."*

9. **Prejudice caused to the Accused:-**

No prejudice has been shown to have been caused to the accused persons either on account of independent witnesses having not been associated or the seals being not visible during trial. No question in this regard, no suggestion regarding this, has been put to the prosecution witnesses to the I.O. It will be apt to quote relevant paras in this regard from ***2013 (14) SCC 420,*** *titled as* ***Gian Chand and others vs. State of Haryana:-***

> ***"14.*** *The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva observing as under:*
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> *"40. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses."*
>
> *"**15.** The defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/contraband articles. Thus, no grievance could be raised by the appellants in this regard."*

10. **Violation of Section 50 of NDPS Act:-**

10(i) Present was a case of search of vehicle. Section 50 of NDPS, Act will be applicable where search is in relation to a person as contrasted to search of premises, vehicles, articles or bag. Reference can be made to ***2004 (2) SCC 608*** *in* ***Krishna Kanwar***

vs. State of Rajasthan, 2003 (7) SCC 465 *in* ***Madan Lal and another*** *vs.* ***State of H.P. & 2005 Cr.L.J. 2208*** *in* ***State of Himachal Pradesh vs. Pawan Kumar***

Thus, contention raised by learned defence counsel regarding violation of Section 50 of NDPS Act, is misplaced.

10(ii) It is also to be noticed that accused persons in their statements recorded under Section 313 Cr. P.C. did not say that they were unaware about their rights or they were misled by taking their joint option. Reference can be made in this regard to relevant paras from ***2004 (2) SCC 56***, titled as ***Prabha Shankar Dubey vs. State of M.P***.:-

> "***7.*** *It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50 What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in presence of one of the officers named in the Section itself. Since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait- jacket formula."*
>
> *"**15.** Additionally, it may also be noticed that while giving statement under Section 313 of the Code of Criminal Procedure, 1973 (for short the 'Code'), the accused did not say that he was unaware of his rights or that he was misled on that account in any manner. On the contrary, in general and vague manner it was only said that he did not know or he had no idea of the allegations. Though that by itself is not sufficient to convict accused, in view of the procedural safeguards required to be observed by compliance with the requirements of Section 50, yet that is of some relevance in appreciating the grievance, now sought to be ventilated. There is no infirmity in the impugned judgment to warrant interference. The appeals are accordingly dismissed."*

11. **Presumption & Conscious possession:**

11(i) The only defence put forward by the accused persons is that though the contraband/charas was recovered from the vehicle in their occupation, but this did not belong to them and it belonged to a person who *"on seeing the police, ran away from the vehicle when it was stopped by the police for checking and the charas was left by him."* Who was that other person, has not disclosed by the accused persons. No particulars of that person have been provided by accused persons. This was a defence put forward by the accused persons. It was for the accused persons to substantiate their defence. This fact was in their special knowledge. The prosecution satisfactorily denied the suggestion that there was any other person present in the vehicle besides the accused persons. The statements of the prosecution witnesses are natural, coherent and in harmony with each other and inspire confidence. If there was any other person in the vehicle, then it was incumbent upon the accused persons to have disclosed about his particulars to the police. It is highly improbable that all of them were in one vehicle with another person as alleged and yet they were not aware about anything regarding that other person but for the fact, that contraband admittedly recovered from the vehicle belonged to that unknown person. It would be profitable to quote relevant paras from ***2013 (14) SCC 420,*** *titled as* ***Gian Chand and others vs. State of Haryana:-***

"19. *From the conjoint reading of the provisions of Section 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise."*

"21. *Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872 (hereinafter referred to as `the Act 1872')."*

"22. *In State of WeIst Bengal v. Mir Mohammad Omar, this Court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference.*

"38……Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (SCC p. 393, para 38)."

11(ii). The next related question is whether all the accused persons could be said to be in conscious possession of the contraband. It is proved on record that all the accused were in physical possession of the charas. Recovery of charas from the vehicle, has been admitted by all the accused. It is settled law that once possession is established, the accused, who claims that it was not in his conscious possession has to establish it, because these facts are in his special knowledge. Reference can be made to:-

(a) ***2010 (9) SCC 608,*** *titled as* ***Dharampal Singh vs. State of Punjab*** *and* ***Major Singh vs. State of Punjab:-***

"12. *We do not find any substance in this submission of the learned counsel. Appellant, Dharmpal Singh was found driving the car whereas appellant, Major Singh was travelling with him and from the dicky of the car 65 Kilograms of opium was recovered. The vehicle driven by the appellant, Dharampal Singh and occupied by the appellant, Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the accused plea is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused."*

"16. *Once possession is established the Court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in the case of Madan Lal and another vs. State of H.P., wherein it has been held as follows:*

> *"26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.*
>
> *27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused- appellants that the possession was not conscious in the logical background of Section 35 and 54 of the Act."*

(b) ***2003 (7) SCC 465.*** *titled as* ***Madan Lal and another vs. State of H.P. :-***

"26. *Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."*

"28. *In fact, the evidence clearly establishes that they knew about the transportation of charas, and each had a role in the transportation and possession with conscious knowledge of what they were doing. The accused-appellant Manjit Singh does not stand on a different footing merely because he was the driver of the vehicle. The logic applicable to other accused-appellants also applies to Manjit Singh."*

11(iii) Thus, it was for the accused persons to have rebutted the presumption under Section 35 & 54 of NDPS Act read with Section 106 of Indian Evidence Act, which they failed to do. The purpose behind recording statement of accused under Section 313 Cr.P.C is to give him an opportunity to explain the circumstances appearing against him in evidence adduced by prosecution. It would be pertinent to refer to ***2010 (9) SCC 608,*** *titled as* ***Dharampal Singh vs. State of Punjab*** *and* ***Major Singh vs. State of Punjab:-***

"21. *As part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice."*

> ***"22.*** *Bearing in mind the aforesaid principle when we consider the facts of the present case we find that the prosecution intends to prove that the appellants were in possession of the opium by disclosing that illicit article was recovered from the dicky of the vehicle driven and occupied by them. Possession is a mental state and what has been unfolded by the prosecution is that on search of dicky of the car opium was recovered. Circumstances aforesaid lead to the conclusion that the appellants were in conscious possession. Therefore, it cannot be said that appellants were not told to explain the circumstances appearing against them in the evidence."*
>
> ***"24.*** *In the case in hand we have in extenso reproduced the circumstances appearing against the appellants in the evidence and on fact found that the circumstances appearing against them were put to them in their statement under Section 313 of the Code of Criminal Procedure. In any of the view it has not occasioned failure of justice."*

The accused have not given any explanation. The recovery of contraband has been admitted. Therefore, the possession of contraband by accused persons has to be held as conscious in the factual background of the case. The judgments relied upon by learned counsel for the accused persons in ***State of H.P. v. Abdul Latif (Cr. Appeal No.159/2012)***& in ***Khekh Ram v. State of H.P. (Cr. Appeal No.1110/16),*** are based upon individual facts of those cases and are not applicable to the facts of instant case.

(12) Therefore, in view of the above discussion/observations, the present appeal succeeds, hence, the same is allowed. The findings of acquittal against the accused persons, as recorded vide judgment under challenge, passed by learned Special Judge, Chamba Division, in Sessions Trial No.18 of 2010, are thus quashed and set aside. Consequently, all the accused persons, namely, Bhotu and Jagdish Kumar, are held guilty and convicted of offences punishable under Section 20 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act. Let them surrender their bail bonds and they be produced in this Court on **20.08.2019**, for being heard on quantum of sentence. Production warrants be issued accordingly.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Pala Singh & others ...Appellants.
Versus
State of H.P. ...Respondent.

Cr. Appeal No. 124 of 2017
Reserved on: 30.04.2019
Date of Decision: 4.7.2019

Indian Evidence Act, 1872–Section 3– Appreciation of evidence–Hostile witness– Held, testimony of hostile witness cannot be brushed aside completely simply on ground that witness was declared hostile– Credible part of hostile witness which is acceptable in facts and circumstances of case and is duly corroborated by other reliable material on record can be taken into consideration in favour of either party. (Para 21)

Cases referred:

Mohan Lal vs. State of Punjab, AIR 2018 SC 3853
Varinder Kumar vs. State of Himachal Pradesh, 2019 SCC Online SC 170

For the Appellants: Mr. Manoj Pathak, Advocate.
For the Respondent: Mr. Vikas Rathore, Mr. Narender Guleria, Additional Advocate Generals with Mr. J.S. Guleria, Mr.Kunal Thakur, Dy. Advocate Generals &Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Present appeal has been preferred by convicts-appellants against the judgment dated 1.7.2016, passed by Additional Sessions Judge-cum-Special Judge (CBI), Shimla, H.P., Camp at Theog, in Sessions Trial No.6-T/7 of 2013/12, titled as State of Himachal Pradesh vs. Pala Singh & others, in case FIR No. 49/2012, dated 6.4.2012, registered at Police Station Theog, District Shimla, H.P., whereby convicts/appellants Pala Singh and Raghubir Singh have been convicted for commission of offence under Section 20 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (in short NDPS Act)whereas accused Narayan Singh was acquitted under Section 29 of the NDPS Act, by extending benefit of doubt in his favour.

2. The convicts/appellants have been sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine in the sum of Rs.1,00,000/- each, for commission of offence under Section 20 of NDPS Act and in default of payment of fine, to undergo further simple imprisonment for a period of one year each.

3. The State has not preferred any appeal against acquittal of co-accused Narayan Singh, whereas convicts/appellants Pala Singh and Raghubir Singh have assailed their conviction and sentence imposed upon them in present appeal.

4. We have heard Mr.Manoj Pathak, Advocate for the convicts/appellants and Mr. Vikas Rathore, learned Additional Advocate General for the State and have also gone through the record.

5. The prosecution case, in brief, is that police party headed by PW-12 Inspector Baldev Thakur, consisting of PW-13 ASI Karam Singh, PW-3 Constable Manoj Kumar, PW-4 Constable Mohd. Mehmood, Constable Satish and Constable Rajesh, had left the Police Station in official vehicle being driven by Constable Rajesh, for patrolling towards Sainj-Balag-Kuthar etc., after recording D.D. entry No.7(A) Ext.PW6/C at 7.00 a.m. on 6.4.2012 and at about 10.15 a.m., it was present at Sewag curve (Mor), on a road from Balag to Kuthar along with Constable Naresh Kumar and Constable Anil Kumar, who were accompanying this police party from Police Post Chhaila. At that time, a white coloured car bearing registration No. PB-76-0430 (Indigo), occupied by driver Pala Singh and his co-passenger sitting on front seat (co-accused Raghubir Singh), came from Kuthar side and on inquiry, they disclosed their names and addresses and by that time, PW-7 Prem Pandey came in his pick-up on the spot and PW-8 Moti Ram also came on the spot by chance, who were associated as witnesses by the Investigating Officer, for checking the vehicle, wherein Raghubir Singh (accused) was sitting with a bag in his lap. During checking, 6 packets were recovered from this bag, which were containing contraband therein, which was identified as cannabis. Thereafter, on checking of right side dash board of the vehicle, 11 packets

containing charas were also recovered. On weighing, total recovered charas was found to be 8.200 kg. The recovered contraband was repacked in the bag and sealed with seal impression 'A' and thereafter, taken into possession vide memo Ext.PW7/A. The NCB-1 form Ext.PW12/A was filled in triplicate and sample seal impression was also taken on a separate cloth Ext.PW7/C and the seal was handed over to PW-7 Prem Pandey. The sample seal impression and parcel were signed by the witnesses i.e. PW-7 Prem Pandey, PW-8 Moti Ram and PW-13 ASI Karam Singh and also by the convicts/appellants. Thereafter, rukka Ext.PW12/B was prepared and sent to Police Station through PW-4 Constable Mohd. Mehmood, whereupon ASI Sanjeev Kumar had registered the F.I.R. Ext.PW2/A and had handed over the copy thereof to PW-4 Constable Mohd. Mehmood, for delivering the same to the Investigating Officer (PW-12). During investigation, site plan Ext.PW12/C was also prepared and accused were arrested vide memos Ext.PW3/B-1 and Ext.PW3/B-2 and thereafter, Jamatalashi/ personal search of the convicts/appellants was conducted vide memos Ext.PW12/D and Ext.PW12/E. On 8.4.2012, the case file was handed over to PW-13 ASI Karam Singh for further investigation.

6. The vehicle (Indigo Car) being used by the convicts/appellants was also impounded. The car alongwith key as well as relevant documents were deposited by PW-12 Baldev Thakur in the Malkhana by handing over the same to PW-6 MHC Sunil Kumar, who had entered it at serial No.581 of the Malkhana Register.

7. On 7.4.2012, PW-6 MHC Sunil Kumar had sent parcel to State Forensic Science Laboratory, Junga through PW-4 Mohd. Mehmood along with documents vide R.C. No.58/12 (Ext.PW6/B). The parcel was delivered in State Forensic Science Laboratory, Junga on the very same day. Respective extracts of Malkhana Register and R.C. are Ext.PW6/A and Ext.PW6/B.

8. It is further case of the prosecution that during interrogation, convicts/appellants had disclosed that they had purchased the charas from co-accused Narayan Singh, whereupon, house of Narayan Singh was raided and he was arrested. On the basis of call details of mobile phones being used by convicts/appellants and co-accused Narayan Singh and location of tower of these phones in the concerned area, it was found that co-accused Narayan Singh had provided the charas to convicts/appellants. During investigation, it was found that the accused were also using telephones, which were not in their names, but in the names of someone else. After procuring details of the telephones from the Nodal Officers of the concerned companies, statements of the persons, in whose names mobile connections were issued, were also recorded.

9. On 7.4.2012, special report Ext.PW11/A was prepared which was delivered to the Sub-Divisional Police Officer, Theog on the very same day and the said report, after making endorsement by Sub-Divisional Police Officer, was handed over to PW-11 HC Man Dev, who had entered the said report in the concerned register. Extract of the register is Ext.PW11/B. After receiving chemical analysis report Ext.PX, from State Forensic Science Laboratory, Junga, challan was prepared and presented in the Court.

10. On finding prima facie complicity of accused persons in commission of offence, convicts/appellants were charged under Section 20 of the NDPS Act, whereas co-accused Narayan Singh was charged under Section 29 of the NDPS Act. The accused persons had pleaded not guilty and thus, were subjected to trial.

11. The prosecution had examined 19 witnesses to substantiate its case. Whereas, after recording their statements under Section 313 Cr.P.C., the convicts/appellants and their co-accused Narayan Singh had opted not to lead any evidence

in defence. On completion of trial, as detailed supra, the trial Court has convicted the convicts/appellants and has acquitted co-accused Narayan Singh.

12. As the respondent/State has not filed any appeal against the acquittal of co-accused Narayan Singh, the witnesses examined to prove his complicity in the offence committed by the convicts/appellants, i.e. PW-5 Ms. Sapna Devi, PW-10 Devinder Verma and PW-14 Smt. Manjeet Kaur, are not relevant.

13. PW-9 Amrit Pal Singh is owner of the car being used by convicts/appellants. He has verified that convict/appellant Pala Singh was the person employed by him as driver and he was in-charge of the vehicle at relevant point of time. PW-16 Krishana Nand had received the parcel at State Forensic Science Laboratory, Junga and had made entry in the crime Register at serial No.481, extract whereof is Ext.PW16/A. Thereafter, on receiving the result and case property, he had handed over it to Constable Pardeep, who had deposited the same in the malkhana.

14. The independent witnesses in present case i.e. PW-7 Prem Pandey and PW-8 Moti Ram, in their deposition before the Court, were declared hostile for resiling from their previous statements recorded under Section 161 Cr.P.C. Therefore, when independent witnesses have become hostile, statements of official/police witnesses are to be scrutinized with care and caution.

15. Learned counsel for the convicts/appellants has disputed correctness of the impugned judgment, on the ground that independent witnesses i.e. PW-7 Prem Pandey and PW-8 Moti Ram have not supported the prosecution case and there are major contradictions and discrepancies in the testimonies of official witnesses, having effect on the genesis of the prosecution story. It is contended on behalf of the convicts/appellants that from the evidence on record, it appears that it is a case of prior information, but the Investigating Officer has failed to follow mandatory provisions of NDPS Act, required to be followed in such a case and further that the Investigating Officer PW-12 Baldev Thakur has not prepared any document on the spot. It is also contended that in the arrest memos Ext.PW3/B-1 and Ext.PW3/B-2, time of arrest of accused persons has been shown as 2.00 p.m. and in these documents, quantity of recovered charas i.e. words "8.200 grams" have been mentioned in printed form after typing it on the computer. Whereas, it is admitted case of the prosecution that police party was not having any computer on the spot and as per prosecution story, convicts/appellants were apprehended at 10.15 a.m., rukka was prepared at 12.15 p.m. and thereafter, police party remained on the spot till 4.00 p.m. and had reached in the Police Station at 7.00 p.m. In these circumstances, there was no possibility of typing out quantity of recovered charas i.e. 8.200 kg in Ext.PW3/B-1 and Ext.PW3/B-2 on the spot, but is typed on these documents, which indicates that the said documents were not prepared on the spot at the time of alleged arrest of convicts/appellants at 2.00 p.m., which creates doubt on the fairness of investigation, rendering the prosecution story doubtful.

16. It is further contended on behalf of the convicts/appellants that in R.C. Ext.PW6/B, date has been mentioned as 7.6.2012 instead of 7.4.2012 and there is no mention of sending sample seal impression and NCB form alongwith recovered contraband and further that PW4 Constable Mohd. Mehmood has stated that rukka is in the handwriting of Karam Singh whereas Investigating Officer at that time was PW12 Inspector Baldev Singh. It is further contended that Investigating Officer has not prepared any document on the spot, which again creates doubt about presence of PW-12 Baldev Thakur on the spot. In the light of submissions made hereinbefore, it is canvassed that the convicts/appellants are entitled for benefit of doubt.

17. Lastly, learned counsel for the respondent has also raised the issue that in the present case, complainant as well as Investigating Officer is one and same Officer and therefore, keeping in view the pronouncement of Apex Court in ***Mohan Lal vs. State of Punjab*** reported in ***AIR 2018 SC 3853,*** the respondents are entitled for acquittal.

18. Learned Additional Advocate General for the State has supported the impugned judgment, for the reasons assigned therein with further submission that verdict in ***Mohan Lal's*** case is not applicable in present case.

19. The plea raised on behalf of the convicts/appellants, that it is a case of prior information, does not bear out from the record, as the police party had left the Police Station at 7.00 a.m., for patrolling in the area of Sainj-Balag-Kuthar etc., after recording it in Daily Station diary vide Ext.PW6/C. During cross-examination to PW-6 HC Sunil Kumar, who has proved this Daily Diary Entry on record, the correctness of this document has not been disputed, which amounts to admission of the said document. Further, no such suggestion has ever been put to Investigating Officers PW-12 Baldev Thakur and PW-13 ASI Karam Chand or to PW-3 Constable Manoj Kumar and PW-4 Constable Mohd. Mehmood. Therefore, plea raised by the convicts/appellants, at this stage, regarding prior information, is without any basis and is not sustainable.

20. The ground taken by the convicts/appellants that the Investigating Officer PW-12 Baldev Thakur has not prepared any document himself or on the spot, is also not having any bearing on the merits of the case as it has come in the statements of officials witnesses that some of the documents were prepared by the Investigating Officer himself and some of the documents were prepared/reduced into writing by other police officials including PW-13 ASI Karam Singh, under the dictation of PW-12 Baldev Thakur. No doubt, the arrest memos Ext.PW3/B-1 and Ext.PW3/B-2 contain the quantity of recovered contraband in printed form, whereas the convicts/appellants were arrested on the spot at 2.00 p.m. and at the spot, there was no computer available with the police and it indicates that these memos were not prepared on the spot, but later on, in the Police Station. But this fact is also of no help to the convicts/appellants, as PW-12 Baldev Thakur, in his cross-examination has stated that no document was prepared regarding information given to the relatives of the accused persons and they were not having computer with them on the spot and both the arrest memos, having description of recovered contraband, were typed in the computer. Similarly, PW-13 Karam Singh, in his cross-examination, has also stated that no arrest memos were prepared on the spot, but these were prepared in the Police Station. However, the arrest information was given from the spot. Meaning thereby, it is a case of the prosecution that these arrest memos were prepared in the Police Station. The convicts/appellants were arrested on the spot, but their arrest memos were prepared in the Police Station and their personal search, after arrest, was conducted in the Police Station itself, which is evident from the memos of search (Jamatalashi) Ext.PW12/D and Ext.PW1/E, proved on record by PW-17 HC Satish Kumar. The preparation of arrest memos Ext.PW3/B-1 and Ext.PW3/B-2 not on the spot but in Police Station may be a lapse on the part of Investigating Officer, who should have prepared the arrest memos on the spot, but this lapse does not falsifies the prosecution case and it does not have any effect on the veracity of the prosecution witnesses. The fact that these memos were prepared in the Police Station, has been disclosed by the prosecution witnesses in their deposition. Therefore, this act on the part of investigation, though amounts to faulty investigation, but is of no help to the convicts/appellants, as no prejudice, to have been caused to them on this count is apparent. The plea of convicts/appellants that quantity of recovered contraband has been typed in Ext.PW3/B-1 and Ext.PW3/B-2, is also not fatal to the prosecution, for the reason that said typing out of quantity stands satisfactorily explained, as discussed above and

therefore, it also does not extend any benefit to the convicts/appellants, rather by telling truth official witnesses have established their creditworthiness so as to inspire confidence in prosecution story.

21. It is a fact that independent witnesses PW-7 Prem Pandey and PW-8 Moti Ram have been declared hostile for resiling from their previous statements made under Section 161 Cr.PC. But it is settled law that testimony of hostile witness cannot be brushed aside only on the ground that the witness has been declared hostile. Credible part of the hostile witness, which is acceptable in the facts and circumstances of the case and is duly corroborated by other reliable material on record, can be taken into consideration in favour of either party. Scrutiny of these witnesses indicates that though they have not supported the prosecution case in totality, but they have admitted presence of police party along with two persons on the spot on the given date and time and also recovery of charas from the Indigo Car bearing No.PB-76-0430. They have also admitted their presence on the spot as indicated in photographs Ext.PW3/A-1 to Ext.PW3/A-7. PW-7 Prem Pandey has corroborated the prosecution case regarding his appearance on the spot in his vehicle and his association during search and seizure procedure. Similarly, PW-8 Moti Ram has also corroborated the prosecution story regarding the manner of his presence on the spot. Though PW-7 Prem Pandey has expressed his ignorance about the presence of PW-8 Moti Ram on the spot, however, he has admitted that he along with Moti Ram is visible in the photographs of the spot. PW8 Moti Ram has also admitted his presence along with PW-7 on the spot. These witnesses have also admitted their signatures on the seizure memos Ext.PW7/A and Ext.PW7/B. PW-8 Moti Ram has admitted that packets were recovered by the police from the vehicle bearing registration No.PB-76-0430 and has also admitted that recovered packets were weighed in their presence, but he did not remember the quantity of recovered charas. The evidence as a whole, of these independent witnesses, inspire confidence about truthfulness of the prosecution case.

22. The prosecution has also examined owner of the vehicle bearing registration No.PB-76-0430 i.e. Amrit Pal Singh as PW-9. In his examination-in-chief, he has clearly stated that he had engaged convict/appellant Pala Singh as a driver, who had borrowed the vehicle for taking his family to Sri Naina Devi Ji Temple and Anandpur Sahib and on 8.4.2012, he came to know about impounding of his vehicle by the police, whereupon he came to Theog along with his father and had talked with convict/appellant Pala Singh in the Police Station, Theog, when he was in police custody there and Pala Singh had disclosed that he had brought the vehicle to Theog and was caught carrying charas in it. In his cross-examination, his veracity remained unshaken. He has proved on record the certificate Ext.PW9/A, issued by him, wherein he had certified that Pala Singh was engaged by him as a driver on the vehicle involved in the incident.

23. In rukka Ext.PW12/B, against the column of the date thereon, the date has been mentioned as 7.6.2012, but at the same time, on this document, there is a seal of Police Station, Theog, mentioning R.C. No.58/12 with the date 7.4.2012 and also under the signatures of the person issuing it, date has been mentioned as 7.4.2012. On its back side, 'In-charge of Case Receipt and Dispatch Branch', Office of Director, State Forensic Science Laboratory, Junga has acknowledged the receipt of articles as per this R.C. on 7.4.2012. PW-16 SI Krishna Nand, who was Incharge Crime Branch SFSL, Junga in his deposition, has stated that PW-4 Mohd. Mehmood had brought one parcel on 7.4.2012, which was received by him on the same date. PW-4 Mohd. Mehmood has also corroborated the said date. Therefore, mention of wrong date at one place in the R.C. does not have any effect on the veracity of the prosecution case.

24. PW-16 Krishna Nand has also proved on record the receipt of result from State Forensic Science Laboratory, Junga on 24.4.2012 along with case property and handing over of the same to Constable Pardeep of Police Station, Theog, after making entries in Crime Register maintained by the officials posted in SFSL and he has proved the abstract of Crime Register Ext.PW16./A. The report of State Forensic Science Laboratory has been proved on record as Ext.PX, wherein it is recorded that the case property was received in the Laboratory on 7.4.2012 and the quantity thereof was found 8.182 kg and on chemical analysis, the same was found to be sample of charas.

25. The plea that respondents are entitled for acquittal in view of ratio of law settled in ***Mohan Lal's case supra*** is not available to the respondents as the Apex Court in case ***Varinder Kumar vs. State of Himachal Pradesh*** reported in ***2019 SCC Online SC 170*** has clarified that the judgment passed in ***Mohan Lal's case*** shall not affect the status of cases instituted/filed prior to the said judgment, rather this judgment shall have the prospective applicability/effect and all pending criminal prosecutions, trials and appeals prior to the law laid down in ***Mohan Lal's case supra*** shall continue to be governed by the individual facts of the case.

26. Except, points discussed hereinabove, no other point has been urged so as to doubt the veracity of official witness. We also do not find any material contradiction, discrepancy or improvement in evidence of spot official witnesses, PW3 C.Manoj, PW4 Mahmood, PW12 Inspector baldev Singh and PW13 Karam Chand and also other witnesses so as to doubt on the prosecution story. Acceptable portion of statements of hostile independent witnesses is also tilting the balance in favour of prosecution case.

27. As discussed hereinabove, we find no merit in points raised on behalf of appellants. Therefore, there is no illegality, irregularity or perversity in convicting and sentencing the appellants. Therefore, no ground for interference in conviction and sentence imposed on appellants is made out. Accordingly, the appeal is dismissed. Record be sent back to the learned trial Court.

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

Chandra Kumari .....Petitioner.
Versus
State of H.P. & others ..... Respondents.

CWP No. No.517 of 2017
Date of decision: 17.07.2019

Constitution of India, 1950 - Articles 14 & 226 – Appointment as Anganwari worker – Setting aside of by Appellate Authority (Deputy Commissioner) – Challenge thereto - Writ jurisdiction – Held, petitioner was awarded three extra marks by selection committee for possessing experience certificate of a Nursery teacher – She was selected on basis of such record – However no such school, where petitioner served as a Nursery teacher, factually existed – Information supplied by Public Information Officer, Himachal Pradesh School Education Board as to non-existence of such school – Petitioner could not prove the contrary i.e as to existence of said school – Findings of Appellate Authority not perverse – Petition dismissed. (Paras 12 & 13)

For the petitioner(s) : Mr. Y.P.S. Dhaulta, Advocate.
For the respondent(s) : Mr. Dinesh Thakur, Additional Advocate General, with Mr. Amit Kumar Dhumal, Ms.Divya Sood, Deputy Advocate Generals and Mr. Sunny Datwalia, Assistant Advocate General, for respondents No.1 to 4.
Mr. Sanjeev Kuthiala, Sr. Advocate, with Ms. Rachna Kuthiala, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

Brief facts necessary for adjudication of the present petition are as under:-

There was one post of Anganwari Worker in Anganwari Centre, Ropa, District Mandi, H.P. Applications were invited from eligible candidates for appointment against the said post. The Selection Committee conducted interview of 13 candidates, who had applied for the said post, which included the present petitioner, as also the private respondent. The Selection Committee found the petitioner eligible for the post in issue and she was offered appointment vide order dated 12.4.2016 and she joined her duties as Anganwari Worker at Anganwari Centre, Ropa on 12.4.2016.

2. The appointment was assailed by respondent No.5 by way of an appeal, provided under Clause 12 of the Scheme/Guidelines for the post of Anganwari Helper under ICDS Scheme/ programme, inter-alia on the ground that the income of family of the petitioner was above the prescribed limit of Rs.20,000/- per annum. The petitioner stood awarded three marks wrongly for possessing experience certificate of a Nursery Teacher by the Selection Committee. The certificate produced by the petitioner of having passed diploma in Nursery Teacher Training was not a genuine certificate, as no such institute existed, which the petitioner had purportedly obtained the said certificate. At the time when the petitioner purportedly passed the diploma in Nursery Teacher Training, she was effectively a regular student of B.A. Class and it was not possible for her to do two regular courses simultaneously.

3. Vide impugned order dated 20.3.2017, passed by the Appellate Authority i.e. Additional Deputy Commissioner, Mandi, Distirct Mandi, H.P. in appeal No.11/16, titled as Smt. Hem Lata Versus State of H.P. and others, the appeal so filed by respondent No.5 herein, has been allowed and appointment of the present petitioner has been set aside. Learned Appellate Authority has directed that appointment be offered against the post of Anganwari Worker in Anganwari Centre, Ropa, to the next in merit.

4. Feeling aggrieved, the petitioner has filed this petition.

5. I have heard learned counsel for the parties and have also gone through the impugned order as also the complete pleadings.

6. A perusal of the impugned order demonstrates that the learned Appellate Authority set aside the appointment of the present petitioner by holding that the certificate of experience furnished by the petitioner, on the basis of which, three marks were assigned to the petitioner, was in fact not a genuine certificate as it stood proved from the information provided by the Public Information Officer, H.P. Board of School Education, Dharamshala

(Kangra), vide his letter No. HB/RTI/2016-5524 dated 10th June, 2016 that the Career Model School Bhangrotu, Village and Post Office Bhangrotu, Tehsil Balh, District Mandi, H.P., did not exist. It is pertinent to mention here that on the strength of this certificate, vide which petitioner claimed to be having teaching experience, the Selection Committee had awarded three marks to the petitioner in terms of the scheme under which she was appointed as an Anganwari Worker. Learned Appellate Authority, further held that the certificate submitted by the petitioner regarding Nursery Teacher Training Course from Mother Teresa School of Teachers Education for the session 2011-12, was also suspicious as there was no proper address of the institution mentioned on the mark-sheet certificate and information provided under Right to Information Act by the Principal Vallabh Government college, Mandi District Mandi, H.P., vide letter No. EDN-GCM-Mandi/RTI/2016-416 dated 7.5.2016, demonstrated that respondent No.3 was a regular student of B.A. Part-I during the relevant time, against Roll No. A1-11-106 for the session 2011-12 in the said college. Learned Appellate Authority, thus held that the Selection Committee did not go into the genuineness of the certificates, submitted by the petitioner before assigning marks to her. It also held that said certificates were not genuine certificates and on the basis of said findings, learned Appellate Authority has set aside the appointment of the petitioner as mentioned above.

7. Learned counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law, because the same is based on information submitted before it, obtained by present respondent No.5 under Right to Information Act. As while preparing the said information, the Authorities concerned did not associate the petitioner with the process, therefore, principles of natural justice has been violated. On these basis, the impugned order have been prayed to be set aside. No other point was urged.

8. Perusal of the record demonstrates that the learned Appellate Court passed the order, setting aside the appointment of the petitioner, after hearing all the parties and after taking into consideration their respective submissions as also the documents placed by them on record.

9. It is a matter of record that respondent No.5 herein had placed before the learned Appellate Authority, the information obtained under Right to Information Act, to demonstrate that Nursery Teacher Experience Certificate obtained by the petitioner was from a non-existing school and simultaneously the Diploma submitted by her for Nursery Teacher Course was also not a genuine one because the diploma pertained to the year 2011-12, when she was enrolled as a regular student of B.A. Part-I, in Vallabh Government College, Mandi, which was a government owned college.

10. In my considered view, while providing the information sought by respondent No.5 under Right to Information Act, Authorities providing the information, were under no obligation to hear the petitioner. Same is not the requirement of Right to Information Act. Therefore, there is no merit in the contention of the learned counsel for the petitioner that the information under Right to Information Act has been provided by flouting the principle of Natural Justice.

11. It is not the case of the petitioner that the information obtained under Right to Information Act was not brought to the notice of the petitioner during the hearing of the appeal, yet the Appellate Authority relied upon the said documents and non suited her. It is borne out from the record that the information obtained under Right to Information Act was placed before the learned Appellate Authority. It is further not the case of the petitioner that she was not given any opportunity by the Appellate Authority to rebut the documents placed on record by the appellant therein, which includes the documents obtained under Right to

Information Act. As the information obtained under Right to Information Act was duly placed on record by respondent No.5 herein before the Appellate Authority, petitioner had ample opportunity to rebut the correctness of the information so provided, which she failed to do. In other words, the contents of the information provided by the Authority under Right to Information Act remained un-rebuted before the Appellate Authority. In this view of the matter, the impugned order passed by the learned Appellate Authority, vide which the services of the petitioner have been terminated, cannot be said to be bad in law for want of compliance of principle of natural justice.

12. It is not in dispute that the petitioner herein was able to gain employment on the strength of the three marks allotted to her by the Selection Committee under the heading of experience. Learned Appellate Authority has categorically held that there was no such school existing, purportedly from which, the teaching experience was gained by the petitioner. Petitioner has not been able to demonstrate that the findings so returned by the learned Appellate Authority, are perverse findings and not borne out from the record. The information which has been provided under Right to Information Act to the effect that no such school exists, from where the Experience Certificate purportedly was obtained by the petitioner, has been provided by none other, but by the Public Information Officer of the H.P. Board of School Education, Dharamshala (Kangra). There is no reason for this Court to disbelieve the information which has been so provided by the said Public Information Officer. During the course of arguments, the petitioner has not been able to persuade this Court to the contrary. Learned Counsel has also not been able to satisfy as to how petitioner undertook a regular diploma course in Nursery Teacher Course while pursuing her graduation as a regular candidate.

13. In view of the findings returned hereinabove, as this Court does not finds any perversity with the order passed by the learned Appellate Court, which stands impugned, this petition is dismissed being devoid of merit. Pending miscellaneous application(s), if any, stand disposed of, accordingly.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Smt. Dromati Devi ….Petitioner

Versus

State of H.P. & others. …Respondents

CWP No. 755/2014

Decided on:26.07.2019

Administrative Law- Principles of Natural Justice- Applicability and non-compliance- Effect– Termination of service and appointment of new incumbent– School Management Committee (SMC) terminating service of petitioner as Mid-day meal worker without notice and appointing 'A' (R5) in her place– R5 was member of SMC of said school and signed resolution appointing her as Mid-day meal worker– Petition against-Held, State had framed guidelines for appointing Mid-may meal workers- Advertisement inviting applications was required to be called by SMC– No such process was ever followed in case of engagement of petitioner or R5– There was breach of compliance of principles of natural justice in terminating service of petitioner and also in engaging service of R5– Since original

appointment of petitioner was also contrary to instructions, petition partly allowed– Appointment of R5 set aside– SMC directed to conduct fresh selection process. (Paras 4 & 5)

Cases referred:
Canara Bank and others vs. Debasis Das and others, (2003) 4 SCC 557
Dharampal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati and others, (2015) 8 SCC 519
Nisha Devi vs. State of Himachal Pradesh and others, (2014) 16 SCC 392

For the petitioner : Mr. G.R. Palsra, Advocate.
For the respondents : Mr. Anil Jaswal, Additional Advocate General for respondents No.1, 2 & 4/State.
Mr. H.S. Rangra, Advocate, for respondent No.3.
Mr. Jai Dev Thakur, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.(oral)

Petitioner has filed instant writ petition, against:-

(i) The order passed by the School Management Committee on 07.09.2013, whereby her services as Mid Day Meal Worker in Government Primary School Shadla, Tehsil Sadar, District Mandi, H.P. were terminated on the basis of a resolution of even date and;

(ii) The resolution dated 24.09.2013, whereby Arti Devi, respondent No.5, was appointed, as Mid Day Meal Worker in Government Primary School Shadla, Tehsil Sadar, District Mandi, H.P in place of the writ petitioner.

2. **Contentions of the petitioner:-**

2(i) Learned counsel for the petitioner contends that:-

a) Theservices of the petitioner as Mid Day Meal Worker in the Government Primary School Shadla, Tehsil Sadar, District Mandi, H.P, have been terminated without issuing any notice to her and without complying with the principles of natural justice.

b) Appointment of respondent No.5, as Mid Day Meal Worker in place of the petitioner is not in accordance with law.

2(ii) **Contentions of the respondents:-**

a) Reply filed by respondent No.3, School Management Committee, has been adopted by official respondents No. 1, 2, 4 as well as by respondent No.5, Arti Devi vide order passed in this case on 20.06.2014.

b) The stand of learned counsel for respondent No.3, the School Management Committee, is that the petitioner's services as Mid Day Meal Worker, had to be terminated by the School Management Committee, as there were numerous complaints against her working.

c) It is further contended that no appointment order was actually issued in favour of the petitioner.

3. I have heard learned counsel for the parties and gone through the appended record.

4. **With respect to observing principles of natural justice**:-

4(i) The contention of respondent No.3/School Management Committee that numerous complaints against the petitioner, led to her termination, cannot be accepted, especially when, Annexure P-4, bearing the stamp of Headmaster Government Primary School Shadla, supplied to the writ petitioner, under Right to Information Act, states that till 07.09.2013, there had been no complaints against the petitioner, either from the teachers or from children or from the School Management Committee, itself.

4(ii) A bare perusal of the Resolution, Annexure P-1, dated 07.09.2013, shows that the services of the petitioner, have been ordered to be terminated from the post of Mid Day Meal Worker w.e.f. 09.09.2013. It is not in dispute that this termination was effected without issuing any notice to the petitioner. No representation/ explanation of the petitioner in any form was called for.

Appointment of respondent No.5:

4(iii) (a) VideAnnexure P-2, dated 07.09.2013, the School Management Committee, resolved to allow respondent No.5, Arti Devi to work as Mid Day Meal Worker till a person is appointed for the said post, on permanent basis. Noticeably, this resolution at Annexure P-2, marks the presence of Arti Devi herself as the Member of School Management Committee.

4(iii) (b) Resolution dated 24.09.2013, Annexure P-3, approved the name of Arti Devi, respondent No.5, to be appointed on regular basis in place of the petitioner. Significantly, just like resolution at Annexure P-2, this resolution at Annexure P-3, also shows beneficiary of resolution, i.e. Arti Devi, respondent No.5, as one of its signatories.

4(iv) Even otherwise, respondent No.5, has straightway been appointed, as Mid Day Meal Worker under the resolution passed on 24.09.2013, Annexure P-3. Learned counsel for respondent No.3, has handed over a copy of guidelines for engaging workers under Mid Day Meal Scheme. These guidelines issued by respondents No. 1& 2, for engaging Cook-cum-Helper under Mid Day Meal Scheme, vide letter dated 08.12.2011, stipulate the notification of vacancies, calling of applications for hiring services of Cook-cum-Helper. Relevant Clause-8 of these guidelines, is reproduced hereinafter:-

*"**Advertisement/Notification of Vacancies**:*

The SMC of the concerned school will notify the vacancies. The President of the School Management Committee (SMC) will call applications for hiring services of cook-cum-helper agaist vacancy at the Gram Panchayat/Nagar Panchayat/Urban local body level.

The vacancy may also be advertised through School Notice Boards and copy be sent to the concerned Panchayat/Urban Local Body."

It is not the case of the respondents that before appointment of respondent No.5, Arti Devi, any advertisement/any notice/any publicity was issued/given for filling up the post of Mid Day Meal Worker in Government Primary School Shadla, Tehsil Sadar, District Mandi, H.P. The appointment of respondent No.5, Arti Devi Mid Day Meal Worker is, thus, in contravention of guidelines framed by respondents No. 1& 2. It would be

profitable to reproduce relevant Para of the judgment passed by the ***Hon'ble Apex Court*** in ***(2015) 8 SCC 519***, titled as ***Dharampal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati and others:***-

> ***"28.*** *It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not."*

In ***(2014) 16 SCC 392***, titled as ***Nisha Devi vs. State of Himachal Pradesh and others***, the Hon'ble Apex Court, held as under:-

> ***"5.*** *Trite though it is, we may yet again reiterate that the principle of audi alteram partem admits of no exception, and demands to be adhered to in all circumstances. In other words, before arriving at any decision which has serious implications and consequences to any person, such person must be heard in his defence."*

In ***(2003) 4 SCC 557***, titled as ***Canara Bank and others vs. Debasis Das and others***, the Hon'ble Apex Court, held as under:-

> "**21**. *How then have the principles of natural justice been interpreted in the Courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is 'nemo judex in causa sua' or 'nemo debet esse judex in propria causa sua' as stated in Earl of Derby's case that is, "no man shall be a judge in his own cause". Coke used the form 'aliquis non debet esse judex in propria causa quia non potest esse judex at pars' (Co.Litt. 1418), that is, 'no man ought to be a judge in his own case, because he cannot act as Judge and at the same time be a party'. The form 'nemo potest esse simul actor et judex', that is, 'no one can be at once suitor and judge' is also at times used. The second rule is 'audi alteram partem', that is, 'hear the other side'."*

4(v) In the instant case, it is apparent, thus, that principles of natural justice have not been complied with either in terminating the services of the petitioner or in appointment of respondent No.5, as Mid Day Meal Worker. Surprisingly, learned counsel for the School Management Committee, has argued for continuation of respondent No.5, on the grounds of equity. Respondent No.5's continuation w.e.f. 07.09.2013 will not create any equity in her favour, when her original appointment was void. Even otherwise, as observed earlier, she (respondent No.5) has herself participated as a Member of School Management Committee in selecting herself as Mid Day Meal Worker. It has also not been specifically

disputed by the respondents that the petitioner had also been working as Mid Day Meal Worker since 2007 before her removal in 2013, without complying the principles of natural justices.

5. In view of the above, the writ petition is allowed to the extent that appointment of respondent No.5, Arti Devi, as Mid Day Meal Worker in Government Primary School Shadla, Tehsil Sadar, District Mandi, H.P., is quashed and set aside. The respondents are directed to conduct fresh selection process for filling up the post of Mid Day Meal Worker in Government Primary School Shadla, Tehsil Sadar, District Mandi, H.P., strictly in accordance with the guidelines framed in this regard by the State and to take it to logical conclusion within three months from today. The parties will be at liberty to apply for the post, if otherwise eligible.

Consequently, the writ petition is disposed of, as such. Pending application(s), if any, also stand disposed of.

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

Bhag Singh & Ors. …… Petitioners.
Versus
State of H.P. & Ors. …… Respondents.

CWP No. 8490 of 2012
Date of decision: 04.07.2019
Date of decision: 04.07.2019

Administration Law– Quasi-judicial functions– Principles of natural justice– Applicability of- Held, Ombudsman directed recovery of amount from petitioners and also imposed fine on them on basis of reassessment report which was prepared behind petitioners' back and without associating them in the process by Authority doing reassessment– The very genesis of order of Ombudsman was bad in eyes of law– Such order cannot be sustained– Order of Ombudsman set aside– Matter remitted to him to reopen it after providing opportunity of hearing to parties and not to consider such material which was obtained behind petitioners' back. (Paras 7 to 9)

For the petitioners : Mr. Surender Saklani, Advocate.
For the respondents : Mr. Dinesh Thakur, Additional Advocate General with Mr. Amit Kumar Dhumal, Deputy Advocate General and Mr. Sunny Dhatwalia, Assistant Advocate General, for respondents No. 1, 2 and 4 and
none for respondents No.3 and 5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

By way of this petition, the petitioner has inter alia prayed for the following relief:-

> " i) That a writ of certiorari may very kindly be issued and impugned inquiry dated 9.3.2012 as contained in Annexure P-1 and impugned order date d6.8.2012 as contained in Annexure P-7 may very kindly be quashed and set aside".

2. Brief facts necessary for adjudication of the present petition are that petitioner No.1 was an elected representative of Zila Parishad, Kangra from the year 2005 to the year 2010. A scheme wasintroduced by the Government of India, under the nomenclatures of MNREGA. A Participatory Committee was to be constituted for the purpose of execution of the work to be undertaken by MNREGA. Petitioner No.1 was appointed as the president of the Participatory Committee, whereas petitioners No.2 to 6 were appointed as members of the said Committee. The project assigned to the said Committee was for execution of the work of construction of Kuhal from Bahanur Khad to the house of one Shri Ram Saran, in Ward No.1, Gram Panchayat, Jassour, Tehsil and District Kangra, H.P. The work is stated to have been completed in June, 2010 and payment etc. thereafter, stood released to the respective parties.

3. It appears that a complaint was filed by respondent No.5 with regard to certain alleged illegalities committed by the Participatory Committee in the course of the execution of the said work. This complaint was enquired into by respondent No.3 i.e. Ombudsman (MNREGA). Pursuant thereto, an award was announced by Ombudsman (MNREGA), dated 9.3.2012 and on the basis of the award so passed by respondent No.3, dated 9.3.2012 (Annexure P-1), respondent No.2 passed order dated 6.8.2012 (Annexure P-7), ordering recovery of an amount of Rs.1,72,198/- from the present petitioners and also imposing fine upon them. Feeling aggrieved, the petitioners have filed this petition.

4. Learned Counsel for the petitioners has primarily argued that the impugned orders i.e. the award passed by the Ombudsman, as also the subsequent order dated 6.8.2012, passed by respondent No.2, are not sustainable in the eyes of law, as the award Annexure P-1 was not passed by the Ombudsman, on the basis of the contents of the complaint and the response of the present petitioners to the said complaint, but was passed on the basis of a report submitted to the Ombudsman on his own asking, by the Block Development Officer, which has been referred to in the impugned award also as a reassessment report, which has vitiated the entire proceedings because the petitioners were neither informed that any such reassessment is being ordered nor were they associated with the process of said reassessment. Thus, the contention of learned counsel for the petitioners is that they have been virtually condemned unheard by the Ombudsman and because the award has been announced on the basis of the reassessment report, in the preparation of which, they were not associated, the award is liable to quashed and set aside as the petitioners mandatorily had a right to be associated with the process of reassessment, because the reassessment was directly relatable to the allegations made against the present petitioners by respondent No.5. As per learned counsel, the principle of natural justice demanded that the petitioners ought to have been associated with the process of reassessment also, as any order which was to be passed by the Ombudsman, based upon the said reassessment, but obvious, was to have civil consequences as far as the petitioners were concerned. Learned Counsel has further argued that as the subsequent order passed by the Deputy Commissioner is based upon the award so passed by the Ombudsman, which is *per-se* is illegal, the subsequent order is not sustainable in the eyes of law and therefore, the same is also liable to be quashed and set aside.

5. Though, learned Assistant Advocate General has not been able to demonstrate from the record that the petitioners were associated with the process of reassessment so ordered by the Ombudsman, however, he has argued that before the order

was passed by the Deputy Commissioner, i.e. Annexure P-7, due opportunity of being heard was given to the petitioners and therefore, the petitioners cannot be permitted to take the plea of being condemned unheard.

6. I have heard learned counsel for the parties and have also gone through the impugned order as well as the documents appended with the plaint.

7. Primarily, the grievance of the petitioners is qua the award having been announced by the Ombudsman by relying upon a reassessment report submitted by the Block Development Officer, in the preparation of which, they were not associated. There is nothing on record to demonstrate that during the course of investigation of the complaint by the Ombudsman, when reassessment was ordered by the Ombudsman, there was either any notice to this effect given to the petitioners or any steps were taken either by the Ombudsman or by the Block Development Officer concerned, to associate the petitioners with the process of reassessment. This clearly demonstrates that the reassessment was carried by the Block Development Officer at the back of the petitioners.

8. Not only this, the issue wise findings, which have been returned in the impugned award Annexure P-1 by the Ombudsman, demonstrates that the same are solely based upon the reassessment report of the Block Development Officer. In this view of the matter, there is merit in the contention of learned counsel for the petitioners that the impugned order passed by the Ombudsman is not sustainable because the same is based upon a report, in the preparation of which, the petitioners were not associated. Therefore, but obvious, as the impugned award has been passed on the strength of the said reassessment report, which was prepared at the back of the petitioners, the same is bad in law and is liable to quashed and set aside.

9. Similarly, as Annexure P-7 is based upon the award passed by the Ombudsman, the same also cannot be said to be sustainable in law because if the genesis of the subsequent order has been found to be bad by the Court, the edifice cannot be held to be legal. The contention of the learned Assistant Advocate General that a show cause notice was issued to the petitioners, cannot cure the inherent defect in Annexures P-1 and P-7. Accordingly, this petition is allowed. Award dated 9.3.2012 (Annexure P-1) and order dated 6.8.2012 (Annexure P-7) are ordered to be quashed and set aside. However, as these two orders are being set aside on technical ground, therefore, the matter is remanded back to the Ombudsman, with the direction that he shall pass a fresh award after reopening the case and giving opportunity of being heard to all the parties. It is clarified that the award shall not be based upon any material which is collected at the back of the parties. Petition stands disposed of in above terms, so also the pending miscellaneous application(s), if any.

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

Ram Parkash ...Appellant
Versus
Surinder Kumar & Others ...Respondents

F.A.O. No.93 of 2009
Date of decision: 03.07.2019

Code of Civil Procedure,1908- Order III Rule 4- Order XLI Rule 23-Concession made by counsel before court– Whether can be challenged? Held, first appellate court framed three additional issues and remitted matter to trial court to return its findings on them– Order passed by court with consent of counsel of both parties– When order was passed with consent of counsel of both parties, it is not open to parties to challenge that order by way of appeal and contend that appellate court itself should have decided the matter instead of remanding it to trial court– Appeal dismissed. (Para 8)

Case referred:
Municipal Corporation Hyderabad vs. Surender Singh, (2008) 8 SCC 485

For the appellant : Mr. N.K. Thakur, Sr. Advocate, with Mr. Divya Raj Singh, Advocate.
For respondents : Mr. Ajay Sharma, Sr. Advocate, with Ms. Anandita Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohal Goel, J. (Oral)

By way of this appeal, the appellant has challenged the judgment passed by the Court of learned Additional District Judge, Fast Track Court, Una, District Una, H.P. in Civil Appeal No.91/2K/RBT 243/04/2000, dated 5.1.2009, whereby the appeal and cross appeal filed by both the plaintiffs and defendants were disposed of in the following terms:-

> "The bare perusal of the judgment and decree dated 31.5.2000 passed by the trial Court goes to show that the recent findings of the trial Court dated 29.11.2008 are in complete contrast to the earlier findings of the trial Court dated 31.5.2000. In other words, the findings of the trial Court dated 29.11.2008 are contradictory to its earlier findings vide which the sale deed in question was declared as null and void and the plaintiff was held to be in possession and entitled to the relief of injunction. Certainly, these findings have effect on the merits of the case. Due to these contradictory findings, I doubt that the findings of the trial Court can sustain. Even the learned counsel for both the parties during the course of arguments admitted at the bar that in such like situation the best course to this Court is to ask the trial Court to record its findings afresh on all the issues and to re-write the judgment"

2. Learned Senior Counsel for the appellant has argued that the judgment, vide which the matter stands remanded by the learned Appellate Court, is *per-se* not sustainable in the eyes of law as the same is not as per provisions of Order 41, Rule 23 (a) of the Act and once appeal stood filed before the said Appellate Court, it was incumbent upon the Appellate Court to have an adjudication upon the case on merit and not remanded the case back to the learned trial Court.

3. Brief facts necessary for the adjudication of the present appeal are that the appellant herein filed a suit for specific performance and injunction against the respondents/ defendants. The said suit was decreed by the Court of learned Sub-Judge, 1st Class, Amb, District Una, H.P. vide judgment and decree dated 31.5.2000.

4. Feeling aggrieved, the defendants preferred an appeal. In this appeal, i.e. Civil Appeal No.91/2K/RBT 243/ 04/ 2000, vide judgment dated 1.5.2008, learned Appellate Court after framing three additional issues, remanded the case back to the learned Trial Court with the direction that learned trial Court was to return its findings on additional issues as also on issue No.3A framed by the learned Appellate Court within a period of six months. Pursuant to the said judgment passed by the Appellate Court, learned Trial Court vide order dated 29.11.2008, returned its findings, to the additional issues.

5. Record demonstrates that the plaintiff also preferred an appeal against the findings so returned by the learned trial Court post remand vide order dated 29.11.2008. Both the appeals i.e. appeal earlier preferred by the defendants against the original judgment and decree passed by the learned trial Court as also the appeal filed by the plaintiff to the subsequent order passed by the learned trial Court stand disposed of vide impugned judgment, relevant portion of which already stands quoted herein.

6. I have heard learned counsel for the parties and have also gone through the judgments passed by the learned Courts below including the impugned judgment as also the relevant record of the case.

7. A perusal of para 17 of the judgment, which stands assailed by way of this appeal, demonstrates that what weighed with learned Appellate Court while remanding the case to the trial Court to decide the same afresh was the factor that there was contradiction in the findings so returned by the learned trial Court in the subsequent order passed by it as compared to the earlier judgment and decree passed by it. Record further demonstrates that during the course of arguments before learned Appellate Court, learned counsel representing the parties, which includes the present appellant also stated at the bar that in such like situation, i.e. in view of the contradiction being there in the finding returned by the learned trial Court in its earlier judgment and decree as compared to the subsequent order passed by it on remand, the best course was to ask the learned trial Court to give his findings afresh on all the issues and to re-write the judgment.

8. In this view of the matter when the order of remand passed by the learned Appellate Court is based upon a concession so made before it by learned counsel for parties including the counsel of present appellant, it does not lie in the mouth of the appellant to assail the said judgment of remand on the ground that the Appellate Court shall have decided the case on merit rather than remanding back to the learned trial Court. Reliance placed by the learned Senior Counsel upon the provisions of order 41, Rule 23 (a) of the Code of Civil Procedure as also the judgment of the Hon'ble Supreme Court in ***(2008) 8 SCC 485 titled as Municipal Corporation Hyderabad*** Versus ***Surender Singh*** is also of no assistance in the facts of this case as herein there is a concession made by the counsel for the present appellant before the learned Court below for the remand of the case.

9. In view of the findings returned hereinabove, this Court does not finds any merit in this appeal and the same is therefore, dismissed. However, it is observed that now as the matter stands remanded back to the learned trial Court for adjudication afresh, the same shall be decided by the learned trial Court completely uninfluenced by the findings returned by it in its earlier judgment and decree dated 31.5.2000 as also in its subsequent order dated 8.1.2009. In other words, the adjudication by the learned trial Court still be purely on the pleadings of the parties and the evidence led by them in support of the respective contentions before the trial Court. Application stands disposed of. The Registry is directed to forthwith return back the record of the case.

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BEFOREHON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Sukh Ram (deceased) through his legal representative Papender Kumar & others .....Appellants/Plaintiffs

Versus

Narain Dass & Others ...Respondents/Defendants

RSA No.88/2007 a/w Objections No.526 of 2009.
Date of decision: 01.07.2019

Limitation Act, 1963– Articles 64 & 65 – Adverse possession– Proof– On facts, held old house of plaintiff standing over suit land had fallen down - Defendants constructed house over said land to the knowledge of plaintiff– Plaintiff admitting defendants possession by way of construction for last many years prior to filing of suit– Oral evidence is corroborated by revenue entries – Duration of defendants' possession exceeds statutory period of 12 years– Possession of defendants open peaceful and hostile to title of plaintiff – Defendants had become owner by way of adverse possession– Suit of possession cannot be decreed in favour of plaintiff.(Paras 14 to 16)

For the appellants/
non-objectors : Mr. G.R. Palsra, Advocate.
For respondents/
objectors : Mr. R.K.Sharma, Sr. Advocate,
with Mr. Arun Kumar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

Brief facts, necessary for the adjudication of the present appeal are as under:-

The predecessor-in-interest of the present appellants (hereinafter referred to as the 'plaintiff') namely Sukh Ram has filed a suit in the Court of learned Civil Judge (Junior Division), Sundernagar, District Mandi, H.P., i.e. Civil Suit No.157/2000, praying for a decree of permanent prohibitory injunction against the respondents/defendants (hereinafter referred to as the defendants). The case of the plaintiff was that he was owner-in-

possession of the suit land comprised in khewat No.87, khatauni No.211, khasra Nos.1073, 1109, kita-2, measuring 0-19-14 bighas, situated in Muhal Bhaur/4, Tehsil Sundernagar, District Mandi, H.P. and that the defendants, who were strangers to the same and had no right, title or interest over the same and were causing interference since 16.5.2000, by removing crops standing upon the same.

2. The case was contested by the defendants on the ground that the plaintiff was not owner-in-possession of the suit land and revenue entries reflecting him as such were incorrect. As per the defendants, the suit land was taken by defendant No.1 from the plaintiff in the year 1974 by way of exchange in lieu of his land measuring 1 bigha, situated in Muhal Nag-Challa. As per the defendants, taking advantage of a General Power of Attorney, executed by the defendants in favour of the plaintiff, he (i.e. the plaintiff) transferred the land in favour of his son. In the alternative, the case of the defendants was that they had become owners-in-possession of suit land by way of adverse possession and they had also constructed a residential house over the suit land by spending more than Rs.8,00,000/- over the same.

3. On the basis of pleadings of parties, learned Trial Court framed the following issues:-

"1. Whether suit land is being possessed by the plaintiff as owner as alleged? OPP.
2. Whether defendants are interfering in the suit land in an illegal manner? OPP.
3. Whether suit is not maintainable? OPD.
4. Whether plaintiff is estopped by his act or conduct to file the present suit? OPD.
5. Whether plaintiff has no cause of action to file the present suit? OPD.
6. Whether suit is barred by limitation? OPD.
7. Whether suit is hit by the provisions of Section 10 CPC).
8. Relief".

4. These issues were decided by the learned trial Court as under:-

Issue No.1: No.
Issue No.2: No.
Issue No.3: Yes.
Issue No.4: Yes.
Issue No.5: Yes.
Issue No.6: Yes.
Issue No.7: No.
Issue No.8: Suit of the plaintiff is dismissed as per operative part of the judgment.

5. The suit of the plaintiff was thus dismissed by the learned trial Court by holding that the plaintiff was not entitled for the relief of permanent prohibitory injunction, as the plaintiff had not been able to demonstrate that he was in possession over the suit land. Learned Trial Court held that plaintiff had admitted the possession of the defendants over the same and in the absence of the possession of the plaintiff over the suit land, he was not entitled for the relief prayed for.

6. In appeal, the findings returned by the learned trial Court were upheld. Feeling aggrieved, the plaintiff has filed the present appeal.

7. This Court has been informed that during the pendency of the present appeal, the plaint was permitted to be amended and thereafter, on 11.8.2008, this Court framed following issue and remanded back the case to the trial Court for fresh decision on the same:-

> "1. Whether the plaintiff is entitled to vacant possession, as alleged? OPP".

8. As per the record, learned Trial Court has decided the issue so framed, vide judgment dated 20.10.2008. While doing so, learned trial Court framed following two questions for adjudication:-

1. Whether the possession of the defendants is matured into ownership of the suit land by way of adverse possession?
2. Whether the plaintiff is entitled for the vacant possession?

9. It is born out from the judgment of the learned trial Court that despite opportunity, evidence was not led by either of the parties in support of the issue framed by this Court, upon which the matter was remanded back to the trial Court. Thereafter, the issue in question so framed, was answered by the trial Court by holding that whereas the defendants had been able to demonstrate that they had become owners-in-possession of the suit land comprised in khasra No.1073 by way of adverse possession, they had not been able to prove the factum of their having become owners by way of adverse possession qua the suit land comprised in khasra No.1109. Learned trial Court accordingly, held that the plaintiff was entitled for vacant possession of the land comprised in khasra No.1109. The objections filed by the respondents/defendants to the findings so returned vide judgment dated 20.10.2008 on remand, vide objections No.526 of 2009, which are being decided alongwith the appeal itself.

10. This appeal was admitted on 16.4.2009 on the following substantial questions of law:-

> "Whether the judgment and decree of the trial Court with regard to granting relief of adverse possession in favour of the respondents of khasra No.1073, measuring 0-3-3 bighas is against the record as there is no pleading and evidence with regard to adverse possession on behalf of the respondents?".

11. Mr. G.R. Palsra, learned counsel for the appellants has primarily argued that the findings returned by the learned trial Court upon remand, that the defendants had become owners of the suit land comprised in khasra No.1073, measuring 0-3-3 bighas, are not borne out from the records. Mr. R.K. Sharma, Learned Senior counsel for the respondents has argued that the findings returned by the trial Court that defendants were not able to prove their possession over khasra No.1109 having been fructified by way of adverse possession, were not sustainable in law, as after remand, opportunity was not granted to the parties to lead evidence on the issue.

12. I have heard learned counsel for the parties and have also gone through the judgments passed by the learned Courts below initially, as also the judgment passed by the learned trial Court on remand.

13. A perusal of the judgment passed by the learned trial Court upon remand demonstrates that it is categorically recorded therein that the parties were called upon to lead evidence over the issue framed by this Court, on which the matter was remanded back to the trial Court, but, the parties by way of their separate statements on record stated that they do not intend to lead evidence.

14. While holding that the defendants had become owners-in-possession over the suit land comprised in khasra No.1073, learned trial Court held that the plaintiff himself had admitted the factum of construction of a house over khasra No.1073, measuring 0-3-3 bighas by defendants with the consent and permission of the plaintiff himself and that the plaintiff had never objected to the same. Learned trial Court has also held that Ext.P1, i.e. jamabandi for the year 1981-82 demonstrated that there was an entry of a 'Gair Mumkin Makan' over khasra No.1073 I.e. the suit land. On these basis, learned trial Court held that this clearly demonstrated that possession of the defendants over khasra No.1073 was open, continuous, uninterrupted and peaceful since the day of exchange i.e. 28.5.1974. A perusal of the earlier judgments passed by the learned Courts below, against which, the present appeal was preferred by the plaintiff, also demonstrates that there were concurrent findings returned in favour of the defendants and against the plaintiff that the defendants were in possession over the suit land and that the plaintiff was not in possession over the same, which also included khasra No.1073.

15. Record demonstrates that plaintiff Sukh Ram stepped into the witnesses box as PW1 and he admitted in his cross-examination that over the suit land, initially there was a 'Kacha house' of the plaintiff existing upon the same, but after the same fell down, Narain Dass constructed a new house upon the said suit land. He also stated that the said house stood constructed by Narain Dass about 20 years back. Statement of Sukh Ram was recorded in the Court on 21.12.2002.

16. It is a matter of record, as is also evident from the jamabandi Ext.P1 that the house stands constructed by the defendants over the land comprised in khasra No.1073. Therefore, keeping in view the fact that the suit was filed in the year 2000 and in his statement recorded in the Court in the year 2002, plaintiff himself haing admitted the factum of a house having been constructed over a part of the suit land about 20 years back, it is evident that as far as khasra No.1073 is concerned, obviously the defendants were in possession over the same for more than 12 years and their possession over the same was open, peaceful and hostile to the original owner i.e. the plaintiff. Incidently, the plaintiff has also admitted in his cross-examination that Narain Dass had executed a General Power of Attorney in his favour and he had sold the land of Narain Dass in favour of his own sons. In this view of the matter, it cannot be said that the judgment and decree of the learned trial Court with regard to granting relief of adverse possession in favour of respondents qua khasra No.1073, measuring 0-3-3 bighas is against the record, pleadings and evidence. The said substantial question of law is answered accordingly.

17. As far as contention of learned Senior Counsel for the defendants is concerned that the judgment and decree passed by the trial Court qua khasra No.1109 is not sustainable because opportunity was not granted to the parties to lead evidence to substantiate the same, in my considered view, there is no merit in the same. It is a matter on record as also evident from the judgment passed by the trial Court on record, that despite opportunity having been granted, the parties stated before the learned trial Court that they did not intend to lead evidence in support of their contention with regard to the issue as framed. In this view of the matter, the defendants cannot be now allowed to take the stand that the findings so returned qua khasra No.1109, are bad in law for want of opportunity granted to them to lead evidence qua this issue.

18. In view of the findings returned hereinabove, this appeal as also the objections filed by the respondents/objectors are dismissed. No order as to costs. Interim order, if any, stands vacated. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Rakesh Shah @ Chillu ....Appellant
Versus
State of H.P. ......Respondent

Cr. Appeal No. 608 of 2017
Reserved on: 15.07.2019
Decided on: 29.07.2019

Indian Evidence Act, 1872- Section 3**-** Appreciation of evidence– Circumstantial evidence– Held, circumstances relied upon must be conclusive in nature and consistent only with hypothesis leading to guilt of accused. (Para 24)
Indian Evidence Act, 1872- Section 8 –Motive – Relevancy and requirement of proof – Held, - Ordinarily prosecution is not required to prove motive of accused to commit offence – But where prosecution case hinges upon circumstantial evidence alone, it must establish that there was some motive behind commission of crime – On facts, motive of accused to commit murder of deceased as latter having illicit relation with his wife, not proved beyond reasonable doubts. (Para 36 & 37)
Indian Evidence Act, 1872 – Section 45– Expert evidence – Report of Serologist– Relevancy – Held, presence of blood group of deceased on knife and clothes of accused not relevant until grouping of blood of accused is also got done. (Para 45)

Cases referred:
Geejaganda Somaiah vs. State of Karnataka, 2007(2) R.C.R (Criminal) 255: 2007(9) SCC 315
Kanhaiya Lal vs. State of Rajasthan, 2014 (4) SCC 715
Mohan vs. State of Himachal Pradesh, Criminal Appeal No. 565 of 2016
Pohalya Motya Valvi vs. State of Maharashtra, (1980) 1 SCC 530
Ramreddy Rajeshkhanna Reddy vs. State of A.P., 2006 (10) SCC 172
State of Goa vs. Pandurang Mohite, AIR 2009 SC, 1066
State of Punjab vs. Sucha Singh, AIR 2003 SC 1471
Varun Chaudhary vs. State of Rajasthan, AIR 2011 SC 72

For the appellant: Ms. Sheetal Vyas, Advocate.
For the respondent: Mr. Vikas Rathore, Addl. A.G with
Mr. Narinder Guleria, Addl. A.G and
Mr. J.S. Guleria, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

The appellant (hereinafter referred to as the 'accused') herein is a convict. He has been convicted by learned Additional Sessions Judge-I, Kangra at Dharamshala for the commission of an offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and also to pay a sum of Rs.10,000/- as fine vide judgment dated 16.3.2017 passed in Sessions Case No. 14-N/VII/2014.

Facts of the case:

2. The allegations against the accused, in a nut-shell, are that deceased Fauju Shah, who was working as Security Guard in B.Sc. Nursing College, Malakwal returned to home after his duty was over at 5.00 p.m. on 2.6.2014. According to the complainant, Shukar Deen (uncle of deceased) his brother Roshan Deen @ Nagu (PW-12, father of the deceased) and Fauju Shah consumed liquor. They assaulted each other. The mother of deceased Fatima Bibi (PW-10) picked up '*Thapi*' (flat wooden piece meant for beating clothes while washing) administered its blow on the head of Fauju Shah. The injury caused thereby started bleeding. He fell down in the courtyard. His father Roshan Deen @ Nagu (PW-2) had also sustained injuries on his person. He, therefore, was taken to the hospital in ambulance 108. The office of ambulance 108 made a call to the police station, Nurpur that in an altercation having taken place at village Malakwal, one person has received injuries and that he is being brought to the hospital. The information so received was entered in the rapat rojnamcha Ext. PW-27/A and Sub-Inspector Tilak Singh along with other police officials rushed to civil hospital, Nurpur. After conducting investigation, he returned to the police station and made entries in the daily diary Ext.PW-12/A. It was recorded that MLC of injured was obtained and that he was called to the hospital again on the next day for x-ray examination and to have the opinion of ENT Specialist on some of the injuries.

3. PW-2 Roshan Deen @ Nagu was brought from hospital in the ambulance. PW-10 Fatima Bibi his wife was also with him. They noticed deceased lying on Atiala in village Malakwal. When they reached in the house informed Begum Bibi (PW-13) their daughter-in-law and wife of deceased that her husband was lying at Atiala.

4. On 3.6.2014 at 6.00 a.m. Balkar Singh (PW-7) informed Shukar Deen (PW-1) that the neck of Fauju Shah had been cut down and he is killed. Balkar Singh called Shukar Deen to come to the spot. Accordingly, PW-1 rushed to the spot and found the beheaded body of Fauju Shah lying on the spot. On suspicion, PW-1 had lodged complaint Ext. PW-1/A with the police of police station, Nurpur against his brother Roshan Deen @ Nagu and Fatima Bibi, parents of deceased because there was property disputes pending between them. The information so given by PW-1 Shukar Deen to the police was entered in daily dairy vide rapat Ext.PW-27/B. PW-27 Megh Nath Inspector/SHO Police Station, Nurpur, District Kangra has has taken the investigation in his hand. He recorded the statement Ext.PW-1/A of Shukar Deen. On the basis of statement of Shukar Deen, a case under Section 302 IPC was found to be made out by the police. He sent the statement made by Shukar Deen to police station through Constable Ajay Kumar, on the basis thereof, FIR Ext.PW-19/A was registered by ASI Ramesh Chand. PW-27, the I.O has telephonically called the FSL team to the spot. The photographs Ext.PW-15/A to Ext.PW-15/A-18 were clicked on the spot. The CD of the photographs Ext.PW-15/D-1 was also prepared. He videographed the spot vide DVD Ext.PW-15/B and prepared the spot map Ext.PW-27/C also. The team of FSL also reached on the spot. The I.O. filled the inquest papers Ext.PW-27/D (five leaves). The blood sample was lifted from the spot and taken in possession after getting the same dried and sealing in a plastic box with impression of seal 'A'. The control soil was also lifted for sample from the nearby place where the blood was lying. The same was sealed in a small box with impression of same seal. The blood lying on the cemented floor near the dead body after getting it dried was also taken into possession after sealing

with impression of seal 'A'. All these items were recovered vide memo Ext.PW-4/A. A pair of chappal Ext.P-3 was also taken in possession and sealed in parcel Ext.P-4. On 2.6.2014 during fight having taken place in the courtyard of the house of deceased, two buttons Ext.P-5 and P-6 had fallen there. The same were also sealed in a parcel along with one piece of '*kangan*' Ext.P-7 to Ext.P-9 and taken into possession vide memo Ext.PW-5/A.

5. PW-9 thereafter made an application Ext.PW-27/F to the Medical Officer, Civil Hospital, Nurpur for the post-mortem of the dead body of Fauju Shah. The Medical Officer on duty, however, advised that the opinion of Forensic expert regarding cause of death and injury is required. The body, therefore, was taken to the Dr. R.P.G.M.C, Tanda for getting the post-mortem conducted by some Forensic Expert. The report is Ext.PW-3/A. The Medical Officer, Civil Hospital, Nurpur written a letter to Forensic Department of RPGMC Tanda. The same along with inquest papers was sent to medical college along with dead body. The post-mortem of the dead body was conducted. The photographs of the post-mortem Ext.PW-18/A-1 to A-10 and CD of the post-mortem Ext.PW-18/A-11 were also taken. The Forensic Expert handed over the clothes, sample of hair, blood and viscera along with letter addressed to Forensic Science Expert to the police officials who have brought the dead body to the medical college. All such samples preserved in the hospital were deposited by the I.O PW-27 in the police station with MHC for necessary action.

6. On 4.6.2014, an empty half bottle of officer choice was recovered from the drain. The same was allegedly thrown by the accused after consuming the liquor on 2.6.2014 during the night at 10.00 a.m. The supplementary statements of Shukar Deen PW-1, the statements of Vakil Shah PW-17, Begum Bibi PW-13, Roshan Deen PW-12 and one Ram Bahadur and Manoj Kumar PW-6 under Section 161 Cr.P.C were recorded. They all stated that the accused was seen with the deceased in the night and they consumed liquor together.

7. The accused was arrested on 6.6.2014. He made a disclosure statement Ext.PW-20/A in the presence of PW-20 Munshi Ram and one Arood Singh that knife Ext.P-1, Pant Ext.P-11 and vest Ext.P-12, he was wearing at the time of murder of Fauju Shah have been thrown under a culvert (*Pulia*) and it is he who alone can get the same recovered. The statement of Munshi Ram and Arood Singh were recorded by the I.O. The accused thereafter led the police to the place one kilometer away from Malakwal chowk towards Lahru road and identified the culvert there. He had taken out beneath the culvert knife, pants and vest. The sketch of the knife Ext.PW-9/A was prepared. The pant and vest were also sealed in a parcel and taken in possession vide memo Ext.PW-9/C in the presence of Ravinder Chaudhary PW-14 and Khushwant Singh PW-9. The photographs of the place of recovery are Ext.PW-15/C-1 to C-7 and CD is Ext.PW-15/D.

8. The application Ext.PW27/H was made to the Tehsildar, Nurpur for demarcation of the land at Malakwal chowk where the deceased was murdered. The demarcation was conducted by the Field Kanungo Ashwani Kumar PW-16, who has prepared the demarcation report Ext.PW-16/A, copy of jamabandi Ext.PW-16/B and tatima Ext.PW-16/C and also recorded the joint statement of witnesses Ext.PW-16/D and E. The same were handed over to the police.

9. All the articles seized during the course of investigation were handed over to MHC of police station for safe custody. The same were sent for scientific analysis. The reports from FSL Ext.PA-1 and PA-2, Forensic Expert opinion of Medical Officer RPGMC Tanda Ext.PW2/B was obtained. The weapon of offence knife Ext.P-1 was also examined by the Forensic Expert and given his opinion thereon. On the completion of the investigation, report under Section 173 Cr.P.C was filed in the Court.

10. Learned trial Judge on appreciation of the contents of the police report and documents annexed therewith and finding that sufficient grounds are made out to proceed further against the accused, framed charge for the commission of offence punishable under Section 302 IPC against him. The accused, however, pleaded not guilty to the charge and claimed trial. The prosecution, therefore, examined 27 witnesses in all to substantiate the charge so framed against the accused.

Prosecution case in a nut-shell:

11. The complainant is Shukar Deen. He is uncle of deceased. He has reported the matter to the police on 3.6.2014 on seeing the dead body of his nephew Fauju Shah and suspected the hand of his brother Roshan Deen @ Nagu PW-12, Fatima Bibi, PW-10 (parents of deceased) as on 2.6.2014, in the evening, they assaulted each other and also the dispute of property between them. When the police arrived at the spot, he has made the statement Ext.PW-1/A again implicating his brother Roshan Deen PW-12 and Fatima Bibi PW-10 for the murder of their son Fauju Shah. In his supplementary statement recorded by the I.O., he has implicated the accused on the basis of the information given to him by Manoj Kumar PW-6 that the accused and deceased were seen together by him at 10.00 p.m on2.6.2014 on Malakwal chowk at Atiala. PW-4 Ashwani Kumar is a witness to the blood samples drawn by the police on 3.6.2014 from the spot, which were taken in possession vide memo Ext.PW-4/A. A pair of chappal belonging to the deceased was also taken in possession in his presence and in the presence of PW-8 Shakti Prasad vide recovery memo Ext.PW-4/B. PW-5 Rakesh Kumar is a witness to the recovery of two buttons Ext. P-5 and P-6 and three pieces of plastic *kangan* Ext.P-7 to P-9 taken in possession on 3.6.2014 from the courtyard of the house of the deceased vide memo Ext.PW-5/A. Arood Singh is another witness to this memo. PW-6 Manoj Kumar is resident of village and post office, Khuwara. According to him on 2.6.2014, in the evening, he had consumed liquor with his friend Ram Bahadur at Malakwal. Their another friend Raghu had to come, therefore, they came to Atiala to wait him there. Around 10.00 p.m., accused and deceased also came there from their house. The accused had a liquor bottle in his hand. They both consumed liquor. The deceased had injuries on his face. On reaching at Atiala, the deceased lie-down there. The accused offered liquor to this witness and his friend Ram Bahadur, however, they refused. The accused filled the bottle with water of handpump and consumed the liquor, which he had been carrying with him. The empty bottles he threw away in the nearby drain. He has also witnessed the recovery of empty bottles Ext.P-2, which the accused had allegedly thrown in the drain vide memo Ext.PW-6/A. PW-7 is the shopkeeper, whose shop is adjacent to Atiala. According to him, on 3.6.2014, when he opened his shop at 5.45 a.m. noticed dead body of Fauju Shah lying on Atiala. He informed Shukar Deen, uncle of deceased accordingly. PW-8 Shakti Prasad is a witness to the samples of blood taken from the spot i.e. Atiala in his presence and presence of Ashwani Kumar PW-4. PW-9 Khushwant Singh and PW-14 Ravinder Chaudhary are the witnesses to the recovery of knife Ext.P-1, pant Ext. P-11 and vest Ext.P-12 from a place beneath the culvert, on the identification of the accused. PW-10 Fatima Bibi and PW-12 Roshan Deen @ Nagu are the parents of deceased. PW-10 has stated that the deceased and her husband quarreled with each other and received injuries. As a result thereof, her husband received injuries on his head. He, therefore, was taken in 108 ambulance to the hospital. Around 10.00 p.m. when they returned from the hospital to the house, found their son Fauju Shah lying on Atiala and the accused sitting with him there. They apprised their daughter-in-law Begum Bibi that her husband was lying on Atiala and that he will come to home. According to them, the accused had killed their son as he suspected illicit relations of deceased with his wife. PW-11 Sahib Singh is also a witness to the last seen theory. According to him, he is salesman in the liquor vend at Malakwal. Deceased Fauju Shah was known to him. On 2.6.2014, around

8.30 p.m. Fauju Shah came to liquor vend and purchased one one pets of officer choice and went towards the house of accused Rakesh. After 10-15 minutes, they both came together from the house of the accused and went towards Malakwal chowk. In the morning, he came to know that Fauju Shah has been killed. PW-13 Begum Bibi is the wife of deceased Fauju Shah. According to her also, deceased and her father-in-law PW-12 quarreled with each other on 2.6.2014. Her father-in-law was taken to the Civil Hospital, Nurpur for medical examination in 108 ambulance. Her husband went to Malakwal bus-stand side. He, at about 10.00 p.m. was seen by her father-in-law and mother-in-law in the company of accused at Malakwal chowk lying on Atiala there. She went to sleep after having dinner. On the next day, came to know that her husband was murdered and his dead body was lying on Atiala. She believed that it is the accused who had murdered her husband as he was suspecting the illicit relations of deceased with his wife. It was told to her by the deceased also that the accused suspects his illicit relations with the wife of the accused. PW-17 Vakil Shah is the brother of deceased. According to him, he is Constable in CRPF and was posted at that time at Jalandhar. His mother Fatima Bibi (PW-10) told him on 2.6.2014 that the deceased was in the company of the accused in the market at Malakwal. On 3.6.2014 at about 5.40 p.m. (time wrongly stated by him), he received a telephonic call from Begum Bibi, wife of deceased that Fauju Shah has been murdered and his dead body is lying on Atiala. He came to Malakwal. According to him, photographs Ext.PW-15/A-1 to Ext.PW-15/A-18 were clicked in his presence. As per his version also, since the deceased was in the company of accused till late evening, therefore, it is the accused who killed him. PW-20 Munshi Ram is the witness to disclosure statement Ext.PW-20/A allegedly made by the accused while in police custody.

12. Other prosecution witnesses are PW-2 Dr. Vijay Arora, Professor and Head Department of Forensic Medicine RPGMC, Tanda, who has conducted the post-mortem of the dead body and given his opinion Ext.PW-2/B and PW-3 Dr. S.K. Mahajan who was posted as ENT specialist, Civil Hospital, Nurpur at the relevant time. It is he who had inspected the dead body, however, referred the same for the expert opinion to RPGMC, Tanda. His report is Ext.PW-3/A. PW-15 Rajinder Soga has clicked the photographs of the dead body Ext.PW-15/A-1 to A-18 and also prepared the DVD of the spot Ext.PW-15/B. The CD of the spot he prepared is Ext.PW-15/B-1. The photographs regarding the recoveries made he clicked are Ext.PW-15/C-1 to C-7 and the CD is Ext.PW-15/D. He has made the entries Ext.PW-15/E in his register. He issued certificate Ext.PW-15/F also. PW-16 is the Field Kanungo, Sadwan, Tehsil Nurpur. He has conducted the demarcation and submitted the report Ext.PW-16/A, jamabandi Ext.PW-16/B, Aks Shazra Kishtvar Ext.PW-16/C to the police. The joint statement of witnesses Balkar Singh, Arood Singh and Joginder Ext.PW-16/D was also recorded by him and handed over to the police. PW-18 is also a Photographer. He has clicked the photographs of the post-mortem of the dead body conducted in RPGMC, Tanda Ext.PW-18/A-1 to A-10 and also prepared CD Ext.PW-18/A-11. They all are formal witnesses.

13. The remaining prosecution witnesses are official witnesses. PW-19 ASI Ramesh Chand has registered the FIR Ext.PW-19/A, on the basis of rukka Ext.PW-1/A. PW-21 was posted as MHC Police Station, Nurpur. The case property was entrusted to him for safe custody in the malkhana. He forwarded the same to FSL, Dharamshala for analysis. PW-22 HHC Chaman Prakash has deposited the case property which was handed over to him by the Forensic Expert in RPGMC, Tanda. He had also taken the case property to FSL Dharamshala vide RC No. 120/14, Ext.PW-21/C. PW-23 is HC Swaroop Singh. He had conducted the investigation partly. He had taken on record certificate Ext.PW-15/F and the abstract of register Ext.PW-15/E from Rajinder Soga, PW-15, the Photographer. PW-24 is Sub-Inspector Kalyan Singh. He has also investigated the case partly. He has recorded the

statements of MHC Bir Singh and HHC Chaman Prakash. In his presence, the samples were sent to RFSL, Dharamshala by MHC Bir Singh. PW-25 is HC Satish Kumar, who was posted as MHC in police station at the relevant time. He sent the knife to Forensic Expert at RPGMC Tanda. After its inspection by the Forensic Expert, the opinion Ext.PW-2/D was given. The same was collected and brought to the MHC by HHC Parmod Singh PW-26. The Investigating Officer is Inspector Megh Nath PW-27, SHO Police Station, Nurpur.

14. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C has denied the incriminating circumstances appearing against him in the prosecution evidence either being wrong or for want of knowledge. According to him, the interested witnesses have been associated by the prosecution who had deposed falsely against him. He, however, opted for not producing any evidence in his defence.

15. Learned trial Judge on appreciation of the evidence comprising oral as well as documentary has convicted the accused for the commission of an offence punishable under Section 302 IPC. He has been sentenced to imprisonment for life and to pay Rs.10,000/- as fine.

Ground of appeal:

16. The appellant-convict aggrieved by the impugned judgment has questioned its legality and validity on the grounds *inter-alia* that the evidence on record has not been appreciated in its right perspective and to the contrary, learned trial Judge has based its findings on surmises and conjectures, which has resulted in miscarriage of justice to him. The accused was made to sign all the documents by putting him under fear. The investigation as conducted, therefore, is stated to be violative of Article 20(3) of the Constitution of India. The documents produced in evidence being fabricated are also hit by Sections 25 and 26 of the Evidence Act and also Section 162 of the Code of Civil Procedure. The case, according to the accused is based on circumstantial evidence. The circumstances relied upon against him do not point out towards his guilt. The alleged disclosure statement Ext.PW-20/A is stated to be not voluntary and rather recorded after subjecting the accused to torture. The same, as such, is hit by Article 20(3) of the Constitution of India. The impugned judgment being not legally and factually sustainable has been sought to be quashed and set and the accused acquitted of the charge.

Arguments addressed:

17. We have heard Ms. Sheetal Vyas, learned counsel representing the accused and Mr. Narinder Guleria, learned Additional Advocate General on behalf of the respondent-State.

18. Ms. Sheetal Vyas, learned counsel has vehemently argued that the impugned judgment is not legally sustainable as the prosecution, according to her, has failed to prove its case against the accused beyond all reasonable doubt. According to learned counsel, the story qua the accused had motive to kill the deceased is highly improbable because had the accused was apprehensive of the deceased having physical relations with his wife, the former had no occasion to consume the liquor with the latter, paramour of his wife. Also that, had the deceased been in physical relations with the wife of the accused, he would have also not taken the risk to consume liquor with him. The prosecution story that deceased was lastly seen on 2.6.2014 around 10.00-11.00 p.m. in the company of accused on Atiala in village Malakwal has not been proved at all. According to Ms. Vyas had the parents of deceased Fatima Bibi (PW-10) and Roshan Deen (PW-12) seen the deceased lying at Atiala and the accused sitting with him there, as a normal human conduct, apprehending danger to his life at the hands of accused with whose wife deceased was in physical relations, would have taken/arranged to take the deceased from Atiala to the house and

would have not satisfied only by apprising his wife Begum Bibi (PW-13) that her husband was lying on Atiala. There is no other corroborative material on record lending support to the prosecution case in this regard.

19. The evidence as has come on record by way of another set of witnesses i.e. Manoj Kumar (PW-6), a Teacher by profession, as per his version, he had collected the payment of the school at Nurpur and thereafter came to Malakwal, there he consumed liquor with his friend Ram Bahadur. The deceased and the accused were seen by them at 10.00 p.m. when they were waiting for their another friend Raghu at Atiala. Ram Bahadur has not been examined and as regards the above testimony of Manoj Kumar, the same according to learned defence counsel, cannot be relied upon for want of better particulars as to in which school this witness was working as Teacher and from which office at Nurpur, he had collected the payment of the school. Also that, some record should have been maintained in his school regarding his visit to Nurpur and the record would have also been maintained at Nurpur from where he had collected the payment of the school. Therefore, his testimony without any corroboration thereto cannot be relied upon. As regards the evidence having come on record by way of testimony of Sahib Singh (PW-11) that around 8.30 p.m., the deceased came to liquor vend and took one-one pets of officer choice and thereafter went to the house of the accused and after 10-15 minutes accompanied by him towards the Malakwal chowk, according to learned counsel, cannot be relied upon as nothing has come on record that this witness was working as Salesman in the liquor vend and no record pertaining to sale of liquor to the deceased produced by him.

20. It has, therefore, been urged that story of the last seen is not at all proved on record. The disclosure statement Ext.PW-20/A, according to learned defence counsel is hit by Article 20(3) of the Constitution of India being not recorded in accordance with law. The presence of PW-20 in the police station is highly doubtful as he failed to disclose the purpose for which he had gone to the police station. He is resident of a place i.e. village Matholi not less then 25 kilometers from the place of occurrence i.e. Malakwal. Otherwise also, the recovery of so called weapon of offence i.e. knife Ext.P-1, Pants Ext.P-11 and vest Ext.P-12 though from a place beneath the culvert, however, an open place is hardly of any help to the prosecution. It has, therefore, been urged that the true story has been withheld from the Court and the story of last seen invented to implicate the accused falsely in this case.

21. On the other hand, Mr. Narinder Guleria, learned Additional Advocate General appearing on behalf of the respondent-State has urged that the prosecution case against the accused stands proved beyond all reasonable doubt. The accused was lastly seen in the Company of deceased and this part of the prosecution case, according to learned Additional Advocate General, stands satisfactorily proved from the evidence available on record. The disclosure statement Ext.PW-20/A is stated to be made by the accused voluntarily and the recovery of weapon of offence, the knife Ext.P-1, Pants Ext.P-11 and vest Ext.P-12 of the accused, pursuant to that also proved his guilt. The motive is also stated to be proved in the case in hand.

22. We have critically analyzed the arguments addressed on both sides and also gone through the record of the case.

Our findings:

Circumstantial evidence:

23. Before coming to the evidence available on record and the alleged incriminating circumstances appearing against the accused, it is deemed appropriate to discuss first as to

in a case which hinges on circumstantial evidence, how and under what circumstances, an accused can be held guilty for the commission of the offence. We have discussed the well settled legal principles attracted in a case of this nature in our recent judgment dated July 15, 2019 rendered in ***Criminal Appeal No. 565 of 2016*** titled ***Mohan*** V. ***State of Himachal Pradesh***. This judgment reads as follows:

> "15. The present being not a case of direct evidence and rather hinges upon circumstantial evidence casts an onerous duty on this Court to find out the truth by separating grain from the chaff. In other words, it has to be determined that the facts of the case and the evidence available on record constitute the commission of an offence punishable under Section 302 IPC against the accused or not. However, before coming to answer this poser, it is desirable to take note of legal provisions constituting an offence punishable under Section 302 IPC. A reference in this regard can be made to the provisions contained under Section 300 IPC. As per the Section ibid, culpable homicide is murder firstly if the offender is found to have acted with an intention to cause death or secondly with an intention of causing such bodily injury knowing fully well that the same is likely to cause death of someone or thirdly intention of causing bodily injury to any person and such injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or if it is known to such person that the act done is imminently so dangerous that the same in all probability shall cause death or such bodily injury as is likely to cause death.
>
> 16. Culpable homicide has been defined under Section 299 IPC. Whoever causes death by way of an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death can be said to have committed the offence of culpable homicide. Culpable homicide is murder if the act by which death is caused is done with the intention of causing death. Expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degree. We are drawing support in this regard from the judgment of Apex Court in **Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869.**
>
> 17. The ingredients of culpable homicide amounting to murder, therefore, are: (i) causing death intentionally and (ii) causing bodily injury which is likely to cause death. In case the accused had motive to cause death of deceased, the eye witness count of the occurrence may not be required, however, where the motive is missing, the prosecution is required to prove its case with the help of the testimony of eye witnesses.
>
> 18. The present being a case of circumstantial evidence, the Court seized of the matter has to appreciate such evidence with all care and circumspection and rely upon only if establishes the guilt of the accused alone and rule out all possibilities leading to the presumption of innocence of the accused. The law is no more res integra as support can be drawn from the judgment of a Division Bench of this Court in ***Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550.*** The relevant extract of this judgment reads as follows:
>
> > **[21]** It is well settled that in a case, which hinges on circumstantial evidence, circumstances on record must establish the guilt of the accused alone and rule out the probabilities leading to presumption of his innocence. The law is no more res integra, because the Hon'ble Apex

Court in Hanumant Govind Nargundkar Vs. State of M.P, 1952 AIR(SC) 343 has laid down the following principles:

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

[22] The five golden principles, discussed and laid down, again by the Hon'ble Apex Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, 1984 4 SCC 116, are as follows:

> (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."

19. Similar is the ratio of the judgment rendered again by this Bench in ***State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213.*** The relevant text of this judgment also reads as follows:

> **"[10]** As noticed supra, there is no eye-witness of the occurrence and as such, the present case hinges upon the circumstantial evidence. In such like cases, as per the settled proposition of law, the chain of circumstances appearing on record should be complete in all respects so as to lead to the only conclusion that it is accused alone who has committed the offence. The conditions necessary in order to enable the court to record the findings of conviction against an offender on the basis of circumstantial evidence have been detailed in a judgment of this Court in Devinder Singh V. State of H.P, 1990 1 Shim LC 82 which reads as under:-
>
> > "1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.
> >
> > 2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not

be explainable on any other hypothesis except that the accused is guilt.

3. The circumstances should be of a conclusive nature and tendency.

4. They should exclude every possible hypothesis except the one to be proved AND

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

[11] It has also been held by the Hon'ble Apex Court in Akhilesh Halam V. State of Bihar, 1995 Supp3 SCC 357 that the prosecution is not only required to prove each and every circumstance as relied upon against the accused, but also that the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The relevant portion of this judgment is reproduced here-as-under:-

> "...........It may be stated that the standard of proof required to convict a person on circumstantial evidence is now settled by a serious of pronouncements of this Court. According to the standard enunciated by this court the circumstances relied upon by the prosecution in support of the case must not only be fully established but the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for as conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt of an accused is to be inferred, should be conclusive nature and consistent only with the hypothesis of the guilt of the accused and the same should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together lead to the only irresistible conclusion that the accused is the perpetrator of the crime........."

20. This Court has again held in ***State of Himachal Pradesh Vs. Sunil Kumar, Cr. Appeal No. 326 of 2011 decided on 15.6.2017*** as under:

> *"13. It is more than settled that in case of circumstantial evidence, the circumstances from which inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:*
>
> i) *The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.*
>
> *ii) Those circumstances should be of a definite tendency unerringly pointing out towards the guilt of the accused.*
>
> *iii) The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was*

committed by the accused.

14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it would not be sound and safe to base the conviction of accused person.

15. In case of circumstantial evidence, each circumstances must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypothesis and should be consistent that only the guilt of the accused (See: Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173)."

21. The Hon'ble Supreme Court in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra, AIR 1984 Supreme Court 1622,*** has held as under:

"150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

… … … … … …

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation."

24. Therefore, from the evidence available on record, it has to be determined that the evidence as well as the facts and circumstances of this case are conclusive in nature and consistent only with the hypothesis to the guilt of the accused and not explainable on any other hypothesis except that the accused is guilty of the commission of offence punishable under Section 302 IPC.

25. Now, if coming to the prosecution case, the accused and deceased belong to village Malakwal. The dead body of Fauju Shah was lying on Atiala. It is Balkar Singh (PW-7) who had seen the dead body first on 3.6.2014 around 5.45 a.m., when he came to open his shop situated there. He informed Shukar Deen (PW-1), the complainant.

26. As per the prosecution case itself, Roshan Deen @ Nagu (PW-12) and his wife Fatima Bibi (PW-10) on one side, whereas, their son Fauju Shah deceased on the other, had assaulted each other on 2.6.2014 at 5.00 p.m., when deceased came to home from his duty. PW-10 administered '*Thapi*' blow on the head of deceased and due to this, blood started oozing out and the injury started bleeding and he also fell down in the courtyard. PW-12 also received injuries who allegedly was taken to hospital in ambulance 108. The police of police station, Nurpur received a telephonic call on that very day at about 8.05 p.m. from ambulance 108 that quarrel has taken place at Malakwal and the injured is being taken to Civil Hospital, Nurpur. The information so received was entered in daily diary vide rapat Ext.PW-27/A. SI Tilak Singh along with other police officials went to Civil Hospital, Nurpur. He conducted investigation there and returned to the police station. Rapat Ext.PW-12/A was entered in daily dairy on his arrival in the police station. What PW-12 Roshan Deen, father of deceased told SI Tilak Singh is that Fauju Shah, the deceased returned to home from his duty at 7.15 p.m. He was under the influence of liquor. He started abusing this witness and thereafter started beating him with a wooden rod. Thereafter, Shukar Deen (PW-1) and his wife Amro also started beating him. Fatima Bibi (PW-10) and her daughter-in-law Begum Bibi (PW-13) came there and saved him from their clutches. Rapat Ext.PW-12/A discloses that he was beaten by Fauju Shah etc. due to their enmity with him. Since he has received injuries on his head, nose, right arm, therefore, expressed his desire to SI Tilak Singh to get him medically examined. SI Tilak Singh got medically examined Roshan Deen (PW-1) vide MLC No. 280/14. Out of five injuries on his person, injuries No. 1 to 3 were found simple in nature and as regards injuries No. 3 and 5 and also 4, the opinion was left to be given after x-ray of the said witness and also the opinion of ENT specialist. The injured PW-12 was called again for x-ray and check-up by the ENT specialist on the next day. No case, however, was registered on the basis of disclosure made by PW-12 before SI Tilak Singh and the action in the matter left to be taken on receipt of final medical opinion. What happened thereafter, nothing has come on record as there is no evidence available on record that x-rays of PW-12 were conducted and he was examined by the ENT specialist also on the next day i.e. 3.6.2014. As a matter of fact, the police has closed the investigation in the matter reported by PW-12 without registering a case and conducting further investigation to take the investigation to its logical end to the reasons best known to it. Though, MLC No. 280/14 was allegedly issued by the Medical officer, Civil Hospital, Nurpur who examined PW-12, however, neither the doctor who medically checked-up PW-12 has been associated in the investigation of the case nor examined as witness and even the post-mortem report Ext.PW-2/A has also not been produced in evidence. Such a conduct attributed to the police itself speaks in plenty about the seriousness and fairness of the investigation conducted.

27. There is another aspect of the matter disclosed by Shukar Deen (PW-1) in his statement Ext.PW-1/A dated 3.6.2014 at 8.10 a.m. to the police after he having seen the dead body of Fauju Shah lying on Atiala with injury on his neck and blood oozing out. According to him, on 2.6.2014, he was present in his house at village Malakwal at 5.00 p.m. His brother Roshan Deen @ Nagu (PW-12) and deceased Fauju Shah had consumed liquor and started quarreling with each other. They exchanged kick and fist blows to each other. Fatima Bibi (PW-10), wife of Roshan Deen @ Nagu picked up a '*Thapi*' and given its blow on the head of Fauju Shah. Fauju Shah, the deceased received injury on his head. The injury started bleeding and the blood oozed out in the courtyard of the house also. Roshan Deen @ Nagu sustained minor injuries on his person. The ambulance was called and he was taken to Civil Hospital, Nurpur. Around 11.00 p.m. the injured returned to the house from the hospital with his wife Fatima Bibi (PW-10). Also that, today (3.6.2014) around 6.00 a.m. he came to know from Balkar Singh (PW-7) over cellphone that Fauju Shah has been murdered by someone by cutting his throat. He rushed to the spot and noticed that Fauju Shah was

murdered by someone with sharp edged weapon. He suspected the hand of Fatima Bibi (PW-10) and Roshan Deen @ Nagu (PW-12) in the murder of their son Fauju Shah, the deceased because land disputes were going on between them. The statement Ext.PW-1/A of Shukar Deen (PW-1) has been recorded by SI/SHO Megh Nath (PW-27), Police Station. Nurpur. On the basis of the statement Ext.PW-1/A, FIR Ext.PW-19/A was registered. As per FIR on the day i.e. 3.6.2014, Roshan Deen @ Nagu (PW-12) has also informed the police at 6.40 a.m. that his son Fauju Shah had been murdered at Malakwal chowk on Atiala. He requested the police to visit the spot and conduct investigation. Therefore, after the stage of registration of the FIR, the deceased was suspected to have murdered by his parents, who as per prosecution version itself, had quarreled with each other.

<u>The last seen theory:</u>

28. How the story of last seen came to be introduced, reference can be made to statement of Shukar Deen (PW-1) who tells us that he came to know about the accused and deceased roaming together from Manoj Kumar (PW-6) and Ram Bahadur @ Shiva. The complaint Ext.PW-1/A implicating the parents of deceased was made by him on suspicion. As per his further version, later on the accused confessed before the police in his presence that he had committed the murder of Fauju Shah. His statement to this effect was recorded, however, no such statement has been produced in evidence by the prosecution. This part of the statement of PW-1 is not only unnatural but highly improbable. There is no iota of evidence that the accused had confessed in his presence before the police that it is he who had murdered the deceased. No doubt, as per his version in the cross-examination, his statements were recorded on two occasions. His first statement (Ext.PW-1/A) was recorded on 3.6.2014 at 8.10 a.m. His supplementary statement that from Manoj Kumar (PW-6) and Ram Bahadur, he came to know about the accused and deceased were together at 10.00 p.m. on 2.6.2014 has been recorded under Section 161 Cr.P.C on 4.6.2014 is belated. Therefore, the last seen story introduced by the prosecution seems to be not correct.

29. No doubt, Roshan Deen (PW-12) and his wife Fatima Bibi (PW-10) while in the witness box have stated that around 10.00 p.m. when they came back in taxi and alighted at Malakwal chowk, their son deceased Fauju Shah was lying on Atiala and accused Rakesh sitting with him. Sahib Singh (PW-11) Salesman also tells us that deceased purchased liquor from him around 8.30 p.m. and went to the house of the accused. After 10-15 minutes, they both came together and went towards Malakwal chowk. According to Manoj Kumar (PW-6) around 10.00 p.m. accused along with deceased Fauju Shah came together towards their houses near Atiala. The accused had bottle of liquor in his hand. Both the accused and deceased had consumed liquor. The deceased had injuries on his face and on reaching Atiala, deceased lie-down there. The accused offered drink to this witness and his friend Ram Bahadur. They, however, refused. On this, the accused filled bottle with water from handpump and consumed liquor. He threw the bottles in the nearby drain. As per further version of this witness, he thereafter went to his house along with his friend Ram Bahadur. Ram Bahadur has not been examined. Begum Bibi (PW-13), wife of deceased tells us that on 2.6.2014, at about 10.00 p.m when her father-in-law Roshan Deen and mother-in-law Fatima Bibi returned from hospital, they informed that Fauju Shah, her husband was lying at Atiala on Malakwal chowk and the accused is with him. She went to sleep after having dinner with her children. Such behaviour and conduct of the parents of deceased PW-10 and PW-12 and that of his wife PW-13 is quite unnatural. There is no explanation as to why they did not deem it appropriate to bring the deceased inside the house, particularly, when as per their version, the accused had been suspecting his (deceased's) illicit relations with his wife. On seeing the deceased lie-down on Atiala, the parents of deceased otherwise would have suspected something wrong with him and not allowed him to remain there any

further. There is no evidence as to at what time Roshan Deen and Fatima Bibi started from the hospital and how much was the distance between the hospital and their house. Therefore, the prosecution story that they came at 10.00 p.m. from the hospital and seen the deceased lie-down on Atiala, whereas, the accused sitting there with him is highly doubtful. On the other hand, if the rapat Ext.PW-12/A is seen, the same has been entered at 21.50 i.e. 9.50 p.m. on that day i.e. 2.6.2014. Though, what is the distance between Civil Hospital, Nurpur and Police Station, Nurpur, again no evidence has come on record, however, SI Tilak Singh had reached in the police station well before 9.50 p.m. In the absence of MLC and also that the doctor who medically checked-up PW-12 has not been examined, it is difficult to believe that PW-10 and PW-12 returned to their house at 10.00 p.m.

30. Again, the statement of Manoj Kumar (PW-6) that he had seen the accused and deceased together at Malakwal chowk where he along with one Ram Bahadur was waiting for arrival of his another friend Raghu there, is doubtful for the reason that his presence, during odd hours, at that place, is not proved for want of supporting material, such as, the name of the school where he was posted as Teacher and the name of the office/place at Nurpur from where he had collected the payment of the school. It is also not known as to why he had come to village Malakwal. If he had come to his friend Ram Bahadur, it is not known that said Ram Bahadur is resident of this village. On the other hand, Manoj Kumar (PW-6) is resident of Khuwara, which place as per his own version, is at a distance of 25 kilometers from Malakwal. His testimony, in such circumstances, cannot be taken as legal and acceptable evidence.

31. Sahib Singh (PW-11), Salesman can't also be believed to be a witness to the last seen theory introduced by the prosecution, because there is nothing suggesting that he was working as Salesman in the liquor vend. In order to prove that he is a true witness and working as Salesman, the owner/proprietor of liquor vend should have been examined. The record pertaining to his wages etc. should have also been collected and produced in evidence. The prosecution has miserably failed to explain as to why such evidence has been withheld.

32. Even on the last seen theory, the law is also no more *res-integra* as the Apex Court in ***State of Goa*** V. ***Pandurang Mohite, AIR 2009 SC, 1066*** has held as under:-

> "16. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this court. In State of U.P. v. Satish [2005 (3) SCC 114] it was noted as follows:
>
> > "22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."

33. The Hon'ble Apex Court has again held in ***Ramreddy Rajeshkhanna Reddy*** V. ***State of A.P. [2006 (10) SCC 172*** as under:-

> "The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case courts should look for some corroboration."

34. In ***Kanhaiya Lal*** V. ***State of Rajasthan, 2014 (4) SCC 715*** has again held as under:-

> "17. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

35. Therefore, the last seen theory introduced by the prosecution is even not substantiated on record legally also, because no evidence has come on record that the accused and deceased quarreled after 10.00 p.m. and it is accused alone and no-one else came there till he was murdered.

Motive:

36. Although, it is not necessary for the prosecution to prove motive of the accused to commit the offence. However, in a case, where there is no eye witness and the prosecution case hinges upon the circumstantial evidence alone, the prosecution is required to establish that there was some motive behind the commission of murder of the deceased. In the case in hand, as noticed in para supra, there is no direct evidence and the prosecution case hinges upon the circumstantial evidence. The scientific investigation conducted in this case also not connect the accused with the commission of the offence. As per the prosecution, the accused had suspicion of the deceased having illicit relations with his wife. PW-13 Begum Bibi, wife of deceased while in the witness box has stated that to her knowledge and belief, it is the accused who murdered her husband as he was suspecting that her husband had illicit relations with his wife. The deceased had also told her about the suspicion of the accused regarding alleged illicit relations with his wife. PW-12 Roshan Deen while in the witness box has also stated that the accused killed his son Fauju Shah on the suspicion that he had illicit relations with his wife. Such version of PW-12, however, is an improvement as he has stated so for the first time while in the witness box, as there is no mention to this effect in his statement recorded under Section 161 Cr.P.C. PW-10 Fatima Bibi has also stated that her son deceased was killed by the accused on the suspicion of his illicit relations with his wife.

37. True it is that in the statements of PW-13 Begum Bibi and PW-10 Fatima Bibi, the wife and mother respectively of the deceased recorded by the police during the course of investigation of the case, they both have doubted the hand of the accused in the commission of murder of deceased as according to PW-13 it is her husband, the deceased who himself had told her about it. According to PW-10, it is the wife of accused who had told that the deceased used to do obscene activities with her and also teasing her. However, interestingly enough, had they both been in the knowledge of such doubt of the accused, would have not allowed the deceased to remain in the company of the accused, that too, when he had suffered the injuries in the assault already taken place. Looking to the conduct of Begum

Bibi (PW-13), the wife of deceased that on coming to know from PW-12 and PW-13 about her husband that the deceased lying on Atiala, she did not go out and to bring him to the room therefrom and rather went to sleep along with her children as stated by her while in the witness box. The statements under Section 161 Cr.P.C of PW-10 and PW-13 have been recorded by the I.O. on 8.6.2014 i.e. much after the occurrence which had taken place on 2.6.2014. The statement so made by them to the police, therefore, is the result of due deliberation and an afterthought to implicate the accused in this case falsely. In case version of PW-11 Sahib Singh is believed as correct, the deceased was not apprehensive of any danger or threat to him from the accused because as per version of this witness, he not only purchased liquor from the liquor vend on 2.6.2014 around 8.30 p.m. but also went towards the house of the accused. After 10-15 minutes, they both came together and went towards Malakwal chowk. Had the deceased been in the knowledge of accused suspecting his illicit relations with his wife, he would have not taken the risk of joining his company, that too, during odd hours and the purpose was to consume liquor with him. Surprisingly enough, the recording of statement of PW-11 Sahib Singh has also been delayed being recorded on 8.6.2014. When the liquor vend where this witness allegedly was working as Salesman is situated in village Malakwal itself, it is not understandable as to how he would have kept mum for such a long time, had the deceased been come to the liquor vend during that night and purchased the liquor from him. Therefore, for want of any proof that this witness was actually working as Salesman in the liquor vend, the possibility he is a stock witness, cannot be ruled-out. His version, therefore, is also not natural. The Apex Court in ***Varun Chaudhary*** V. ***State of Rajasthan, AIR 2011 SC 72***, has held that in a case where there is no eye witness or the scientific evidence to connect the accused with the commission of the offence, the prosecution must establish on record that the accused had some motive to commit the murder of the deceased. This judgment reads as follows:

> "23. It is also pertinent to note that the prosecution could not establish the purpose for which the deceased was murdered by the accused. Of course, it is not necessary that in every case motive of the accused should be proved. However, in the instant case, where there is no eye witness or where there is no scientific evidence to connect the accused with the offence, in our opinion, the prosecution ought to have established that there was some motive behind commission of the offence of murder of the deceased. It was the case of the prosecution that the deceased, an Income Tax Officer had raided the premises belonging to some scrap dealers and, therefore, he had received some threats from such scrap dealers. It is an admitted fact that the accused are not scrap dealers or there is nothing to show that the accused had been engaged by scrap dealers to commit the offence. Thus, there was no motive behind the commission of the offence so far as the accused are concerned."

38. In the given facts and circumstances even if it is believed that the accused had enmity with the deceased, the possibility of he has been falsely implicated in this case at the instance of prosecution witnesses cannot be ruled-out because it is rather PW-12 and his wife PW-10, the parents of deceased quarreled with deceased and both sides sustained injuries in the scuffle. Therefore, the possibility of murder of deceased caused by someone else and on account of enmity, the accused has been implicated falsely cannot also be ruled-out. The Apex Court in ***State of Punjab*** V. ***Sucha Singh, AIR 2003 SC 1471***, has held as under:-

> "11.....When the basic foundation of the prosecution case crumbled down, the motive becomes inconsequential. At the same time, animosity is a

> double-edged sword. It could be a ground for false implication, it could also be a ground for assault. In the instant case, in view of the facts and circumstances as discussed above, the motive, however, strong merely creates a suspicion. Suspicion cannot take the place of proof of guilt."

39. In view of reappraisal of the given facts and circumstances and also the evidence discussed hereinabove, the motive to kill the deceased attributed to the accused is not at all proved and the possibility of latter having been implicated in this case falsely cannot be ruled-out.

Disclosure Statement Ext.PW-20/A and recoveries pursuant to that.

40. The Apex Court in ***Geejaganda Somaiah*** V. ***State of Karnataka, 2007(2) R.C.R (Criminal) 255: 2007(9) SCC 315***, has held that no doubt the statements recorded under Section 27 of the Evidence Act are generally termed as disclosure statement leading to the discovery of facts which presumably are in exclusive knowledge of the maker, however, keeping in view that the same are being frequently misused by the police, the Court should be vigilant while placing reliance thereon. This judgment reads as follows:

> "21. Section 25 of the Evidence Act mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Similarly Section 26 of the Evidence Act provides that confession by the accused person while in custody of police cannot be proved against him. However, to the aforesaid rule of Sections 25 to 26 of the Evidence Act, there is an exception carved out by Section 27 the Evidence Act providing that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 27 is a proviso to Sections 25 and 26. Such statements are generally termed as disclosure statements leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.
>
> 22. As the Section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act."

41. Therefore, a duty is casted upon this Court to scrutinize the evidence qua this aspect of the matter produced by the prosecution with all caution and circumspection.

42. As per the record, the accused was arrested on 4.6.2014. The alleged disclosure statement was recorded on 6.6.2014, after about 48 hours of his arrest. In case any such statement had to be made by the accused voluntarily, he would have made the same during the course of his interrogation conducted by the I.O. immediately after his arrest on

4.4.2014. Therefore, making of such statement voluntarily by the accused on 6.6.2014 while in the police custody is highly doubtful. The Apex Court in ***Pohalya Motya Valvi*** V. ***State of Maharashtra, (1980) 1 SCC 530***, a case where the disclosure statement of the accused was recorded after 48 hours, has held as under:-

> "16. It may be recalled that the appellant was in custody of the Police Patil from 2nd Oct. 1970 and it is alleged that he had pointed out the place where the dead body was kept, evidence on which point has not been accepted by both the courts. He was formally arrested on 3rd Oct. 1970 and he is alleged to have made a statement leading to the discovery of the spear on 4th Oct. 1970. He was thus in custody for nearly 48 hours and was unceasingly questioned both by the relatives of Motibai and by the Police Patil Kutrya before the investigating Officer entered the scene. In this background it is difficult to believe that it was for the first time the appellant gave information to the PSI leading to the discovery of the spear. It is more probable to believe that the place where the dead body and the spear were lying were already known and, therefore, it is not possible to accept the suggestion that it was for the first time the appellant gave information on 4th Oct. 1970 leading to the discovery of the spear."

Therefore, it is doubtful that the statement Ext.PW-20/A has been made by the accused while in custody voluntarily and for the first time.

43. Now, coming to the evidence qua this aspect of the matter, the I.O. PW-27 while in the witness box has stated that on 6.6.2014 while in custody, the accused had made the disclosure statement that the knife Ext.P-1, by which he murdered deceased Fauju Shah, pants Ext.P-11 and vest Ext.P-12 which he was wearing at that time were thrown by him at a distance of one kilometer from Malakwal chowk towards Lahru under one culvert. When cross-examined, no doubt, he has denied the suggestion that neither the accused made any disclosure statement nor got the alleged recovery effected and that the memos were prepared by him at his own in the police station. It is also denied that the statements of witnesses were recorded by him at his own to implicate the accused in a false case in connivance with the family members of the deceased. PW-20 Munshi Ram is a witness to the disclosure statement Ext.PW-20/A. According to him, he was in the police station in connection with his work, when the accused made the disclosure statement. In his statement recorded under Section 161 Cr.P.C, nothing is there that he was present in the police station in connection with some work. Therefore, this part of his statement is the result of improvement he made while in the witness box. Another witness Arood Singh to the disclosure statement has not been examined.

44. Now if coming to the place of recovery, PW-9 Kushwant Singh has admitted that place below culvert from where the recoveries were allegedly effected is an open place and anyone can have access to that. This witness has further admitted that the accused never made any disclosure statement in his presence. He also admits that knives similar to the knife Ext.P-1 and the clothes i.e. pants and vest recovered by the police are generally available in the market. They are the only material witnesses to this part of the prosecution case. The close scrutiny of their respective statements and also the investigation right from the very beginning is not fair nor the conduct of the Investigating Officer is above board. The possibility of recoveries so effected and the disclosure statement Ext.PW-20/A fastened upon the accused, cannot be ruled-out. Therefore, no findings of conviction could have been recorded against the accused on such evidence having come on record qua the so called disclosure statement made by the accused and the recoveries effected pursuant to that. Consequently, the recovery memos Ext.PW-4/A and Ext.PW-4/B and site plan Ext.PW-27/C

relied upon to prove the recovery of knife, pants and vest etc. at the instance of the accused can't also be believed to be the genuine documents.

Scientific investigation:

45. Now if coming to the scientific investigation conducted in this case, true it is that as per chemical examiner's report, human blood of group 'B' was detected in the blood stained soil lifted from the spot, blood lifted on cotton cloth, blood stained on dagger/knife, T-shirt and pants of the accused, T-shirt and vest of the deceased and blood samples of the deceased. However, such evidence cannot also be taken as conclusive proof to infer that it is the accused alone who had killed the accused for the reason that the blood group 'B' is mostly common blood group and judicial notice thereof can be taken. The accused may also have blood group 'B'. However, the grouping of the blood of the accused has not been done. Even DNA profiling has also not been conducted. It is not proved that the pants and vest having allegedly blood stains were worn by the accused while in the company of deceased. PW-11 Sahib Singh and PW-6 Manoj Kumar have also not stated so nor the same got identified from them while in the witness box so that something tangible suggesting that the accused had worn the same when seen by them in the company of deceased. The throat of deceased was found to be cut with sharp edged weapon. The possibility of such weapon was knife Ext.P-1 cannot also be ruled-out, however, it is the accused alone who had inflicted the fatal injury to the deceased is not proved beyond all reasonable doubt. The investigating agency, in our considered opinion, has concealed the true facts from the Court either for some extraneous considerations or its inability to trace out the real culprit. The accused seems to have been made an escape goat and implicated falsely in this case. Therefore, the scientific investigation conducted in this case is also of no help to the prosecution.

Medical evidence:

46. The medical evidence as has come on record by way of testimony of PW-2 and PW-3 and also the post-mortem, no doubt, is suggestive of that the present is a case of culpable homicide amounting murder because it is on account of multiple injuries on vital parts of the body of deceased caused his death. There, however, remains the mystery as to who has killed him so brutally. As per prosecution case itself, initially, deceased on the one hand and his parents PW-10 and PW-12 on the other, have assaulted each other. PW-1 Shukar Deen also joined hand with the deceased in assaulting PW-10 and PW-12 and other members of their family. The death of the deceased may be the result thereof, is just possible and the story of last seen and also the murder of deceased by the accused has been introduced on due deliberation and for extraneous considerations. Therefore, no findings of conviction could have been recorded, in view of such sketchy evidence available on record.

Conclusion drawn:

47. In view of the discussion hereinabove, we are satisfied that the present is a case of sketchy evidence against the accused. Whatever evidence having come on record by way of statements of PW-1 Shukar Deen, PW-10 Fatima Bibi, PW-12 Roshan Deen and PW-13 Begum Bibi cannot be relied upon against the accused as they are interested witnesses. The evidence as has come on record by way of their respective testimony is otherwise also inconsistent and contradictory in nature. They even have improved their previous version. Learned trial Court, as such, has not appreciated the evidence available on record in its right perspective and to the contrary recorded its findings on the basis of conjectures and surmises. Such an approach has certainly resulted in miscarriage of justice to the accused.

He has been convicted while placing reliance on highly inadmissible evidence. The impugned judgment, as such, is neither legally nor factually sustainable.

48. Consequently, this appeal succeeds and the same is accordingly allowed. The accused is acquitted of the charge under Section 302 IPC framed against him. The accused is serving out the sentence. He be set free forthwith, if not required in any other case. The Registry to prepare the release warrants accordingly. The amount of fine, if already deposited, be refunded to the accused against proper receipt.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

State of H.P. ……Appellant.
Versus
Narender Singh ……Respondent.

Cr. Appeal No. 106 of 2012.
Decided on: 22.7.2019.

Indian Evidence Act, 1872– Section 113 A – Presumption as to abetment to commit suicide – Applicability – Held, before presumption contemplated under Section 113-A of Act is drawn against accused, prosecution must prove that wife was subjected to cruelty – Degree of cruelty meted out to deceased must be such that she could not make any distinction between urge to live and pangs of death. (Para 12)
Indian Penal Code, 1860– Sections 306 and 498-A– Cruelty and abetment to commit suicide – Proof – Appeal against acquittal of trial court– Held, demand of dowry by accused not proved – Relations between parental side of victim and accused good – No dowry given at time of marriage of accused with victim on account of poverty of her mother- Mere asking by accused of his wife to sleep on the floor does not amount to cruelty – Appeal dismissed – Acquittal upheld. (Para 13)

Case referred:
State of H.P. vs. Pardeep Singh and another, Latest HLJ 2013 (HP) 1431

For the appellant: Mr. Narender Guleria, Addl. Advocate General.
For the respondents: Ms. Kanta Thakur, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J, (Oral).

The State of Himachal Pradesh aggrieved by the judgment dated 31.10.2011 passed by learned Addl. Sessions Judge (Fast Track Court) Kangra at Dharamshala in RBT S.C. No. 52-P/VII/10 has come up in appeal to this Court on the grounds inter alia that the same being based upon hypothesis, conjectures and surmises is not legally sustainable. The prosecution evidence has not been appreciated in its right perspective and as a result thereof wrong conclusions drawn. The cogent and reliable evidence as has come on record by way of testimony of PW-1 Anu Kumari, PW-2 Pawan Kumar, PW-3 Manohar Lal, PW-6

Kalpana Devi, PW-11 Prem Lata and PW-12 Ashwani Kumar has been ignored without assigning any reason. The evidence as has come on record by way of official witnesses, including PW-10 Dr. Atul Gupta and PW-13 SI SHO PS Shahpur and the Investigating Officer Raj Kumar has also not been considered to the reasons best known to the learned trial Judge. The evidence qua the demand of dowry by the accused from the deceased has been ignored for want of any complaint qua the same by the complainant ignoring the fact that in such like cases, the parents avoid to indulge in litigation and rather to adopt the conciliatory procedure to settle the dispute. The factum of the deceased was married with the accused in January, 2007 and she committed suicide on 14.9.2009 well within 7 years of her marriage with the accused has not been taken into consideration. In view of the evidence qua cruel and mal-treatment meted out to the deceased having come on record by way of testimony of the mother, sister and other relatives of the deceased prove the guilt of the accused as it is the near relations who alone can say something in such like cases. The presumption that it is the accused who has abetted the commission of suicide by the deceased can be legally drawn in such like cases and it was for the accused to have otherwise proved his innocence. He, allegedly failed to discharge the onus on him, therefore, he has been sought to be convicted and sentenced for the commission of the offence punishable under Section 498 A and 306 of the Indian Penal Code.

2. Deceased Pooja Devi was married with accused in January, 2007 since her mother Smt. Veena Devi was widow, therefore, the accused agreed not to demand any dowry. Therefore, in the marriage, no dowry was either demanded by the accused or given. Pooja, allegedly committed suicide by pouring kerosene oil on her person on 13.9.2009 at 8:30 PM. Information to this effect was received from HHC Ajit Singh posted at that time in Medical College Tanda in Police Station Shahpur that Pooja was admitted with burn injuries on her person and she has expired. The information so received was entered in Daily Diary, copy whereof is Ext. PW-13/A by PW-13, the then Insp. SHO, PS Shahpur. Subsequently, he accompanied by other police officials left for Medical College, Tanda. He prepared inquest papers Ext. PW-10/B. He also moved an application Ext. PW-10/A to Sr. Medical Officer for conducting post mortem of the deceased. The post mortem was conducted and the report Ext. PW-10/C collected. The dead body was handed over to the relatives of the deceased. He, thereafter recorded the statement Ext. PW-13/B of Veena Devi, the complainant under Section 154 Cr.P.C., on the basis whereof, FIR Ext. PW-8/C was recorded. He got the dead body photographed vide photographs Ext. PW-13/D to Ext. PW-13/K. The spot map Ext. PW-13/L was also prepared. He had taken into possession the stove (Ext. P-5), match box (Ext. P-6), 14 match sticks (Ext. P-7) from kitchen vide memo Ext. PW-13/L. The kerosene oil was found spreaded on the floor of the kitchen. He had taken in possession the plastic canny (Ext. P-8) vide memo Ext. PW-3/A. The burnt blankets (Ext. P-1 to Ext. P-4) were also taken into possession from the courtyard along with broken pieces of bangles Ext. PW-3/B. The statements Ext. PW-13/N of PW-3 Manohar Lal, Ext. PW-13/O of PW-2 Pawan Kumar and Ext. PW-13/P of PW-6 Kalpana Kumari were recorded as per their version. The case property was handed over by him to the MHC Anjan Paul (PW-8). On receipt of the report of the Chemical Examiner Ext. PA and on completion of the investigation, he prepared the challan and presented the same in the Court.

3. Learned trial Judge on going through the challan and documents annexed therewith has concluded that a prima facie case under Section 498-A and 306 IPC is made out against the accused. Charge against him was, therefore, framed accordingly. He, however, pleaded not guilty to the charge.

4. The prosecution in order to sustain the charge against the accused has examined 13 witnesses in all. The material prosecution witnesses are PW-1 Anu Kumari,

the younger sister of deceased Pooja, PW-2 Pawan Kumar, a neighbour, PW-3 Manohar Lal, Pradhan, Gram Panchayat Pargod, PW-5 Girdhari, the owner of the vehicle in which Pooja was taken to hospital for treatment, PW-6 Kalpana Devi, a resident of the same village, PW-11 Prem Lata, maternal Aunt of the deceased and PW-12 Ashwani Kumar, Pradhan of Gram Panchayat Dehria, the local Gram Panchayat of the parental house of the deceased.

5. The other material prosecution witness is PW Veena Devi, the mother of the deceased. As a matter of fact, she is the complainant in this case, however, her statement could not be recorded in the trial Court as the prosecution failed to produce her in the witness-box. This Court while allowing the application filed under Section 391 Cr.P.C. by the appellant-State has directed learned trial Court to take all steps for securing her presence and record her statement. The same thereafter was ordered to be sent in a sealed cover. Consequently, the statement of Veena Devi has been recorded on 2.9.2016 and the same received in this Court.

6. The remaining prosecution witnesses are PW-4 Ajit Singh, Photographer, PW-7 HHC Ajit Singh, posted at that time in police booth of Medical College Tanda, PW-8 Anjan Pal, the then MHC, Police Station, Shahpur, PW-9 Const. Shadi Lal, who had taken the case property to RFSL, Dharamshala, District Kangra, PW-10 Dr. Atul Gupta, the then Registrar, Forensic Medicine, Govt. Medical College, Tanda and PW-13 Insp. SHO Raj Kumar, Police Station Shahpur. They all are formal witnesses.

7. On the other hand, the accused in his statement recorded under Section 313 Cr. P.C. while admitting that the deceased was married to him in the year 2007 and that after her death, PW-13 Insp. SHO Raj Kumar has taken into possession, Stove, Match Box, Match Sticks, Plastic Kerosene Oil Canny, burnt pieces of towel and blankets, bangles etc. from his kitchen/house, has denied the remaining incriminating circumstances appearing against him either being wrong or for want of knowledge. According to him, the prosecution witnesses have deposed falsely against him. He, however, opted for not producing any evidence in his defence.

8. Learned trial Judge, on hearing the Public Prosecutor and also the learned defence counsel as well as on appreciation of the evidence available on record has arrived at a conclusion that the prosecution failed to prove its case against the accused beyond all reasonable doubt. He, therefore, has been acquitted of the charge framed against him. Learned Addl. Advocate General has argued with all vehemence that prosecution evidence as has come on record by way of testimony of prosecution witnesses amply demonstrates that it is the accused who had been torturing and harassing the deceased not only physically but mentally also at the pretext of dowry and it is due to that she has committed suicide in the matrimonial home in a period less than 2 years of her marriage with the accused. Learned Addl. Advocate General has, thus urged that it is the accused who has abetted the commission of suicide by Pooja, the deceased. He, therefore, has been sought to be convicted and sentenced for the offence he committed.

9. On the other hand, Ms. Kanta Thakur, Advocate, learned counsel representing the accused has urged that no iota of evidence has come on record to show that the accused after the marriage started demanding dowry from the deceased. Also that for want of evidence that he had been torturing and maltreating her, no findings of conviction could have been recorded against him. It has, therefore, been submitted that learned trial Court has rightly acquitted the accused of the charge framed against him.

10. Admittedly, the deceased was married in the month of January, 2007 with the accused. A male issue was born out of this wed-lock to the deceased who as per the

prosecution evidence presently resides with the accused. There is again no dispute so as to Pooja died an unnatural death. The only disagreement, however, is that as per the prosecution story, it is the accused, who on account of his harassment and cruel treatment meted out has abetted the commission of suicide by her whereas the defence of the accused is that while cooking food on kerosene oil Stove, her clothes caught fire and irrespective of he made every possible effort to save her, she died. The question that it is the accused alone who has abetted the commission of suicide by the deceased or she died accidental death on account of her clothes having caught fire while cooking food on stove has to be decided on reappraisal of the evidence available on record. However, before that it is deemed appropriate to discuss as to what constitute the commission of offence punishable under Sections 498 A and 306 IPC. A bare reading of Section 498 A reveals that sine qua non to establish the commission of such an offence is subjecting the wife with cruelty by her husband or his relatives with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or willful conduct of the husband of such woman or a relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health. We can draw support in this regard from the judgment of a Division Bench of this Court in ***State of H.P. Vs. Pardeep Singh and another, Latest HLJ 2013 (HP) 1431.*** The relevant text of this judgment reads as under:

> ***"10.*** *At the outset it is desirable to discuss as to what constitutes the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code. A bare reading of Section 498-A reveals that* ***sine qua non*** *to establish the said offence is subjecting to cruelty the wife by her husband or relative with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or willful conduct of the husband of such woman or a relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health."*

11. We may also make reference to the judgment of the Apex Court in Manju Ram Kalita vs. State of Assam, reported in (2009) 13 SCC 330, wherein it has been held as under:

> ***"11.*** *"Cruelty" for the purpose of Section 498-A IPC is to be established in the context of Section 498-A IPC as it may be different from other statutory provisions. It is to be determined/ inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide, etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty."*
>
> ***12.*** *So far as the commission of offence punishable under Section 306 of the Indian Penal Code is concerned, the prosecution is required to prove beyond all reasonable doubt that some person has committed suicide as a result of abetment by the accused."*

12. Be it stated that in a case of torture and harassment of a daughter-in-law, in her matrimonial home, the allegations normally remains confined within four walls of the house and it is difficult to produce the evidence specific in nature. Anyhow, the onus to prove that suicide was abetted by the accused alone is on the prosecution and to raise presumption under Section 113 A of the Indian Evidence Act, one of the ingredients that the

deceased was subjected to cruelty is required to be proved first by the prosecution. The evidence qua the degree of cruelty as meted out to the deceased was such a high that she could not make any distinction between the urge to live and the pangs of death should also be there on record. It is only in that eventuality commission of the offence punishable under Sections 498-A and 306 IPC can be inferred.

13. In the case in hand, the material prosecution witness is Veena Devi, the complainant. During the course of recording her statement and noticing that she was not able to understand the questions, her daughter Anu Kumari (PW-1) whose statement was already recorded by learned trial Court, requested to act as an interpreter to this witness and her statement recorded with her help. The complainant has given the instances of cruelty when one month prior to her death, the deceased demanded money from her. According to her, she had given Rs. 1,000/- to the deceased for her day to day expenses and a further sum of Rs. 300/- towards bus fare etc. The deceased, according to this witness had been demanding money time and again. She, however, told her that for want of source of income, she was not able to meet their demands. The other instance is that the accused asked the deceased to bring bed from her mother, however, when she expressed her inability to provide the same, the accused made the deceased to sleep on floor. Now, if coming to the instances of cruelty disclosed by PW-1 Anu Kumari, she allegedly used to go to the house of the deceased. One month prior to her death, she had gone to the house of the deceased and stayed there for 2-3 days. The accused administered beatings to the deceased and ousted her from the house. She along with the deceased, therefore, slept in the kitchen on floor. The deceased told her that the accused had been beating her for want of dowry. The above instances of cruelty alone have come on record by way of the testimony of the complainant and PW-1 Anu Kumari. If their statements in cross-examinations are seen, it is crystal clear that deceased used to cook food on kerosene oil stove. The accused and deceased had been visiting the house of the complainant once after 2-3 months. According to them, the deceased was taken to hospital by her in-laws. The people told that the deceased had expired due to bursting of stove. The statement of the complainant has been recorded with the help of the so called interpreter none else but PW-1 Anu Kumari whose statement was already recorded during the course of trial. The testimony of PW-1 Anu Kumari in cross-examination that the deceased visited her house for about 12 times after marriage shows that the relations were cordial as had the accused been cruel to the deceased, such number of visits by PW-1 Anu Kumari and the deceased to the house of each other were not possible. Not only this, according to PW-1 Anu Kumari, the accused had also been visiting her house after the marriage. As regards sleeping on floor, PW-1 Anu Kumari admitted that it generally happens in their houses that they sleep on the floor. Nothing has come in the statement of the complainant nor in that of PW-1 Anu Kumari that the accused demanded dowry in their presence. PW-1 Anu Kumari has stated in her cross-examination that the accused never demanded dowry in her presence. As regards the complainant, her statement reveals that it is the deceased who had been demanding money from her. Admittedly, at the time of marriage with the deceased, the accused had not taken any article in dowry.

14. If coming to the testimony of PW-2 Pawan Kumar, neighbour of the accused on hearing cries, he rushed to the house of the deceased and the accused covered her by a blanket. She was crying for help saying that she will never cook food on Stove again. According to this witness, Pooja caught fire while cooking food on the Stove. Though, he has been cross-examined, however, his testimony in examination-in-chief remained un-shattered. PW-3 Manohar Lal Pradhan Gram Panchayat Pargod, resident of Village Lapyana, the same village after having been informed about the incident went to the spot and noticed that the deceased covered by a blanket was crying. As per this witness also, she caught fire while cooking food on Stove. PW-5 Girdhari Lal is the owner of the vehicle in

which the deceased was shifted to hospital for treatment. PW-6 Kalpana Devi is also resident of same village i.e. Lapyana. According to her, the accused resides separately from them for the last two years. On 13.9.2009 at 8:30 pm, he knocked the door and told that Pooja has caught fire. She denied in her cross-examination conducted by learned Public Prosecutor that the accused told qua the deceased had poured kerosene oil on her body and thereafter set herself on fire. She along with her husband went to the house of the accused and tried to extinguish the fire by putting blanket over the deceased but of no avail. The another witness is PW-11 Prem Lata, the maternal Aunt of the deceased. According to her at the time of marriage of deceased with the accused, it was decided that dowry will not be given. She, however, later on came to know from the deceased that the accused had been torturing her for dowry. When cross-examined, she admitted that nothing was given in dowry at the time of marriage of Pooja and even after that also. The deceased had been visiting the house of her parents with her husband and even resided with them also. The deceased and her husband, the accused came to her place at Barsar in District Hamirpur also after the marriage. PW-12 Ashwani Kumar, the Pradhan Gram Panchayat Dehria, the local Gram Panchayat of the complainant though has stated that the mother of the deceased told him on one occasion that the accused harassed the deceased and had been administering beatings to her on the demand of dowry. He assured her to discuss the matter with the accused. When cross-examined, he has admitted that the complainant is his neighbour. The deceased had been coming to her mother after marriage. He had not taken any action on the oral complaint made by the complainant.

15. The close scrutiny of the evidence discussed hereinabove leads to the only conclusion that the deceased though died an unnatural death but for want of cogent and reliable evidence it cannot be said that the accused has abetted the commission of suicide by her or that she was being tortured or treated with cruelty on the demand of dowry as admittedly the accused has not taken any article in dowry at the time of his marriage with her. Not only this, but his relations were cordial with the complainant and also the other relatives of the deceased, namely, her sister PW-1 Anu Kumari and the family of maternal uncle and other relatives. The deceased and accused both had been visiting the house of the complainant and other relatives frequently. The complainant has not disclosed any instance when the accused demanded dowry from her through the deceased. Her testimony rather only shows that it is the deceased who demanded money from her once or twice. She told her that for want of source of income, it may not be possible for her to fulfill their demand. The demand of bed by the accused is also not established at all. The sleeping on floor cannot also be said to be an instance of cruelty for the reason that in the rural areas, the people generally sleeps on floor also. When the mother of the deceased Veena Devi is a widow, having no source of income, the deceased must be sleeping on floor in her parental house also. The present, as such, is not a case where all the ingredients of the commission of offence punishable under Sections 498-A and 306 IPC are established. The plea the accused has raised in his defence that while cooking food on the stove, her clothes caught fire appears to be plausible and nearer to the factual position as has been stated by the prosecution witnesses itself while in the witness-box.

16. In view of what has been said hereinabove, the appeal fails and the same is accordingly dismissed. The personal bonds furnished by the accused shall stand cancelled and the surety discharged.

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

CWP No. 2753 of 2016 with CWP Nos. 3586, 3611, 3616, 3618, 3619, 3699 of 2015 and 2705, 2712, 2810, 2858, 2861 of 2016
Reserved on: 16.07.2019
Date of decision: 22.07.2019.

Constitution of India, 1950– Article 12– 'State'– Whether school affiliated with C.B.S.E. but not receiving any financial aid comes within definition of 'State'?– Held, a private school not receiving any financial aid from Govt. does not fall within definition of 'State' as used in Article 12 of Constitution even if it is affiliated with C.B.S.E. and discharging public functions. (Para 12)
Specific Relief Act, 1963- Section 41(e)– Contract of personal service– Specific performance thereof- Held, contract of personal service like employment and related issues cannot be specifically enforced.(Para 13)

1. CWP No. 2753 of 2016
Sandeep Keshav .....petitioner
Versus
State of H.P. & Ors. .....Respondents.
2. CWP No. 3586 of 2015
Neena Bhasin .....petitioner
Versus
State of H.P. & Ors. .....Respondents.
3. CWP No. 3611 of 2015
Sandeep Keshav .....petitioner
Versus
State of H.P. & Ors. .....Respondents.
4. CWP No. 3616 of 2015
Sarita Sharma .....petitioner
Versus
State of H.P. & Ors. .....Respondents.
5. CWP No. 3618 of 2015
Vandana Goswami .....petitioner
Versus
State of H.P. & Ors. .....Respondents.
6. CWP No. 3619 of 2015
Hari Chand Sharma .....petitioner
Versus
State of H.P. & Ors. .....Respondents.
7. CWP No. 3699 of 2015
Sudha Sharma .....petitioner
Versus
State of H.P. & Ors. .....Respondents.
8. CWP No. 2705 of 2016
Sarita Sharma .....petitioner
Versus
State of H.P. & Ors. .....Respondents.
9. CWP No. 2712 of 2016

Hari Chand Sharma .....petitioner
Versus
State of H.P. & Ors. .....Respondents.

10. CWP No. 2810 of 2016
Vandana Goswami .....petitioner
Versus
State of H.P. & Ors. .....Respondents.

11. CWP No. 2858 of 2016
Neena Bhasin .....petitioner
Versus
State of H.P. & Ors. .....Respondents.

12. CWP No. 2861 of 2016
Sudha Sharma .....petitioner
Versus
State of H.P. & Ors. .....Respondents.

Cases referred:

Apollo Tyres Ltd. vs. C. P. Sebastian, (2009) 14 SCC 360
Chandra Nath Thakur vs. The Bihar Sanskrit Shiksha Board & Ors., 1999 (1) PLJR 529
Committee of Management, Delhi Public School and Anr. vs. M. K. Gandhi and Ors., (2015) 17 SCC 353
Executive Committee of Vaish Degree College v. Lakshmi Narain, (1976) 2 SCC 58
K. K. Saksena vs. International Commission on Irrigation and Drainage and Ors, (2015) 4 SCC 670
Ramesh Ahluwalia vs. State of Punjab and others, (2012) 12 SCC 331
S. S. Rana vs. Registrar, Cooperative Societies and Another, (2006) 11 SCC 634
Satimbla Sharma vs. St. Pauls Senior Secondary School, (2011) 13 SCC 760
Sushmita Basu and Ors. vs. Ballygunge Siksha Samity and Ors., (2006) 7 SCC 680
Trigun Chand Thakur vs. State of Bihar & Ors., Civil Appeal No(s). 10003 of 2019 decided on 09.07.2019

For the Petitioner(s): Mr. Neel Kamal Sood, Mr. Deepak Bhasin and Mr. Vasu Sood, Advocates.

For the Respondents: Mr. Bhupinder Thakur and Ms. Svaneel Jaswal, Dy. A.Gs. with Mr. Ram Lal Thakur, Asstt. A.G., for respondents-State.
Mr. Praneet Gupta, Advocate, for respondent No. 2, in all the petitions.
Mr. Rajnish Maniktala, Sr. Advocate with Mr. Naresh Kumar Verma, Advocate, for respondent No. 3 in CWP Nos. 3586, 3611, 3616, 3618, 3619 and 3699 of 2015 and respondents No. 3 and 4 in CWP No. 2753, 2705, 2712, 2810, 2858 and 2861 of 2016.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Petitioners belong to teaching and non-teaching faculty of St. Thomas School, a non aided school (for short 'School'). The first batch of petitions being CWP Nos. 3586, 3611, 3616, 3618, 3619, 3699 of 2015, have been filed for the following substantive relief(s):

> *I. The respondent No. 2 may kindly be directed to audit the records of respondent No. 3, as postulated in sub-clause 10 of Rule 13 of the CBSE Affiliation Bye-Laws (annexed with the writ petition as Annexure P-1); and further directions may kindly be issued to the respondent No. 2 to ensure that the staff of St. Thomas School under the Management of Respondent No. 3, is paid salaries as per CBSE Bye – Laws and irregularities committed by respondent No. 3 may kindly be ordered to be cured, by extending all monetary benefits in favour of the petitioner.*
>
> *II. That the petitioner further prays, that in the event of non-compliance of sub-clause 10 of Rule 13, appropriate directions may kindly be issued to respondents No. 2 and 3 to pay the arrears of revised pay-scale from the date of affiliation i.e. the year 2010 till March, 2014 alongwith interest @ 12% per annum till the date of actual payment, with all consequential benefits.*
>
> *III. That the respondents may kindly be directed to release DA and yearly increments in accordance with the CBSE Affiliation Bye-Laws w.e.f. the year 2010 on the revised pay-scale, which relief has not been extended in favour of the petitioner till date, except the payment of 65% DA, instead of 113% DA before the year April, 2014, whereas at present only 15% DA is being given on revised pay-scale w.e.f. April, 2014 with further directions to the respondents to release DA on revised pay-scale as per CBSE Affiliation Bye-Laws, with due and admissible interest.*

2. Whereas the subsequent batch of petitions being CWP Nos. 2753, 2705, 2712, 2810, 2858, 2861 of 2016, have been filed for the following substantive reliefs:-

> *a) That the impugned memorandum dated 13.09.2016, Annexure P-11, may kindly be quashed and set aside and further directions may kindly be issued to respondents No. 3 & 4 to maintain the sanctity and decorum of the school, failing which respondent No. 2 may be directed to take action.*
>
> *b) That the respondents No. 1 & 5 may kindly be directed to supervise and regulate the working of the respondents No. 3 and 4 and further audit the irregularities committed by the respondents No. 3 and 4 and also ensure that the employees of the school are paid their legal and legitimate dues.*
>
> *c) That the respondents No. 3 and 4 may kindly be restrained from conducting any inquiry on the basis of alleged charge-sheet memo Annexure P-11.*

3. The learned counsel for respondents No. 3 and 4 has raised preliminary objections regarding the very maintainability of these writ petitions, which according to the respondents are not maintainable as they seek to enforce a contract of personal service.

4. On the other hand, Shri Neel Kamal Sood, learned counsel for the petitioner(s) would contend that since this school is affiliated with CBSE and additionally the right to education is applicable to the school, therefore, all these writ petitions are maintainable.

5. In this background, the moot question is whether the writ petitions are maintainable.

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

6. There is no dispute that school is affiliated to CBSE and is imparting education and in terms of the judgment of the Hon'ble Supreme Court in *Ramesh Ahluwalia vs. State of Punjab and others (2012) 12 SCC 331*, is discharging public functions and would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution of India but how far the writ jurisdiction under Article 226 of the Constitution of India can be exercised in relation to the grant of pay-scales as per the CBSE regulation and in relation to disciplinary action initiated against the erring teachers is the question that is required to be still answered.

7. It is not in dispute that CBSE is only a Society, registered under the Societies Registration Act, 1860 and the school affiliated to it is not a creature of the statute and hence is not a statutory body.

8. The distinction between a body created by the statute and a body governed in accordance with a statute was explained by the Hon'ble Supreme Court in ***Executive Committee of Vaish Degree College v. Lakshmi Narain (1976) 2 SCC 58***, in the following terms:-

> *"It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body."*

9. Similar reiteration of law can be found in ***S. S. Rana vs. Registrar, Cooperative Societies and Another (2006) 11 SCC 634***, wherein the Hon'ble Supreme Court was dealing with the case of an employee of Kangra Central Cooperative Bank Ltd., which was a Society and had not been constituted under any statute. It is in this background, it was observed that the functions of the bank like any other cooperative societies were mainly regulated in terms of the provisions of the H.P. Cooperative Societies Act, 1968 except as provided in the bye-laws of the Society. The State had no say in the functions of the Society. Membership, acquisition of shares and all other matters were governed by the bye-laws of the Society. The terms and conditions of an officer of the cooperative society, also governed by the Rules framed by the society, whereas the State did not exercise any direct or indirect control over the affairs of the Society for deep and pervasive control and, therefore, the general regulations under statute like the Companies Act or the Cooperative Societies Act would not render the activities of a Company or a Society as subject to control of the State. Such control in terms of the provisions of the Act is meant to ensure proper functioning of the society and the State or statutory authorities would have nothing to do with its day-to-day functions.

10. The school is affiliated to CBSE for the sake of convenience mainly for the recognition of the courses of study and it may also comply with the provisions of the Right of

Children to Fee and Compulsory Education Act, 2009 (for short 'the RCE Act')and Rules framed therein (for short 'the RCE Rules'), which apply to any other school.

11. Section 21 of the RCE Act provides for the constitution of a School Management Committee consisting of the elected representatives of the local authority, parents or guardians of children and teachers. The School Management Committee shall perform the functions enumerated under Section 21 of the RCE Act and such other functions as may be prescribed by the RCE Rules. Section 24 of the RCE Act enumerates the duties of a teacher who shall be liable to disciplinary action under the service rules on default committed in performance of their duties. Section 38 of the RCE Act empowers the State Government to frame rules including that of the terms and conditions of service of teacher in a school affiliated to CBSE. Rule 19 of the RCE Rules provides for the Grievance Redressal of Teachers whereunder they can move the head teacher, sub-committee, appeal and a second appeal. But service matters, orders of suspension from service and all penalties under disciplinary proceedings initiated by the School Management are specifically excluded from its purview. Meaning thereby, that there is no statutory provisions either in the RCE Act or in the RCE Rules relating to disciplinary action the infraction of which alone can clothe the writ court with jurisdiction.

12. Even though the school is affiliated to CBSE but being unaided is, therefore, not a State within Article 12 of the Constitution of India, as held by the Hon'ble Supreme Court in ***Satimbla Sharma vs. St. Pauls Senior Secondary School (2011) 13 SCC 760***. Nevertheless the school discharges a public duty of imparting education, a fundamental right of the citizens. The school affiliated to CBSE is therefore, an 'authority' amenable to the jurisdiction under Article 226 of the Constitution of India.

13. However, a judicial review of the action challenged by a party can be resorted to the writ jurisdiction only if there is a public law element and not to enforce a contract of personal service, which contract includes all matters relating to the service of an employee confirmation, suspension, transfer, termination etc. (Ref. ***Apollo Tyres Ltd. vs. C. P. Sebastian (2009) 14 SCC 360***).

14. No doubt, a writ could be issued against a private body or person especially in view of the words / expressions used in Article 226 of the Constitution of India. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought.

15. What follows is if the private body is discharging a public duty imposed on such body, then public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but nevertheless, there must be the public law element in such act. Even though some time it may be difficult to distinguish between public law and private law.

16. Thus writ of mandamus can be issued against a private body, which is not a State within the meaning of Article 12 of the Constitution of India and such body is amenable to writ jurisdiction under Article 226 of the Constitution of India and the High Court under Article 226 of the Constitution can exercise judicial review of the act challenged by a party but there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties.

17. It is settled if the rights are purely of a private character no mandamus can be issued. If the management of the school is purely a private body with no public duty mandamus would not lie. Whereas on the other hand, the aided institution discharging

public function by way of imparting education to the students would be amenable to the writ jurisdiction.

18. Even if it is assumed that an educational institutional is imparting public duty, the act complained of must have direct nexus with the discharge of public duty. It is undisputedly a public law action which confers a right upon the aggrieved to invoke extraordinary writ jurisdiction under Article 226 of the Constitution for a prerogative writ.

19. However, individual wrongs or breach of mutual contract without having any public element as its integral part cannot be rectified through petition under Article 226. Wherever Courts have intervened in exercise of jurisdiction under Article 226 , either the service conditions were regulated by statutory provisions or the employer had the status of 'State' within the expansive definition under Article 12 or it was found that the action complained of has public law element.

20. In ***Committee of Management, Delhi Public School and Anr. vs. M. K. Gandhi and Ors. (2015) 17 SCC 353***, it was held by the Hon'ble Supreme Court that a writ petition against a private school at the behest of a teacher, whose services were terminated, was not maintainable as it was not a State within the meaning of Article 12 of the Constitution and, therefore, no direction could have been given by the High Court to CBSE for interfering with the termination of the teacher and for the proper remedy, the teacher was to file a civil suit for damages, if otherwise maintainable. The aforesaid judgment was though delivered on 16th August, 2007 but was reported in the year, 2015.

21. In ***Sushmita Basu and Ors. vs. Ballygunge Siksha Samity and Ors. (2006) 7 SCC 680***, a teacher of recognized private school had filed a writ petition to fix the salary of the teaching and non-teaching staff of the school and to remove all anomalies in the in the pay-scales as recommended by the Third Pay Commission as extended to other government aided school or government schools.

22. The learned Single Judge of the High Court allowed the writ petition and directed the Director of School Education to enforce parity in payment.

23. However, on appeal, the learned Division Bench of the High Court allowed the appeal and set aside the decision of the learned Single Judge by observing that there were no Acts, statutory rules or even government order directing private unaided educational institutions to implement the recommendations of the Third Pay Commission, especially, in the context of the fact that the salaries and emoluments of teachers of private unaided institutions were not the subject matter of reference to the Third Pay Commission.

24. While affirming the judgment of the learned Division Bench of the High Court, it was observed by the Hon'ble Supreme Court that interference under Article 226 of the Constitution of India to issue writ of mandamus by the Court against a private education institutions would be justified only if a public law element is involved and if its only a private law remedy no writ petition would lie.

25. In ***K. K. Saksena vs. International Commission on Irrigation and Drainage and Ors, (2015) 4 SCC 670***, the Hon'ble Supreme Court surveyed the entire case law on the point and observed as under:-

> *"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "State" within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There*

are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.

53. It is trite that contract of personal service cannot be enforced. There are three exceptions to this rule, namely:

"(i) when the employee is a public servant working under the Union of India or State;

(ii) when such an employee is employed by an authority/body which is a State within the meaning of Article 12 of the Constitution of India; and

(iii) when such an employee is "workmen" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and raises a dispute regarding his termination by invoking the machinery under the said Act.

In the first two cases, the employment ceases to have private law character and "status" to such an employment is attached. In the third category of cases, it is the Industrial Disputes Act which confers jurisdiction on the Labour Court/Industrial Tribunal to grant reinstatement in case termination is found to be illegal."

26. Similar reiteration of law can be found in a very recent judgment of the Hon'ble Supreme Court in Civil Appeal No(s). 10003 of 2019, titled as *Trigun Chand Thakur vs. State of Bihar & Ors.*, decided on 09.07.2019 wherein a Division Bench of the High Court of Patna had affirmed the judgment of learned Single Judge holding that Management Committee of the private schools is not "State" within the meaning of Article 12 of the Constitution of India and hence the writ petition was not maintainable.

27. A learned Single Judge of the Patna High Court relied upon an earlier Division Bench judgment of the Patna High Court in *Chandra Nath Thakur vs. The Bihar Sanskrit Shiksha Board & Ors., 1999 (1) PLJR 529* and held that in matters relating to termination of teachers by Management Committee of the private schools, the writ petition is not maintainable and accordingly dismissed the same.

28. Being aggrieved, the appellant therein filed LPA No. 670 of 1999 before the learned Division Bench of the said Court which came to be dismissed vide order dated 21.01.2008 on the basis of the judgment rendered in *Chandra's Nath Thakur case (supra).* It was held that a teacher of privately managed school, even though financially aided by the State Government or the Board, cannot maintain a writ petition against an order of termination from service passed by the Management Committee.

29. It was further held that even a consent order cannot confer jurisdiction over the Court and does not make the Managing Committee "State" within the meaning of the Article 12 of the Constitution of India. The Hon'ble Supreme Court dismissed the appeal after hearing the parties, perusing the material on record and the judgment in *Chandra's Nath Thakur case (supra)* by observing "*we do not find any ground to take a different view*".

30. Reverting back to *Ramesh Ahluwalia's case (supra)*, the same is equally distinguished inasmuch as the employee therein was only directed to file an appeal before the Education Tribunal so constituted.

31. Thus, what can be concluded is that the teaching and non-teaching staff of the school related to CBSE is neither a public servant working under the Union of India or State nor an employee employed by a body, which is a State within the Article 12 of the Constitution of India.

32. The contract of personal service cannot be enforced in other circumstances even against an authority discharging public function under Article 226 of the Constitution of India.

33. In the instant case, the relief sought by the petitioners is not for enforcement of any order issued by the government but for enforcing private right available to them by virtue of contract of service and the same is not enforceable by way of a writ petition in view of the law expounded by the Hon'ble Supreme Court (supra).

34. Therefore, once this Court holds that it has no jurisdiction then, obviously, it cannot go into the merits of the case much less to decide the same on merits.

35. Since no writ of the teaching and non teaching staff is maintainable against St. Thomas School, Shimla, therefore, all the aforesaid writ petitions are held to be not maintainable and are dismissed as such, reserving liberty to the petitioners to avail such remedy as is available to them under law.

36. It is made clear that in case they choose to avail such remedy, then the period spent in the litigation from the date of the institution to the date of decision shall not be counted while computing limitation. The parties are left to bear their costs.

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

RFA No.367 of 2001 with RFA Nos.382,394, 434, 390 a/w Cross Objections No. 339/2005, 371, 420 a/w Cross Objections No. 339/2003, 368, 414, 452, 397, 412, 381, 411, 430, 383, 385, 422 a/w Cross Objections No. 170/2002, 401, 410, 415, 388 a/w Cross Objections No. 121/2002, 380, 429, 428, 372, 400 a/w Cross Objections No. 358/2003, 438, 424, 374, 370 a/w Cross Objections No. 169/2002, 416, 409, 369 a/w Cross-Objection No. 458/2004, 389, 431, 425, 413 a/w Cross Objections No. 122/2002, 376, 387, 456, 384, 393, 399, 433, 421, 395, 418 a/w Cross Objections No. 168/2002, 406, 427, 426, 423 a/w Cross Objections No. 357/2003, 375, 392 a/w Cross Objections No. 120/2002, 378 a/w Cross Objections No. 258/2002, 386, 373 a/w Cross Objections No. 118/2002, 403, 419, 405, 436 a/w Cross-Objections No. 356/2003, 432, 435, 398, 391, 457, 437 a/w Cross Objections No. 202/2002, 402, 347, 407 of 2001 and RFA No. 52 of 2002.
Reserved on: 20.06.2019
Date of decision: 02.07.2019.

Land Acquisition Act, 1894– Section -11- Acquisition of land for public purpose – Dispute as to title– Determination– Jurisdiction of Land Acquisition Collector – Held – Land

Acquisition Collector has no jurisdiction to determine question of title of any person in land sought to be acquired. (Paras 23 & 24)

Land Acquisition Act, 1894- Section 30 - Dispute as to apportionment of compensation – Trespasser, whether entitled for compensation? Held, trespasser is not a person interested vis a vis acquired land – He has no right in it and thus not entitled for apportionment of compensation.(Paras 16, 29 & 35)

1. RFA No. 367 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

2. RFA No. 347 of 2001
Vias Mani & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

3. RFA No. 368 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

4. RFA No. 369 of 2001 a/w Cross-Objections No. 458/2004
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

5. RFA No. 370 of 2001 a/w Cross Objections No. 169/2002
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

6. RFA No. 371 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

7. RFA No. 372 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

8. RFA No. 373 of 2001 a/w Cross-Objections No. 118/2002
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

9. RFA No. 374 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

10. RFA No. 375 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

11. RFA No. 376 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
12. RFA No. 378 of 2001 a/w Cross Objections No.258/2002
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
13. RFA No. 380 of 2001
Rajindera Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
14. RFA No. 381 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
15. RFA No. 382 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
16. RFA No. 383 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
17. RFA No. 384 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
18. RFA No. 385 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
19. RFA No. 386 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
20. RFA No. 387 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
21. RFA No. 388 of 2001 a/w Cross Objections No. 121/2002
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.
22. RFA No. 389 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus

The Collector, Shimla & Ors. .....Respondents.

23. RFA No. 390 of 2001 a/w Cross Objections No.339/2005

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

24. RFA No. 391 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

25. RFA No. 392 of 2001 a/w Cross Objections No. 120/2002

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

26. RFA No. 393 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

27. RFA No. 394 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

28. RFA No. 395 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

29. RFA No. 397 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

30. RFA No. 398 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

31. RFA No. 399 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

32. RFA No. 400 of 2001 a/w Cross Objections No. 358/2003

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

33. RFA No. 401 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

34. RFA No. 402 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus
The Collector, Shimla & Ors. .....Respondents.

35. RFA No. 403 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

36. RFA No. 405 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

37. RFA No. 406 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

38. RFA No. 407 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

39. RFA No. 409 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

40. RFA No. 410 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

41. RFA No. 411 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

42. RFA No. 412 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

43. RFA No. 413 of 2001 a/w Cross Objections No. 122/2002
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

44. RFA No. 414 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

45. RFA No. 415 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

46. RFA No. 416 of 2001

Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

47. RFA No. 418 of 2001 a/w Cross Objections No. 168/2002
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

48. RFA No. 419 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

49. RFA No. 420 of 2001 a/w Cross Objections No. 339/2003
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

50. RFA No. 421 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

51. RFA No. 422 of 2001 a/w Cross Objections No. 170/2002
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

52. RFA No. 423 of 2001 a/w Cross Objections No. 357/2003
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

53. RFA No. 424 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

54. RFA No. 425 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

55. RFA No. 426 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

56. RFA No. 427 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

57. RFA No. 428 of 2001
Rajindra Kumari & Ors. .....Appellants.
Versus
The Collector, Shimla & Ors. .....Respondents.

58. RFA No. 429 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

59. RFA No. 430 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

60. RFA No. 431 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

61. RFA No. 432 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

62. RFA No. 433 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

63. RFA No. 434 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

64. RFA No. 435 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

65. RFA No. 436 of 2001 a/w Cross Objections No. 356/2003

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

66. RFA No. 437 of 2001 a/w Cross Objections No. 202/2002

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

67. RFA No. 438 of 2001

Rajindra Kumari & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

68. RFA No. 452 of 2001

Asa Ram (dead) through his LRs. & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

69. RFA No. 456 of 2001

Bhagat Ram & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

70. RFA No. 457 of 2001

Satya Devi & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

71. RFA No. 52 of 2002

Birju Ram @ Brij Lal & Ors. .....Appellants.

Versus

The Collector, Shimla & Ors. .....Respondents.

Cases referred:

Collector of Bombay vs. Nusserwanji Rattanji Mistri, (1955) 1 SCR 311

Harish Chander vs. Union of India and five others, Writ C. No. 16412 of 2018 decided on 24.04.2019

Haryana Wakf Board vs. State of Haryana, 2019 (1) Scale 100

Jagadishwar Sanyal vs. Collector of Goalpara and another, AIR 1925 Calcutta 197(2)

Mehar Rusi Dalal vs. Union of India, 2004 (7) SCC 362

Pralhad and others vs. State of Maharashtra and another, (2010) 10 SCC 458

Puran vs. The State of Himachal Pradesh and others, AIR 1976 HP 17

S Palani Velayutham and others vs. District Collector, Tirunelveli & Ors., (2009) 10 SCC 664

Shanti Devi and another vs. Province of West Bengal, AIR 1954 Cal. 212

State of Maharashtra vs. Shrimant Govindrao Narayanrao, 1983 (2) Bom CR 487

State of Orissa vs. Brundaban Sharma, (1995 (Suppl.) 3 SCC 249

Tule Ram vs. Union of India & Ors., RFA No. 199/85decided on 06.11.1997

For the Appellant(s): Mr. Sumeet Raj Sharma, Advocate, for the appellant(s), in all the appeals, except RFA Nos. 347, 452, 456, 457 of 2001 and 52 of 2002.

Mr. G. D. Verma, Senior Advocate with Mr. Romesh Verma, Advocate, for the appellants in RFA Nos. 347, 452, 456, 457 of 2001 and 52 of 2002.

For the Respondents: Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals with Mr. Bhupinder Thakur, Deputy Advocate General and Mr. Rajat Chauhan, Law Officer, for the respondent-State.

Mr. Sumeet Raj Sharma, Advocate, for respondents No. 2 to 5 in RFA Nos. 347, 452, 456, 457 of 2001 and 52 of 2002.

Mr. G. D. Verma, Senior Advocate with Mr. Romesh Verma, Advocate, for respective respo ndent(s)/Cross Objectors in RFA Nos. 367/2001, 370/2001, 376/2001, 386/2001, 387/2001, 389/2001 397/2001, 400/2001 402/2001, 409/2001, 414/2001, 418/2001, 421/2001, 424/2001, 426/2001, 429/2001, 430/2001, 434/2001, 435/2001.

Mr. Ramakant Sharma, Senior Advocate with Ms. Devyani Sharma, Advocate, for respondent- SJVN.

Mr. Vinay Kuthiala, Senior Advocate with Ms.Vandana Kuthiala and Mr. Diwan Singh Negi, Advocates, for the

respective respondent(s)/Cross Objectors in RFA Nos. 368/2001, 369/2001, 373/2001, 374/2001, 378/2001, 380/2001, 383/2001, 384/2001, 388/2001, 389/2001, 390/2001, 392/2001 395/2001, 399/2001, 412/2001, 413/2001, 419/2001, 420/2001, 422/2001, 423/2001, 425/2001, 428/2001, 436/2001, 437/2001, 438/2001.

None for respondent No. 2 in RFA Nos. 381/2001, 382/2001, 385/2001, 391/2001, 393/2001, 394/2001, 401/2001, 405/2001, 410/2001, 411/2001, 416/2001, 427/2001, 431/2001, 432/2001, 433/2001.

None for respondent No. 2(i) to 2(v) in RFA No. 371/2001/2001.

None for respondents No. 2 to 5 and 7 to 9 in RFA No. 372/2001.

None for respondents No. 2 to 7 in RFA No. 398/2001.

None for respondent No. 2 to 6 in RFA No. 403/2001.

None for respondents No. 3, 4(c) and 4(d) in RFA No. 429/2001.

Respondent No. 2 exparte in RFA Nos. 380/2001, 406/2001 and respondent No. 6 exparte in RFA No. 372/2001.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellants are the legal representatives of late Shri Raj Kumar Rajinder Singh, who aggrieved by the award passed by the learned District Judge in petitions filed under Section 30 of Land Acquisition Act, 1894 (hereinafter called the 'Act'), have filed the instant appeal(s). Likewise, the cross-objections have been filed by the private respondents whereby their claim(s) of having acquired the property by way of adverse possession has been dismissed.

2. The Government of Himachal Pradesh in the Department of MPP and Power vide notification dated 05.03.1988, published in H.P. State Gazette on 01.07.1989 under Section 4 of the Act had notified the acquisition of land in dispute situate at Jhakri for construction of residential accommodation for staff of Nathpa Jhakri Power Project. In the books of the Collector, original petitioners Raj Kumar and Rajinder Singh (since deceased) stood recorded as owner in possession of the land in dispute. However, at the time of last settlement in 1982-83, private respondents stood recorded in possession of the land in dispute without any status. The Collector Land Acquisition had determined the compensation payable for acquisition of the land, however, he observed that the amount of compensation for acquisition of the land could not be paid to the petitioner Raj Kumar and Rajinder Singh since a dispute about the title had arisen as a result of application of H. P. Abolition of Big Landed Estate and Land Reforms Act, 1953 (hereinafter called the Land Reforms Act) and H. P. Ceiling on Land Holdings Act, 1972 (hereinafter called the Ceiling Act). Accordingly the Collector referred the dispute under Section 30 of the Act for adjudication to the District Judge on 13.01.1993.

3. All the Reference Petitions were clubbed and consolidated together with Land Reference Petition No. 68-R/4 of 1995/93 vide order dated 21.05.2001. Evidence recorded in

the aforesaid reference was ordered to be read in all the reference petitions as per the statements of the learned Counsel for the parties.

4. As observed above, the learned Reference Court dismissed the claim set up by the original petitioners as also the private respondents, constraining them to file the instant appeals and cross-objections.

5. As regards the petitioners, they have no right or locus standi to maintain the instant appeals in view of the judgment passed by the Hon'ble Supreme Court in *Satluj Jal Vidyut Nigam vs. Raj Kumar Rajinder Singh (dead) through his LRs and others 2018 (11) SCI 383* (for short the 'Judgment'), wherein it has been categorically held that after the proceedings under the Abolition Act, the original petitioner Raj Kumar Rajinder Singh was found to be under personal cultivation of only 13 bighas 12 biswas whereas the other land in village Jhakri of 393 khasra numbers admeasuring 1011 bighas, 6 biswas was declared to have vested in the State under Section 27 of the Act. Even though as per order dated 14.11.1962 Raj Kumar Rajinder Singh was permitted to retain only 64.12 bighas of land which was under his personal cultivation, however, the said order was modified on 19.09.1964 whereby he was given 13 bighas 12 biswas of land comprised in Khatauni No. 1 out of 14 Khasra numbers i.e. 14, 122, 125, 142, 143, 165, 212, 238, 241, 288, 423, 494, 511 and 512, which is clearly evident from para-5 of the judgment and reads as under:

> *"5. The land in village 'Jhakri' of 393 khasra numbers admeasuring 1011 bighas, 6 biswas was declared to have vested in the State under Section 27 of the Abolition Act and the intermediary Rajinder Singh as per order dated 14.11.1962 was permitted to retain only 64.12 bighas of land which was under his personal cultivation. In Himachal Pradesh, one acre comprises 5 bighas of land. Vide order dated 19.09.1964 passed by the Assistant Collector, the order of vesting was modified to the extent that he was given 13 bighas, 12 Biswas of land comprised in Khatauni No. 1 out of 14 Khasra numbers, i.e. 14, 122, 125, 142, 143, 165, 212, 238, 241, 288, 423, 494, 511 and 512. Some of the aforesaid survey numbers were unmeasured. However, the fact remains that the total area which was found to be under personal cultivation, was 13 bighas, 12 Biswas."*

6. It is not in dispute that none of the aforesaid khasra numbers measuring 13 bighas, 12 biswas form the subject matter of acquisition and, therefore, the original petitioner and now his LRs have no right to claim any compensation for the land which form the subject matter of the instant appeal. For the foregoing reasons, there is no merit in all these appeals.

7. However, learned Counsel for the petitioner(s), at this stage, would submit that since the petitioner was not paid any compensation under either of the Acts i.e. Abolition or Ceiling Act, therefore, respondents be directed to pay the requisite compensation. However, even this plea appears to be contrary to record inasmuch as the Compensation Officer Mahasu vide order dated 12.04.1966 had determined the compensation of Rs. 28,019.45 under the Abolition Act. But, since the original petitioner had already received an amount of Rs. 1703.25 in excess from the tenants who had acquired propriety right under Section 11 of the Abolition Act, the same was deducted from the amount and the amount payable was found to be Rs. 26316.20 and the same was actually paid to him on 06.05.1966. The appeal was filed against the order of the Compensation Officer and the same was partly allowed by the learned District Judge, Mahasu and directions with respect to the deduction of Rs. 1703.25 were set aside and the payment of entire amount of Rs. 28,019.45 was ordered to be paid to the original petitioner without

aforesaid deduction. This fact is duly noted by the Hon'ble Supreme Court in paras 7 and 8 of the judgment, which reads as under:-

> *"7. Pursuant to the order of vesting, the competent authority under the Abolition Act i.e. Compensation Officer, Mahasu, vide order dated 12.04.1966 determined the compensation of Rs. 28,019.45. Since the Zamindar had already received an amount of Rs.1,703.25 in excess from the tenants who had acquired proprietary rights under Section 11 of the Abolition Act, same was deducted from the amount and the amount payable was found to be Rs.26,316.20 and it was actually paid on 6.5.1966.*
>
> *8. As against the order passed by the Compensation Officer dated 12.4.1966, the appeal was preferred before the District Judge, Mahasu. The appeal was partly allowed and the direction which was made of deduction of Rs.1703.25 was set aside and the payment of entire Rs.28,019.45 was ordered without aforesaid deduction."*

8. Apart from above, compensation of Rs. 57,988/- had also been received by the original petitioner in the year 1980-81 under the Ceiling Act, 1972, as has been taken note of by Hon'ble Supreme Court in para-26 of the judgment, which reads thus:-

> *"26. It was urged on behalf of the appellant that the respondent Rajinder Singh has received compensation 3 times with respect to the same land. Firstly, in 1966-67 he had received a sum of Rs.28,019/- as compensation due to the vesting of entire land in the State Government and the Compensation Officer had determined the same under the Abolition Act. The land, in any event, had vested in the State. The second time the compensation of Rs.57,388/- had been received in the year 1980-81 under the Ceiling Act, 1972. For the third time, the respondent has received compensation in a sum of Rs. 60 lakhs. The respondent has committed a serious fraud. It was also urged that Rajinder Singh has filed W.P. No. 256/1979, the High Court dismissed the writ petition and observed that the respondent has acted unfairly knowing fully well that the land had already vested in the State and made other observations regarding successive litigations preferred by the respondent and the withdrawal of RFA No. 9/1973.*

9. Now, adverting to the cross objections and the claims set up by the private respondents before the learned Reference Court, it is vehemently contended by learned counsel that apart from the Cross-Objections the private respondents otherwise are entitled to assail the impugned award under Order 41 Rule 33 of the Code of Civil Procedure (for short the 'Code'), which read as under:-

> *"33. Power of court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised In favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:*

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."

10. It cannot be disputed that the object of the aforesaid rule is to empower the Appellate Court to do complete justice between the parties. This rule gives the Court ample power to make an order appropriate to meet the ends of justice. It enables the Appellate Court to pass any decree or order which ought to have been made and to make such further order or decree, as the case may be, in favour of all or any of the parties even though the appeal is as to part only of the decree; and such party or parties may not have filed an appeal. The necessary condition for exercising the power under the rule is that the parties to the proceedings are before the Court and the question raised properly arises out of the judgments of the lower Court. In that event, the Appellate Court can consider any objection to any part of the order or decree of the Court and set it right. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised and each case therefore must depend upon its own facts. Although, the general principle is that a decree is binding on the parties to it, until it is set aside in appropriate proceedings. Ordinarily, the Appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal. But in exceptional cases, the rule enables the Appellate Court to pass such decree or order as sought to have been passed even if such decree or order would be in favour of parties who have not filed any appeal.

11. The scope of the rule has repeatedly come up for consideration before the Hon'ble Supreme Court, but I need only refer to the judgment rendered in ***Pralhad and others vs. State of Maharashtra and another (2010) 10 SCC 458*** wherein it was held:

"18. The provision of Order 41 Rule 33 CPC is clearly an enabling provision, whereby the appellate Court is empowered to pass any decree or make any order which ought to have been passed or made, and to pass, or make such further or other decree or order as the case may require. Therefore, the power is very wide and in this enabling provisions, the crucial words are that the appellate court is empowered to pass any order which ought to have been made as the case may require. The expression "order ought to have been made" would obviously mean an order which justice of the case requires to be made. This is made clear from the expression used in the said Rule by saying "the court may pass such further or other order as the case may require". This expression "case" would mean the justice of the case. Of course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.

19. In fact, the ambit of this provision has come up for consideration in several decisions of this Court. Commenting on this power, Mulla (Civil Procedure Code, 15th Edn., p. 2647) observed that this Rule is modeled on Order 59 Rule 10 (4) of the Supreme Court of Judicature of England, and Mulla further opined that the purpose of this Rule is to do complete justice between the parties.

20. In Banarsi vs. Ram Phal (2003) 9 SCC 606, this Court construing the provisions of Order 41 Rule 33 CPC held that this provision confers powers of the widest amplitude on the appellate Court so as to do complete justice between the parties. This Court further held that such power is unfettered by considerations as to what is the subject matter of the appeal or who has filed the appeal or whether the appeal is being dismissed, allowed or disposed of while modifying the judgments appealed against. The learned Judges held that one of the objects in conferring such power is to avoid inconsistency,

inequity and inequality in granting reliefs and the overriding consideration is achieving the ends of justice. The learned Judges also held that the power can be exercised subject to three limitations: firstly, this power cannot be exercised to the prejudice of a person who is not a party before the Court; secondly, this power cannot be exercised in favour of a claim which has been given up or lost; and thirdly, the power cannot be exercised when such part of the decree which has been permitted to become final by a party is reversed to the advantage of that party. (See SCC p. 619, para 15 : AIR para 15 at p. 1997). It has also been held by this Court in Samundra Devi vs. Narendra Kaur (2008) 9 SCC 100 SCC (para 21), that this power under Order 41 Rule 33 CPC cannot be exercised ignoring a legal interdict. 22. In view of the aforesaid interpretation given to Order 41 Rule 33 CPC by this Court, we are of the opinion that the High Court denied the relief to the appellants to which they are entitled in view of the Constitution Bench decision in K.S. Paripoornan vs. State of Kerala, (1994) 5 SCC 593.by taking a rather restricted and narrow view of the scope of Order 41 Rule 33 CPC and also on a misconstruction of the ratio in Paripoornan."

12. In view of the law expounded by the Hon'ble Supreme Court, I uphold the contentions of the Cross-Objectors

13. However, the moot question still remains as to whether the private respondents have been able to prove the plea of adverse possession set up by them.

14. The statements of all the claimants as recorded before the learned Reference Court are verbatim the same as that of Smt. Priyamani, who stated that the land was given by Late Maharaja Padam Singhfather of Raj Kumar Rajinder Singh to the predecessor-in-interest more than 50 years back and thereafter they had been in continuous, open, peaceful and hostile possession of the land under acquisition. It was further stated that the State of Himachal Pradesh was aware of the possession and, in turn, even treated themselves to be the complete owner thereof and thus, entitled to the compensation to the exclusion of the petitioner(s) and the State.

15. Adverting to the evidence on record, it would be noticed that the petitioner had examined one S. R. Jhingta, General Power of Attorney, as PW-1, who in his cross-examination categorically denied the possession of the private respondents. Apart from that, admittedly the private respondents have not been recorded in the possession of the land under acquisition prior to the last settlement 1980-82.

16. As a matter of fact, the learned Reference Court on the basis of the evidence has concluded and rightly so that the private respondents were rank trespassers, who had encroached upon the disputed land at the time of last settlement.

17. Moreover, the plea of adverse possession as also tenancy cannot be raised by the private respondents, because so long, as the relationship of landlord and tenant subsists, the tenant cannot set up any title by way of adverse possession, however, notoriouslyhe may proclaim title in himself and deny the title of the landlord. The mere fact that the landlord takes no steps to contest the tenants hostile assertion improves in no way his position (*See: Tulsiram vs. K. L. Pande AIR 1956 Nag 11*).

18. It is in this background that Shri Vinay Kuthiala, learned Senior Advocate duly assisted by Ms. Vandana Kuthiala, Advocate, would vehemently argue that irrespective of the capacity, in case, the private respondents have been found in possession of the land,

then on this ground alone they are entitled to the compensation as they have right in compensation.

19. In support of such contention learned Counsels have placed reliance on the following judgments:-

1. ***Jagadishwar Sanyal vs. Collector of Goalpara and another AIR 1925 Calcutta 197(2).***

2. ***Shanti Devi and another vs. Province of West Bengal, AIR 1954 Cal. 212.***

3. Puran vs. The State of Himachal Pradesh and others, AIR 1976 HP 17.

4. ***S Palani Velayutham and others vs. District Collector, Tirunelveli & Ors. (2009) 10 SCC 664***.

20. In ***Jagadishwar Sanyal case (supra)***, the learned Division Bench of the Hon'ble Calcutta High held that a tenant or sub-tenant, even though his interest is not transferable except with the sanction of the superior landlord, has an interest which entitles him to be heard upon the question of adequacy of compensation: Godadhar Dass v. Dhunput Singh (1881) 7 Cal. 585, Jagat Chandra Dat v. Collector of Chittagong (1913) 40 Cal. 64. In a later case Sadhu Charan Roy Chowdhury v. Secretary of State (1920) 31 C.L.J. 63, it was further reiterated out that even a tenant with a precarious interest in land was entitled to compensation. Besides this the Judicial Committee in Perry v. Clissold (1907) A.C. 73 held, (confirming the decision of the High Court of Australia in Clissold v. Perry 1 Com. L.R. 363), that compensation was payable to every person deprived of the land resumed for public purposes even though his title was merely permissive and had not been perfected by adverse possession for the statutory period. Therein, the appellant was undoubtedly a tenant of the land and it was this background that the Court held it is not necessary to consider whether his tenancy was heritable or permanent or for life. Nor it is necessary to discuss whether the insertion, of the covenant against alienation, without a clause for re-entry, would entitle the grantor to terminate the lease and to re-enter on the ground of forfeiture. Whatever view is taken of the nature of the tenancy, it is plain that the appellant was entitled to some compensation in respect of his interest which was destroyed by reason of the acquisition of the land. He was accordingly entitled to be heard upon the question of the adequacy of the award.

21. In ***Shanti Devi's case (supra)*** another Division Bench of the Hon'ble Calcutta High Court held that for every property acquired or requisitioned all the persons interested are entitled to have their claims determined and assessed; particularly in the case of requisition, the effect of the requisition order is to deprive all parties who are interested in the property of their exercise of acts of possession or such other rights which were being exercised in respect of that property, under whatever title it may be. It is not necessary always to determine whether the person claiming is the original owner of the property, or he has a subsisting title to the property, though he may be in possession of the same.

22. The Court further reiterated the observations of the Judicial Committee in Perry v. Clissold, 1907 AC 73 (B), confirming the decision of the High Court of Australia in -- 'Clissold v. Perry', 1 Com-W LR 363 (C) by observing that compensation was payable to every person who has been deprived of possession and it is not necessary to scrutinise strictly whether such a person had legal right to retain possession against the rightful owner.

23. In ***Puran's case (supra)***, it was held by a learned Single Judge of this Court that once found in occupation of the premises whether in the capacity of tenant or licensee

he is a person interested within the meaning of Section 3(b) of the Act and according to this definition any person claiming an interest, no matter whether the claim is valid or otherwise is a person interested and it is not for the Collector to determine the question of the right of any person. He is only concerned with the determination of the compensation and authorised to apportion the same between the persons claiming the compensation irrespective of the fact whether they have got a right or not. The only thing is that they must appear before the Collector and demand the same on one ground or the other and if there is any objection from any quarter that he is not a person interested then that matter must be referred to the civil Court by the Collector for determination of their right to apportionment of share in the compensation.

24. In ***S Palani Velayutham's case (supra),*** it was observed by the Hon'ble Supreme Court that there wassignificant difference between 'persons known or believed to be interested' and 'persons interested'. A 'person interested' no doubt would include all persons claiming an interest in the compensation on account of the acquisition of land, including the vested reminder men. On the other hand, 'a person known to be interested' refers to persons whose names are recorded in the revenue records, as persons having an interest in the acquired lands, as the owner, sharer, occupier or holder of any interest. They are entitled to notice.

25. It was observed that there is no obligation on the part of the Collector to hold an enquiry to find out whether there are any other persons interested in the land or whether there are any vested reminder men, in addition to those whose names are entered **as the owners/holders/occupiers of the acquired land. Nor does the Collector have any obligation to issue notices to persons whose names are not entered in the revenue records. This does not mean that the persons whose names are not entered in the revenue records do not have any right in the acquired land or that they lose their claim to compensation. Their interests and rights in regard to compensation are protected by the provision relating to apportionment of compensation and provision for referring the disputes to a civil court for apportionment of compensation.**

26. It was further observed that persons are "believed" to be interested in the acquired land, if their names are disclosed to the Collector as persons having an interest in the acquired land (though their names are not entered in the revenue records) either in correspondence or otherwise and whom the Collector believes as having an interest in the acquired lands. The question whether a person is believed to be interested in the acquired land, would depend upon the subjective satisfaction of the Collector.

27. **It was also observed that the Collector is not expected to hold mini enquiries to find out whether the persons whose names are disclosed, (other than those whose names are entered in the revenue records) are persons interested in the acquired land or not. Therefore no person has any right to assert that the Collector should recognise him to be a person interested in the acquired land, and issue notice to him, merely because someone informs the Collector that such person is also having an interest, if his name is not entered in the revenue records.**

28. **It was lastly held that, of course, if the Collector is prima facie satisfied from his records that someone other than those whose names are entered in the revenue records, are also interested in the land, he may at his discretion, issue notice to them. If he is not satisfied, he need not issue notice to them. Who is to be 'believed to have an interest' is purely subjective administrative decision. Such persons have no right to claim that notice of acquisition should be issued to them.**

29. As noticed above, in the instant cases, it has been categorically found that the private respondents have no lawful title and have failed to establish the title by way of adverse possession. The possession, if any, has only been recorded after 1982-83, which means as on the date of notification the private respondents even if in possession would be deemed trespasser over the land.

30. Now the moot question is whether a trespasser, who has no right to possess the property, has right to disbursement of compensation, more particularly, when none of the judgments relied upon by the private respondents deal with this question.

31. In ***State of Maharashtra vs. Shrimant Govindrao Narayanrao, 1983 (2) Bom CR 487***, a Division Bench of Bombay High Court held that a distinction has to be made between persons in occupation of the land with interest therein and those in occupation without any such interest. It may be that a rank trespasser cannot make any claim in the land acquisition proceeding for compensation because he is in no sense a person interested in the land as per the real import of the term. The interest contemplated by the Land Acquisition Act is the legal interest and not the trespasser's illegal desire to squat upon the land.

32. A Division Bench of the Hon'ble Delhi High Court in ***RFA No. 199/85, titled asTule Ram vs. Union of India & Ors., decided on 06.11.1997*** held that since a trespasser has got no interest in the land which could be sold, there could not be any market-value of the land and therefore, such trespasser cannot claim any apportionment in the compensation amount. It shall be apt to reproduce the necessary observations which read as under:-

> *"13. Since a trespasser has got no such interest in the land which could be sold, there could not be any market-value of the land. Consequently, on this score respondents, Suraj Narain and Balesh cannot claim any apportionment in the compensation award.*
>
> *14.1 In this respect, Ld. counsel appearing on behalf of the appellant contended that a person who is merely a licensee is not entitled to share of compensation. A trespasser certainly would not be a person having any better interest in the land. In this connection, Ld. counsel for the appellant relied upon Shankar Govind Vs. Kishan AIR 1917 Nagpur 23. The following observations were made in that case:*
>
> *"...The wajib-ul-arz recognizes not an interest in the land but a mere license to occupy: See Motiram Vs. Rup Khan (2). In England a license is not an interest in land within the meaning of S. 68, Land Clauses Act, 1845, so as to give a right to compensation for lands or any interest therein "taken for public purposes see Frank Warr & Co. Vs. London Council (3). It is true that to restore himself to the same position as he enjoyed before the site and the building thereon were acquired, the defendant must find another site but this would equally have been the case had he elected to sell the house privately. I hold, therefore, that the plaintiff is entitled to the whole of the compensation awarded for the site..."*

14.2 Ld. counsel for the appellant further relied upon District Deputy Collector, Panch Mahals Vs. Mansangji Mokhamsangji Naik AIR 1928 Bombay 305. Following observations are noteworthy:

The ordinary rule that has been adopted in England in the case of compulsory acquisition of land occupied by tenants, whose tenancies are determined by notice or efflux of time, is that they cannot claim compensation for loss of profits, even though they had reasonable expectation of continuing in possession or having the lease renewed.

14.3 Ld. counsel for the appellant also referred to Tulsiram Tukaram Vs. K.L. Pande and Ors. AIR 1956 Nagpur 11. In that case, there was some difference of opinion between Chief Justice Sinha and Justice Hidayatullah and on difference of opinion, Justice S. Kaushalendra Rao gave his opinion in paragraph 39 as follows:

(39) In presence of the true owner, which fact clearly distinguishes the instant case from that of 1907 AC 73 (F), even a licensee was held to be not entitled to be compensated. See _ 'Shankar Govind Vs. Kishan AIR 1917 Nag 23 (T). A trespasser cannot claim greater recognition than a licensee. In competition with true ownership, the possession of the non-applicant even if adverse on the date of the reference could not, before it ripened into title, be considered as an interest entitled to be compensated under the Land Acquisition Act.

15. Hence, in the present case the respondents, Suraj Narain and Balesh, did not have any interest in the land in dispute to justify awarding any compensation. Interest in the present context should mean an estate or a right in property. The word 'interest' has a basic concept of right to have advantage or profit arising out of land. Since a rank trespasser would have no such estate or right in any such advantage or profit arising out of the land, he has no interest which could be said to be transferable.

16. According to Stround's Judicial Dictionary 4th Edn.

Vol. 3 the term "interest" means as under:

"INTEREST. (1) "Interest is vulgarly taken for a terms or chattle reall, and more particularly for a future tearme; in which case it is said in pleading that he is possed de interesse termini. But ex vi termini, in legal understanding, it extended to estates, rights and titles, that a man hath of, in, to, or out of, lands; for he is truly said to have an interest in them: and by the grant of to turn inter see suum in such lands, as well reversions as possessions in fee simple shall passe".

(37) "The interest of the landlord" (Landlord and Tenant Act 1954 (c.56), s. 30 (2)) means his interest from the time it originally arose, and an interest under successive head leases is a single interest for this purpose (Artemion Vs. Procopion [1966] 1 .Q.B. 878). The landlord's "interest" within the meaning of s. 30(2) is created at the date of execution of the lease and not at such later date

as it may be expressed to commence (Northcote Laundry v. Donnelly [1968] 1 W.L.R. 562).

(38) Proprietary "interest" which gives a right to work minerals may be that of the owner in fee simple, of the lessee of the minerals or a person having a licence not presently revocable to work the minerals and carry them away: See Re East Yorshire Gravel Co.'s [1955] 1 W.L.R. 88; [1954] 3 All. E.R. 631."

INTEREST IN LAND (1) By the construction put upon the Mortmain Act (c. 36; repealed, but its provisions re-enacted by the Mortmain and Charitable Uses Act 1888 c. 42. no interest in land could be given by will to charitable uses, but this is modified as regards will of persons dying after August 5, 1891 (Mortmain and Charitable Uses Act 1891 (c. 73). There have been numerous and frequently conflicting cases defining what is such an interest in land. In Jervis v. Lawrence (22 Ch. D. 202), Bacon V.C. said "I believe there is a fault that has been committed in great many of these cases.

(21) An interest in land is not to be confounded with a mere CHARGE on land (per Page Wood L.J. Franks v. Bollans, 3 Ch. 718). See also Keith Vs. Twentieth Centaury Club, 73 L.J. Ch 549).

(22) (defense (General) Regulations 1939 (No. 927). reg. 51(2). A requisitioning authority may do "anything which any person having an interest in the land would be entitled to do in virtue of that interest," interest there means any interest or interests which any person may have in the land and not merely a right adequate to enable the occupier to do anything necessary or expedient for the purposes of the occupation (Demetiades Vs. Glasgow Corporation [1951] 1 T.L.R. 396). "Interest in the land" within this regulation meant any interest which a person might have in the land and was not restricted to what was necessary to achieve the object of the occupation (Demetriades Vs. Glasgow Corporation [1951] W.N. 108."

17. For the foregoing reasons, it is apparent that the respondent Suraj Narain and Balesh being rank trespassers are not persons having any interest in the land and as such they are not entitled to claim any apportionment.

18. Since the respondents do not claim to be tenants or lessee of Tule Ram, their case would not be covered by the ratio of the judgments of Mangat Ram Vs. State of Haryana, , Inder Prashad Vs. Union of India, , Col Sir Harinder Singh Brar Bans Bahadur Vs. Bihari Lal, .

19. In Union of India Vs. Ajit Singh, 1997(43) DRJ 169, the following observations were made in paragraph 9 of the judgment:

"9. ...The Court is required to take into consideration relevant factors, viz., the duration of the lease, the nature of the right to enjoyment of the leasehold interest and the improvements the tenant made on the land etc. It is equally settled law that if the Government is the owner of the land, before initiating the acquisition, it is entitled to terminate the lease and take possession of the lands

in terms of the lease. Necessarily, in the above case the tenant cannot have any right to compensation as he is bound by the terms of the lease... "

20. In case the licensee who is in possession and whose licence has been terminated or in case of tenant, whose tenancy has been terminated or has come to an end by efflux of time, loose their interest in land appears to be the ratio of the above judgment. If it is so, one cannot say that any trespasser would have any better rights.

21. It was argued by the Ld. counsel for the respondents that since the possession being 9/10 of the ownership, the respondents would certainly have interest in land and in this regard Ld. counsel for the respondents referred to Manche Anege Akue Vs. Manche Kojo Ababio IV . There cannot be any dispute with this proposition, but there is a distinction between occupation and possession. Possession is authorised and legal occupation while occupation is a mere entry or remaining on the land without having any legal authority. A mere entry on land is not possession of land. The general rule is that where the possession is doubtful, the possession follows a legal title. A trespasser not having any right to possess or to enjoy the land, cannot claim any interest in the land within the meaning of Section 9 of the Land Acquisition Act.

22. For the foregoing reasons, we are of the definite opinion that firstly, the respondents, Suraj Narain and Balesh Chand were not even in occupation at the time of acquisition of the land, leave aside possession. Secondly, even if for the sake of argument, it is held that Suraj Narain and Balesh were in occupation of one bigha land out of 19 bighas 10 biswas land in terms of the entries vide Ex. P-1 and P-2, the respondents, Suraj Narain and Balesh, could claim apportionments in compensation only in respect of one bigha of land and entire amount of compensation in respect of the remaining portion measuring 18 bigha 10 biswas land would go only to Tule Ram, the appellant. Thirdly, even if it is assumed that they were in occupation of one bigha land out of 19 bigha 10 biswas land being rank trespassers did not have any interest even in one bigha land to claim compensation for acquisition of the land. In respect of each of the three counts the apportionment of compensation in favour of the respondents as ordered by the Learned Reference Court cannot be justified by any stretch of imagination.

33. Recently, the Hon'ble Supreme Court in ***Haryana Wakf Board vs. State of Haryana, 2019 (1) Scale 100***, has held that because the status of the lessees under an impermissible and void arrangement is that of a deemed trespasser and "trespasser have no right to possess the property" as such the lessees/deemed trespasser are not entitle for disbursement of compensation. It was further held that the compensation has to be determined depending upon the right, title or interest which one possess. It would be opposite to refer to the relevant observations, which read as under:-

"In the instant case, it is apparent that even if we accept the submission raised by learned counsel appearing on behalf of some of the lessees that the

arrangement was on the year to year basis it would not confer any right. In fact, leases were for the period exceeding three years. It was an impermissible and void arrangement as such no title would accrue to the lessee. They were holding Wakf property, which by its very nature was dedicated for the public purpose and no right could be conferred to the lessees on the basis of void leases. In such cases Section 18 of Tenancy Act, 1953 is not applicable. In such case, the status of the lessees would be that of a deemed trespasser and trespasser have no right to possess the property as such could not said to be entitled for disbursement of the compensation to the extent of 3/4th. Only some amount of compensation owing to displacement could have been given or in case there was a crop, for damage of the crop. They could not successfully claim apportionment on the basis of the price of the land as there was no ownership right for occupancy right vested with such lessees. The extent of compensation to be paid in such cases would depend upon the facts of each case, nature of possession, rights, if any, and no straightjacket formula can be laid down in this regard. At the most in such a case where there is no right, title conferred or accrued by virtue of cultivation of the land of occupancy, the compensation to the extent of 5% to 15% could have been given for the purpose of resettlement in view of the fact that a person had been displaced and deprived of right to livelihood. The major part of compensation must be paid to the owner in such cases."

34. Similar issue thereafter came up before the learned Division Bench of the Allahabad High Court in ***Writ C. No. 16412 of 2018, titledHarish Chander vs. Union of India and five others decided on 24.04.2019,*** wherein it was held that a trespasser or encroacher is a person who enters or remains upon land in the possession of another, without a privilege to do so being created or conferred by the possessor's consent or otherwise has no right under the Land Acquisition Act and further has no right to seek any benefit under the provisions of the Act or to challenge the acquisition thereunder. It was further held that since the petitioners are encroacher/trespasser, they cannot be treated as persons interested in the property in dispute. If the right of the trespasser in such a situation is either accepted or recognized, then no proceedings under the provisions of the Act would ever get concluded.

35. In view of the aforesaid exposition of law, it can safely be held that the status of the private respondents was only that of rank trespassers as was rightly held even by the learned Reference Court, therefore, they are not entitled to any compensation whatsoever under the Act.

36. Having failed to convince this Court on the aforesaid ground, the learned Senior Counsels S/Shri G.D. Verma and Vinay Kuthiala, as a last ditch effort, would vehemently argue that it is settled law that when the State proceeds to acquire land on an assumption that it belongs to a particular person, then the award made by Collector cannot be called in question by State seeking a reference under Section 30 on the premise that the land did not belong to the person from whom it was purportedly acquired and was a land owned by the state having been vested in it.

37. In support of such contention, reliance has been placed on the following judgments of the Hon'ble Supreme Court:-

1. Collector of Bombay vs. Nusserwanji Rattanji Mistri, (1955) 1 SCR 311

2. State of Orissa vs. Brundaban Sharma, (1995 (Suppl.) 3 SCC 249

3. Mehar Rusi Dalal vs. Union of India, 2004 (7) SCC 362.

38. No doubt, the submission on the first blush appears to be attractive, however, when considered in detail, I really do not find the aforesaid propositions as canvassed to be applicable to the facts of the instant case.

39. It is not in dispute that it is only by virtue of the judgment of the Hon'ble Supreme Court in ***Raj Kumar Rajinder Singh's case (supra)***, that the Court for the first time came to the categorical conclusion that the original respondent(s) was permitted to retain only 13 bighas and 12 biswas of the land in Jhakri whereas the remaining land measuring 1011 bighas + 64.12 bighas (-) 13.12 bighas =1062.06 bighas vested in the State and directed the original respondent(s) that the compensation that had already been withdrawn by the original petitioners or by his LRs in the land acquisition in the original proceedings under Section 28A shall be refunded alongwith interest @ 12% per annum within three months from 24.09.2018. Even the review preferred against the judgment shall stand dismissed by the Hon'ble Supreme Court on 09.01.2019.

40. Earlier to this the land in question was being treated as one owned by the original respondent Raj Kumar Rajinder Singh and it was in this background that the same was sought to be acquired.

41. Apart from that, the respondents or for that matter even the private respondents have failed to establish not only their respective title(s) but have further failed to establish that they are either "persons interested" or "persons known or believed to be interested" so as to be entitled to any compensation.

42. In view of the aforesaid discussion, I find no merit either in these appeals, cross-objections and in the contentions raised by learned counsels for the claimants who have not filed cross-objections seeking apportionment in the compensation.

43. Consequently, there is no merit in these appeals and the same are accordingly dismissed. Pending application(s), if any also stand(s) disposed of.

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

Sh. Chando (deceased) through his LRs Smt. Sandesh Devi & Ors.
…….Appellants

Versus

Sh. Baldev Singh & Ors. ……Respondents

RSA No. 481 of 2006
Reserved on: 28.06.2019
Date of decision: 02.07.2019.

Indian Succession Act, 1925- Section 63 – Indian Evidence Act, 1872- Section - 68 - Will– Reading of – Principles– Held, while construing a document fundamental rule is to ascertain intention from words used– Surrounding circumstances are to be considered but for purpose of finding out the intended meaning of the words which have been actually employed– True intention of testator has to be gathered not by attaching importance to isolated expressions but by reading will as a whole with all its provisions and ignoring none of them as redundant or contradictory. (Paras 14 & 17)

Indian Succession Act, 1925– Section 90 – Will – Bequeath of property – Construction of Will – Held, where property is bequeathed in generic which may increase, diminish or otherwise change during testator's life so that description may from time to time apply to different amounts of property of like nature then property answering the description at death of testator passes under Will unless contrary intention is shown. (Para 18)

Indian Succession Act, 1925– Section 90 – Construction of Will – Will bequeathing 'all property' in favour of nephews – Held, bequeath includes land which was initially under tenancy of testator and of which he had become owner by operation of tenancy laws before his death (Paras 13 & 21)

Cases referred:

Gnanambal Ammal vs. T. Raju Ayyar, AIR 1951 SC 103 at pp. 105-6
Lachman Singh (dead) By LRs. vs. Raja Ram Singh (1993) 3 SCC 517
Maj Gen. Rajinder Singh Chowdhary vs. S. Manjit Singh Chowdhary and others, AIR 2001 Delhi p.15
Ram Gopal vs. Nand Lal, AIR 1951 SC 139 at page 141
Venkata Narasimha vs. Parthasarathy, (1913) 41 Indian Appeal 51 at p. 73

For the Appellants : Mr. Ramakant Sharma, Sr. Advocate
with Ms. Devyani Sharma Advocate, for the appellants.
For the Respondents : Nemo.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellants are the defendants, who aggrieved by the judgment and decree dated 19.09.2006 passed by the learned Addition District Judge, Fast Track Court, Kangra at Dharamshala in Civil Appeal No. 99-J/05/04, have filed the instant regular second appeal.

2. The parties hereinafter shall be referred to as the 'plaintiffs' and 'defendants'.

3. The brief facts of the case are that the plaintiffs filed a suit for declaration and injunction against the defendants/ appellants wherein it was averred that they were owners in possession of 1/3rd share of the land described in the plaint stating that the land was earlier recorded to be owned and possessed by one Shero son of Shyama who was grand maternal father of the plaintiffs. It had been averred that Shero had one daughter Thakri Devi and the plaintiffs are sons and daughters of Smt. Thakri Devi who has already died, they being Rajput by caste and governed by the agricultural custom of Kangra District had become owners and the suit land could not have been alienated by Shero by way of Will, sale, gift or any other manner except for legal necessity. It had been averred that Shero was the last holder of the suit property and the defendants without the consent and knowledge of Shero got a Will dated 30.03.1972 executed in their favour and mutation in that respect was also got attested after the death of Shero. It had been alleged that the Will was the result of fraud, coercion and was not binding upon the plaintiffs. It had also been averred that Shero was big landlord having sufficient means of livelihood. The defendants are trying to interfere in the ownership and possession of the plaintiffs and are proclaiming themselves to be owners. Thereby the suit for declaration was filed seeking declaration that they have become owners. It had also been averred that the suit was earlier filed titled as Girdhari versus Chand in the Court of Ld. Sub Judge, Jawali but the same was withdrawn with

permission to file afresh on the same cause of action. The defendants despite asking them time and again to admit the claim of plaintiffs had not bothered to pay heed to the requests of plaintiffs, hence, the suit.

4. The respondents/defendants had contested the suit on the preliminary objections of maintainability, cause of action, estoppel, locus standi and limitation. It had been averred that the defendants had become owner by virtue of registered Will dated 30.03.1972 which was duly executed by Shero in sound state of disposing mind. It had been averred that deceased Shero used to reside with the defendants who are his nephews. Even after the death of Shero all the customary rituals were performed by the defendants. The mother of plaintiffs expired prior to Shero and at that time neither the plaintiffs nor the parents of the plaintiffs looked after and served the deceased Shero in any manner. The defendants have also denied that the parties are governed by any agricultural custom of Kangra district. They have also averred that deceased was never duped by them since he was residing with the defendants after the death of his wife who had died much earlier and he was being looked after by the defendants. He executed a valid Will out of his free volition. The daughter of Shero namely Thakri Devi never visited him nor anyone visited the house of Shero after his death in spite of information provided to them. Even the father of plaintiffs did not turn up. Thereby it had been alleged that the averments made by the plaintiffs are absolutely wrong and thereby dismissal of the suit had been prayed for.

5. On pleadings of the parties the following issues were framed.

> "1. Whether the plaintiffs are owners in possession of the suit land and the alleged Will dated 30.03.1972 is against law and facts and against the Agricultural custom of Kangra District, as alleged?OPP
>
> 2. Whether the suit land is ancestral qua the plaintiffs and Shero deceased and the parties are Rajput by caste and are governed by agricultural custom of Kangra district regarding the sale, Will and gift of the ancestral land, as alleged?OPP.
>
> 3. Whether the suit of the plaintiff is not maintainable in the present form, as alleged?OPD.
>
> 4. Whether the suit of the plaintiffs is without cause of action, as alleged?OPD
>
> 5. Whether the suit of the plaintiffs is time barred, as alleged?OPD.
>
> 6. Whether the defendants are owners in possession of the suit land by virtue of registered Will dated 30.03.1972, as alleged.
>
> 7. Relief."

6. The learned Trial Court after recording evidence and evaluating the same, dismissed the same, constraining the appellants/defendants to file an appeal before the learned first Appellate Court, who vide its judgment and decree dated 19.09.2006 partly allowed the appeal and held the plaintiffs to have become the owner in possession of land to the extent of share of Shero comprised in Khata No. 99, Khatauni No. 241, Khasra Nos. 65/6, 14, 15, measuring 24 Kanals, which comes to 8 kanals, and, 8 kanals i.e. 1/3rd share of the land comprised in Khata No. 9, Khatauni No. 241, Khasra Nos. 65/6, 14 and 15, measuring 24 kanal situated in Tika Bhadpur, Tehsil Fatehpur, District Kangra, H.P. As far as the other land is concerned, the defendants are held to have become owner in possession vide Will Ext.D1.

7. Aggrieved by the judgment and decree passed by the learned first Appellate Court, the defendants have filed the instant appeal.

8. It would be noticed that as against this very decree, even the plaintiffs have filed an appeal which was registered as RSA No. 565 of 2006, however, the same was dismissed for want of prosecution on 09.07.2013, as the plaintiffs have failed to bring on record the legal representatives of deceased respondent No. 2 therein. The order dated 09.07.2013 reads as under:-

> "Last opportunity of eight weeks is granted to take appropriate steps to bring on record the legal representatives of deceased respondent No. 2 failing which the appeal shall stand dismissed for non prosecution without reference to Court."

9. On 09.11.2006, the appeal came to be formally admitted on the following substantial questions of law, which reads as under:-

> 1. Whether the impugned judgment and decree is the result of complete misreading, misinterpretation and mis-appreciation of Exhibit D1 dated 30.03.1972.
>
> 2. Whether the impugned judgment and decree is the result of non-consideration of the provisions of Section 45 of the H.P. Tenancy and Land Reforms Act.
>
> 3. Whether the learned lower appellate Court is right in reversing the findings on issue No. 5 without giving any cogent reasons and ignoring the provisions of Limitation Act.
>
> 4. Whether the learned lower appellate Court being last court of fact is right in not discussing the entire oral as well as documentary evidence in view of the law laid down by the Hon'ble Apex Court reported in 2000 (5) SCC 652.
>
> 5. Whether the impugned judgment and decree is the result of non-consideration of documents Exhibits D3 to D17.
>
> 6. Whether the learned lower appellate Court was right in not discussing the statements of DW1 to DW6.
>
> 7. Whether the learned lower appellate Court is right in misconstruing the Will Ext. D1 and excluding the property situated in Tika Bhadpur, Tehsil Fatehpur whereas, the appellants were entitled to succeed with respect to all the properties left behind by the testator which he was owing and possessing on his death in the year 1986.

<u>Questions No. 1 and 7</u>

10. Since both these questions are intrinsically interlinked and interconnected and moreover the fate of this appeal otherwise rests mainly upon these two questions, therefore, they are taken up together for consideration and are being disposed of by way of common reason.

11. At the outset, it needs to be observed that the validity of the Will in favour of the defendants is no longer in question as the same has attained finality after the dismissal of RSA No. 565 of 2006. Therefore, the only question which remains to be considered is whether the whole of the suit property to the extent of the share of the deceased has been willedor only part thereof was willed away by the deceased.

12. For answering this question, one would essentially have to fall back on the Will Ext. D1. On perusal thereof, it would be noticed that it has been clearly stated therein that the defendants Chando and Bachittar shall be the owners of the whole property on which he (Shero) was the owner in possession.

13. The learned first Appellate Court observed that since the land at Bhadpur to the extent which was under the tenancy of Shero is not effected in any manner by the Will as he was not the owner thereof appears to be contrary to the record, reason being that admittedly late Shero had died in the year 1986 by which time he had already become the owner of the property at Bhadpur after coming into force of the H.P. Tenancy and Land Reforms Act, 1972 and mutation of ownership had already been attested in his favour in the year 1976.

14. Apart from that, it is more than settled that in construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used: the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed (*Ram Gopal vs. Nand Lal, AIR 1951 SC 139 at page 141*).

15. In construing the language of the Will the court is entitled to put itself into the testator's armchair (*Venkata Narasimha vs. Parthasarathy) (1913) 41 Indian Appeal 51 at p. 73 (Privy council*) and is bound to bearing in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense…..

16. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. (*Venkata Narasimha's case (supra) and Gnanambal Ammal vs. T. Raju Ayyar, AIR 1951 SC 103 at pp. 105-6)).*

17. The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the Will as a whole with all its provisions and ignoring none of them as redundant or contradictory (*Raj Bajrang Bahadur Singh vs. Bakhtraj Kuer) (AIR 1953 SC 7 at p. 9*).

18. In *Lachman Singh (dead) By LRs. vs. Raja Ram Singh (1993) 3 SCC 517*, it was observed that while construing a Will the principles enunciated in Section 90 of the Indian Succession Act is relevant. Where a property is bequeathed in generic and may increase diminish or otherwise change during the testator's life so that the description may from time to time apply to different amounts of property of like nature or to different subjects, then the effect of the section is that the property answering the description at the death of the testator passes under the Will unless contrary intention is shown. It would be opposite to refer to the relevant observations as contained in paragraphs 4 to 7 which reads thus:-

> *"4.Decisions of this Court in Rana Sheo Ambar Singh v. Allahabad Bank Ltd, Allahabad, 1962 (2) SCR 441; Shri Ram Prakash v. Mohammad Ali Khan (dead) thr. L.Rs., 1973 (2) SCC 163; Sri Vidya Sagar v. Smt. Sudesh Kumari & Ors.; 1976 (1) SCC 115, and Jamshed Jahan Begam & Ors. v. Lakhan Lal & Ors., 1970 (2) SCR 566, were brought to our notice explaining the nature of rights arising out of Section 18 of the Act. It was again pointed out that what is disposed of by the Will is not the Zamindari rights but the entire property of Arjun Singh which would include bhumidhari right. It has also been brought to our notice that Section 90 of the Indian Succession Act should also be adopted*

in considering the Act. The contention on behalf of the appellants is that though the Will had been executed it is only in respect of Zamindari haq which stood extinguished on the commencement of the Act and, therefore, the Will could not affect the rights arising out under the Act and, therefore, the view taken by the Additional Commissioner and the Board of Revenue stands to reason in preference to that of the High Court.

5. In construing a Will the principle enunciated in Section 90 of the Indian Succession Act is relevant. Where a property is bequeathed in generic and may increase, diminish or otherwise change during the testators life so that the description may from time to time apply to different amounts of property of like nature or to different subjects, then the effect of the section is that the property answering the description at the death of the testator passes under the Will unless contrary intention is shown.

6. The will became operative only on the death of Arjun Singh in 1958. Therefore, on that date, whether the Will could have been executed by Arjun Singh and what right could flow therefrom has to be seen. It is not in dispute that under Section 18 of the Act Arjun Singh became bhumidhar of the lands in question. A bhumidhar is enabled under Section 169 of the Act to make a Will and bequeath his holding or any part thereof and general order of succession provided under Section 171 is subject to Section 169 of the Act. The Will executed by Arjun Singh, as far as the portion relevant for our purpose is concerned, reads as follows :-

> *After my death however my all properties whether movable or immovable i.e. Haquait Zamindari and a residential house Kaccha and a Gonda Kacha will devolve on my wife Mrs. Raj Kumari d/o Gajaidhar Singh, Thakur, resident of Baderi mentioned above who would enjoy its ownership under the provisions of the will, and after her death my above daughter Mrs. Bitto resident of above Badera will enjoy ownership rights over the properties of the will throughout her life, after the death my family heirs will succeed to the properties under the will. [emphasis supplied by us]*

7. The intention of the testator is very clear that he wanted to bequeath to his wife all properties whether movable or immovable which included at the time of execution of the Will Haquait Zamindari and a residential house Kaccha and a Gonda Kacha for her life time and thereafter to his daughter for her life time and subsequently to the heirs who will succeed to the properties under the Will. Therefore, a reading of the Will makes it clear that when the testator made the Will he did dispose of all his properties whatever be the nature of the same and thus bhumidhari rights in respect of the lands in question were also covered by the same applying the principle underlying Section 90 of the Indian Succession Act to which we have adverted to, and there is no contrary intention expressed.

19. In *Maj Gen. Rajinder Singh Chowdhary vs. S. Manjit Singh Chowdhary and others, AIR 2001 Delhi p.15)*, the Full Bench of the Hon'ble Delhi High Court observed as under:-

8. What is the intention of the testator has to be found out on a reading of the will and there cannot be any hard and fast rule of uniform application to find out as to whether the grant was absolute or it was subject to any condition or stipulation. The true intention of the testator has to be gathered not only by attaching importance to isolated expressions but by reading the will as a whole with all the provisions and ignoring none of them as redundant or contradictory (See. Raj Bajrang Vs. Thakurani, AIR 1953 SC 1953). As observed in Navneet Lal's case (supra), although there is no binding rule that the court should avoid intestacy at any cost, yet the court would be justified in preferring that construction of the will which avoids intestacy. Where the words are ambiguous attempt should be made to avoid that construction which leads to intestacy.

9. The rule of construction in the case of a will is that the court has to find out the meaning of the testator from the language used, taking the whole of the document together. In maters of construction of wills, deci- sions in other cases, do not and cannot afford sufficient guidance. It is not proper to interpret a will by searching for other cases-English or Indian. Intention is to be gathered from the words of the document bearing in mind its circumstances. In Narender Nath Sircar Vs. Kamal Basini Dasi, (1896) 23Cal.563: 23 I.A. 16: 6 MLJ 71. Lord Machaghten said: "To construe one Will by reference to expressions of more or less doubtful import to be found in other Wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on Wills which cumber our English Law Reports, in order to under- stand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd." It is seldom profitable to compare the words of one Will with those of another or to attempt to find out to which of the Wills, upon which decisions have been given in reported cases, the Will before the Court approximates closely. Cases are helpful only in so far as the purport to lay down certain general principles of construction and at the present these principles seem to be fairly well settled. The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intention of the testator. This intention has to be gathered primarily from the language of the document which is to be read as whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised. (See. Gnanmbal's case (supra). Rules of construction by analogy is a dangerous one to follow in construing will differently worded and executed in differ- ent surroundings. In Bipra das Vs. Sadhan Chandra , Miller, J, said: It is always dangerous to construe the words of one will by the construction of more or less similar words in a different will which was adopted by a Court in another case. In constituting the will the Court must consider the surrounding circumstances, the testator's position, his family relationship, the probability that he would use his words in a particular sense and many other things summed up in the picturesque phrase. The Court should put itself in the testator's armchair Veerattalingam Vs. Rameth, , K. Balra Rao Vs. Datta Rao AIR 1992 SC 290. It is seldom profitable to compare the words of one will with those of another. The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intention of the testator, which has to be gathered primarily for the language of the document read as a whole.

20. Bearing in mind the aforesaid exposition of law, I once again revert back to the Will Ext. D1, the English translation whereof reads as under:-

"Will Deed

I, Sher Singh, aged 80 years, s/o Shyama, Caste Rajpur, am a resident of Takwal Dakhli, Fatehpur, Tehsil Nurpur, District Kangra. I have sufficient property (movable & immovable) located at Takwal and Muhayi, Tehsil Nurpur, District Kangra, Mauja Fatehpur. My only daughter Thakri Devi is married and is residing in her matrimonial house and she is not in position to look after me. Moreover, I have given sufficient and huge property to her. I have two nephews who are residing with me and looking after me. Rest of my nephews are residing separately and not taking care of me. Bachittar and Chando, my nephews are loyal to me and I am very affectionate to them. I have made this will out of my free will and sound health and disposing state of mind thereof I bequeath all my property, in whatever from existing, after my death to Bachittar and Chando, sons of Mahloo, s/o Shyama, Caste Rajpur, R/o Takwal, Tehsil Nurpur, District kangra in equal proportionate. This will has been prepared for the purpose of future use.

Dated 30/3/72 Place: Nurpur

Witness Sd/- Witness

Sd/ (Illegible) Sher Singh- illegible Sd/- (illegible)

Shri illegible Ram Nambardar Ami Chand s/o Nathu

illegible Tehsil Nurpur Illegible Tehsil Nurpur"

21. Now, in case the contents of the Will are perused, nowhere has the testator confined the same to the land other than the one situated in Tikka Bhadpur, Tehsil Fatehpur. Therefore, the findings of the learned first Appellate Court to the effect that the land at Bhadpur to the extent which was under the tenancy of the Shero is not effected in any manner by the Will is clearly erroneous, contrary to the record and based on misreading of the Will.

22. Resultantly, the findings of the learned first Appellate Court are set aside and questions No. 1 and 7 are answered accordingly.

<u>Questions No. 2 to 6</u>

23. Since, the findings of the learned first Appellate Court have already been set aside while answering questions No. 1 and 7, the remaining questions are academic and, therefore, need not be answered.

24. In view of the aforesaid discussion, I find merit in this appeal and the same is accordingly allowed and the judgment and decree passed by the learned first appellate Court is set aside, leaving the parties to bear their own costs. Pending applications, if any, also stands disposed of.

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

Smt. Kaushalya Devi & Ors. ...Appellants

Versus

Punjab Wakf Board & Anr. ...Respondents

RSA No. 138 of 2019
Date of decision: 22.07.2019.

Wakf Act, 1995–Section 6 (5) - Dispute with respect to wakf-property– Bar of jurisdiction of civil court– Held, question whether disputed property is a Wakf property or not is to be decided by Wakf tribunal– Civil court will not have jurisdiction to entertain suit relating to Wakf property. (Paras 8 & 9)

Cases referred:
Bhanwar Lal & Anr. vs. Rajasthan Board of Muslim Wakf & Ors., (2014) 16 SCC 51
H. P. Waqf Board vs. Khwaja Khallilula and another, AIR 2017 HP 38
Haryana Wakf Board vs. Mahesh Kumar, 2014 (16) SCC 45
Mumtaz Ahmed vs. State of H.P. and others, LPA No. 210 of 2015 decided on 16.11.2016
Punjab Wakf Board vs. Sham Singh Harike, (2019) 4 SCC 698
Rajasthan Wakf Board vs. Devki Nandan Pathak, 2017 AIR SC 2155
Ramesh Gobindram vs. Sugra Hamayun Mirza Wakf, (2010) 8 SCC 726

For the Appellants: Mr. Dushyant Dadwal, Advocate.
For the Respondents: Mr. R. K. Bawa, Sr. Advocate with Mr. Prashant Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Plaintiff filed a suit for declaration. One of the issues which was considered by the learned Trial Court was with regard to the jurisdiction of the Civil Court as the defence led by the defendants was to the effect that the property in question was a Wakf Property and, therefore, only the Wakf Tribunal had the jurisdiction to try the case.

2. The learned Trial Court for want of notification decided the issue against the defendants and on merits partly decreed the suit of the plaintiffs by declaring them to be the owners of the land comprised in Khata No. 64, Khatauni No. 124, Khasra No. 471, measuring 0-30-34 HMs, situated in Tikka Kuthera, Mauza Palura, Tehsil Jawali, District Kangra, H.P.

3. Aggrieved by the judgment and decree passed by the learned trial Court, the defendants filed an appeal before the learned first Appellate Court and also placed on record the copy of notification No. 33 dated 15.08.1970, published in Gazette of India and exhibited as Ext.D10. The first Appellate Court on the basis of this notification came to the conclusion that the Civil Court has no jurisdiction to entertain the suit as the land was a Wakf Property. In drawing such conclusion the learned first Appellate Court relied upon the following judgments of the Hon'ble Supreme Court.

1. Rajasthan Wakf Board v. Devki Nandan Pathak 2017 AIR SC 2155

2. Ramesh Gobindram v. Sugra Hamayun Mirza Wakf (2010) 8 SCC 726

3. Bhanwar Lal & Anr. v. Rajasthan Board of Muslim Wakf & Ors., (2014) 16 SCC 51.

4. As regards this Court, it can conveniently be held that the issue with regard to the jurisdiction of the Civil Court in dealing with the Wakf Property is no longer *res*

intergra as the same stands conclusively decided by learned Division Bench of this Court in a batch of petitions lead case whereof LPA No. 210 of 2015 titled as ***Mumtaz Ahmed vs. State of H.P. and others***, decided on 16.11.2016, wherein it was observed as under:-

> *"26. In order to settle the disputes qua the Wakf properties, the Act provides for establishment of Wakf Tribunals which have to determine the disputes, as detailed in Sections 6 of the Act. It is apt to reproduce Section 6 of the Act hereunder:*
>
> > *"6. Disputes regarding wakfs:- (1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final :Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs. (2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.*
> >
> > *(3) The Survey Commissioner shall not be made a party to any suit under sub- section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.*
> >
> > *(4) The list of wakfs shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.*
> >
> > *(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in sub-section (1)."*
>
> *27. Section 7 of the Act, reproduced below, deals with the powers of the Wakf Tribunal:*
>
> > *"7. Power of Tribunal to determine disputes regarding wakfs :- (1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final;*
> >
> > *Provided that -(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and*
> >
> > *(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:*

> *Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.*
>
> *(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any wakf shall be stayed by any court, tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.*
>
> *(3) The Chief Executive Officer shall not be made a party to any application under sub-section (1).*
>
> *(4) The list of wakfs and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.*
>
> *(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6 , before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be."*
>
> *28. Thus, Sections 6 and 7 of the Act provides for determination of certain disputes regarding wakf properties only by the Wakf Tribunal. But the question arises that after determining the dispute by the Tribunal, what remedy is available to the aggrieved party.*

5. The issue of jurisdiction otherwise is no longer *res intergra* in view of the recent judgment of the Hon'ble Supreme Court in ***Punjab Wakf Board vs. Sham Singh Harike (2019) 4 SCC 698*** wherein majority of the decisions relied upon by the learned first Appellate Court, as quoted in para-3 supra, were taken into consideration. The Hon'ble Supreme Court held that the Tribunal is constituted for the termination of any dispute, question or other matter relating to a Wakf or Wakf property, which arises under the Wakf Act. The bar of jurisdiction of Civil Court is confined only to those matters which are required to be determined by the Tribunal under the Wakf Act, 1995. Thus Civil Court possess the jurisdiction to entertain the suit and proceedings which are not required by or under the said Act to be determined by the Tribunal.

6. In order to determine the said bar of jurisdiction of Civil Court, one has to ask question as to whether the issue raised in the suit or proceeding is required to be decided under the Wakf Act by the Tribunal under any provision or not. If answer to the question is affirmative, the bar of jurisdiction of Civil Court would operate.

7. Adverting to the suit instituted by the appellants-plaintiffs, they themselves have challenged the Mutation No. 88 vide which the land 707/3034 share in Khasra No. 471 is shown to be converted into the name of the Wakf Board, Ambala Cantt., which is against the fact, is illegal, null & void and is not binding on the rights of the plaintiffs.

8. As per the judgment rendered by the Hon'ble Supreme Court in ***Haryana Wakf Board vs. Mahesh Kumar, 2014 (16) SCC 45,*** it has been held that whether the suit property is Wakf Property or not, is a question that has to be decided by the Tribunal and, therefore, the jurisdiction of the Civil Court is clearly barred.

9. Once that be the position, then obviously, the jurisdiction of the Civil Court to entertain the present suit is clearly barred and, therefore, no fault can be found with the judgment passed by the learned first Appellate Court whereby the plaint was directed to be returned for presentation before the competent forum.

10. To be fair to the learned counsel for the appellant, he has placed strong reliance upon another Division Bench judgment of this Court rendered by the same Bench in case titled as ***H. P. Waqf Board vs. Khwaja Khallilula and another, reported in AIR 2017 HP 38****, however,* the said judgment is clearly distinguishable and otherwise does not apply in the fact situation obtaining in this case, as admittedly the suit property in that case was neither notified nor declared as Wakf Property whereas in the present case the property was already declared as Wakf Property vide notification published in the official gazette (supra).

11. In view of the aforesaid discussion, I find no merit in this appeal and the same is dismissed in *limine*.

12. However, the dismissal of the appeal shall not come in the way of the appellants in seeking the remedy in accordance with law before the Wakf Tribunal that already stands constituted. The parties are left to bear their own costs.

13. It is further made clear that the time spent in pursuing this litigation w.e.f. 23.09.1996 up to the date of the receipt of the certified copy of the judgment of this Court shall not come in the way of the appellants, provided the suit is filed within 60 days from the date of preparation of the judgment. It is further made clear that since the defendants/respondents are already pursuing this litigation, therefore, it would not be necessary for the appellants to issue notice to the respondents/defendants instituted before the Wakf Board.

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

Smt. Mahesha Devi and others ….Appellants/Defendants.

Versus

Smt. Satya Devi (since deceased) through her LRs Smt. Chanchala Devi and others ….Respondents/Plaintiffs.

R.S.A. No. 184 of 2003
Reserved on : 22.7.2019
Date of decision: 26th July, 2019.

Indian Evidence Act, 1872– Sections 101 & 103– **Indian Contract Act, 1872 -** Section 16 (3)– Undue influence, fraud etc.,- Onus of proof– Held, normally onus of proof is on party, who is alleging fraud, undue influence or misrepresentation – But where person is in fiduciary relationship with another and latter is in a position of active confidence, then burden of proving absence of fraud etc is on person in dominating position.(Para 15)

Indian Evidence Act, 1872– Sections 101 & 103 – **Indian Contract Act, 1872 -** Section 16 (3) – 'Pardanashin Lady'– Concept– Held, rules regarding 'Pardanashin lady' are equally applicable to an illiterate and ignorant women– Illiterate lady not knowing Hindi .English or Urdu and knowing 'Pahari' only, on facts, held entitled to protection available to Paranashin lady. (Paras 16 & 18)

Specific Relief Act, 1963 – Section 34 – Suit challenging sale deeds on ground of fraud – Proof –Held, power of attorney executed by illiterate lady in favour of defendant No.1 just to enable her to defend litigation on her (Plaintiff) behalf – Defendant No.1 misusing PoA and executing sale deeds with respect to plaintiff's land in favour of others including her son – Sale consideration never paid to plaintiff – Sale deeds were result of fraud on plaintiff – Decrees of lower courts upheld- RSA dismissed. (Para 22)

Cases referred:

Farid-un-Nisa vs. Munishi Mukhtar Ahmad and another, AIR 1925, P.C. 204

Kala Wati vs. Smt. Vidya Devi and others, 2009 (3) SLC 306 = 2009 (2) Latest HLJ 1219

Kharbuja Kuer vs. Jangbahadur Rai and others, AIR 1963, SC 1203

Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others, AIR 2003 SC 4351

Parasnath Rai and others vs. Tileshra Kuar, 1965 Allahabad Law Journal 1080

Sulender Singh and others vs. Pritam and others, 2013 (1) Latest HLJ 386

For the Appellants : Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, for appellants No.1 to 3(a) & 3(b).

For the Respondents : Mr. Ashok Chaudhary, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The defendants are the appellants, who after having lost before both the learned Courts below, have filed this Regular Second Appeal.

The parties shall be referred to as the 'plaintiffs' and the 'defendants'.

2. The brief facts of the case are that the plaintiffs filed a suit for declaration claiming themselves to be the owner in possession of the suit land. It was averred that the plaintiffs were locked in litigation with Smt. Ranjan Devi and others in Civil Suit No. 165 of 1990 qua the suit land. During the pendency of the suit, defendant No.1 Smt. Mahesha Devi was approached by plaintiff No.1 Smt. Satya Devi to contest that litigation of Civil Suit No. 165 of 1990 on her behalf. Qua it, an agreement dated 13.07.1990 was entered to the effect that if that suit was decided in favour of the plaintiffs, then they would give 32 kanals of land out of the suit land to defendant No.1. Plaintiffs claimed themselves to be illiterate and simpleton and taking advantage of this position, defendant No.1 obtained two general power of attorneys No.110 dated 17.3.1992 and 204 dated 30.8.1994 on the pretext of contesting the aforesaid litigation. But defendant No.1, fraudulently, in the power of attorney, got inserted the powers to alienate the land, though such power of alienation under the power of attorney was never given to defendant No.1, because the plaintiffs had already agreed to give 32 kanals of land to defendant No.1 in case of decision of the suit in their favour. The said suit subsequently was decided in favour of the plaintiffs. It was averred that defendant No.1 on the basis of general power of attorneys, fraudulently transferred the land measuring 2-34-24 hectares, out of the suit land, to her son Tilak Raj, defendant No.2 vide sale deed No. 365 dated 25.9.1995 and land measuring 0-23-04 hectares to defendant No.3 vide sale deed No. 382 dated 10.10.1995, for a consideration of Rs.1,02,000/- and Rs.19,000/- respectively. It was further averred that the plaintiffs had never authorised defendant No.1 to alienate their property nor she paid any sale consideration amount to them. According to the plaintiffs, they came to know about the

fraudulent transactions by defendant No.1 in favour of defendants No.2 and 3, when they commenced interference in their peaceful possession in October, 1995. Thereafter, qua fraudulent alienations, defendant No.1 was contacted, who promised to revoke the transactions. But, subsequently, defendant No.1 issued notice dated 01.11.1995 to plaintiff No.1 for implementation of agreement dated 13.7.1990 for transfer of 32 Kanals of land in her favour. Thereafter, she filed suit No. 1239 of 1995 for possession of 32 kanals of land, which she got dismissed on 10.10.1996 by stating that she had already purchased the suit land from the plaintiffs. Consequently, the plaintiffs claimed that transactions of sale by defendant No.1 made in favour of defendants No.2 and 3 were fraudulent, malafide and claimed that the plaintiffs being co-owners in possession of the suit land and sale deeds affected by defendant No.1 in favour of defendants No.2 and 3 are wrong, void and liable to be set-aside alongwith mutations.

3. The defendants contested the lis by claiming that the sale deeds virtually executed and registered by defendant No.1 on the basis of general power of attorneys of the plaintiffs. Defendant No.1 was duly authorised to effect the sale deeds of the property of the plaintiffs and the power of attorneys were never revoked by the plaintiffs till execution of the sale deeds. Defendant No.1 was also authorised to look after the litigation of the plaintiffs and the property was sold after instructions of the plaintiffs. No fraud was committed or played. Objections qua maintainability, locus-standi and estoppel were also raised.

4. The learned trial Court on 06.02.1998, framed the following issues:

1. *Whether the plaintiffs are co-owners/co-sharers in joint possession of the suit land , as alleged? OPP*
2. *Whether the sale deeds dated 25.09.1995 and 10.10.1995 are the result of fraud, mis-representation and are null and void as alleged? OPP*
3. *Whether the suit of the plaintiffs is not maintainable in the present form, as alleged? OPD*
4. *Whether the plaintiffs are estopped by their acts and conduct to file the present suit, as alleged? OPD*
5. *Whether the General power of attorneys dated 17.03.1992 and dated 30.08.1994 were validly executed by the plaintiffs with their free will and option, as alleged? OPD*
6. *Relief.*

5. After recording the evidence and evaluating the same, the learned trial Court decreed the suit with costs and the plaintiffs were declared to be co-owner in possession of the suit land and the sale deeds No.365 dated 25.9.1995 and No. 382 dated 10.10.1995 executed on the basis of G.P.As documents No.110 dated 17.3.92 and No.204 dated 30.8.94 were wrong, null and void and mutations sanctioned on the basis of these documents were required to be expunged from the revenue record and the defendants were restrained permanently from claiming any right, title or interest on the basis of the said documents and from alienating the land in any manner.

6. Aggrieved by the judgment and decree passed by the learned trial Court, the defendants filed an appeal before the learned District Judge, Kangra at Dharamshala, which too, came to be dismissed vide judgment and decree dated 17.4.2003, constraining the appellants/defendants to file the instant appeal.

7. On 7.6.2004, the appeal was admitted on the following substantial questions of law:

1. *Whether the plea of fraud and mis-representation of facts has not been raised in conformity with the requirement of the law and the two Courts below have acted illegally and unlawfully by upholding the claim of the plaintiffs/respondents?*
2. *Whether in the absence of plea of Parda Nashin lady, the inferences and conclusions drawn by the Courts below are bad and wrong?*
3. *Whether the plea of Parda Nashin lady is available when the impugned transaction is between the two ladies?*
4. *Whether the respondents are estopped to assail the validity of the Power of Attorney Ext. PW-1/A and Ext. PW-1/B after having allowed appellant/ defendant No.1 to act as her General Power of Attorney on the basis of the same in the previous litigation?*
5. *What is the effect of the failure of the defendants/appellants No.2 and 3 to step into the witness box.*

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

8. A perusal of the substantial questions of law would show that the same are intrinsically interlinked and interconnected and verge around the question of perversity in the judgments rendered by the learned Courts below and, therefore, all of these substantial questions of law are taken up together for consideration and are being disposed of by common reasoning.

9. In order to find out whether there is any perversity in the judgment and decree passed by the learned Courts below, it would be necessary to refer to the pleadings and thereafter relevant evidence.

10. A bare perusal of the plaint would show that in the heading thereof, the plaintiffs have taken a specific plea regarding power of attorneys having been executed fraudulently and under mis-representation. In addition thereto, in case the entire contents of the plaint are perused, it is manifest that the plea of mis-representation and fraud has specifically been taken.

11. This Court in ***Smt. Kala Wati vs. Smt. Vidya Devi and others 2009 (3) S.L.C. 306,*** while dealing with the question of Fraud, held as under:

> *"13. Section 17 of the Indian Contract Act, 1872, (hereinafter referred to as the `Act')deals with fraud defining it to mean inter alia the suggestion of a fact which is not true by a person who does not believe it to be true, active concealment of a fact by a person having knowledge or belief of the fact.*
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> *In**Krishna Mohan Kul alias Nani Charan Kul and another** vs. **Pratima Malty and others, AIR 2003, SC 4251**, the Supreme Court while considering the provisions of Section 16 supra held:-*
>
> > *"13. In judging of the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of very great importance in such cases. It is always obligatory for the donor/beneficiary under a document to prove due execution of the document in accordance with law, even de hors the reasonableness or otherwise of the transaction,*

to avail of the benefit or claim rights under the document irrespective of the fact whether such party is the defendant or plaintiff before Court.

14. It is now well established that a Court of Equity, when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. The proposition is very clearly started in Ashburner's principles of Equity, 2nd Ed. , p. 229. thus:

> *"when the relation between the donor and donee at or shortly before the execution of the gift has been such as to raise a presumption that the donee had influence over the donor, the Court sets aside the gift unless the donee can prove that the gifts was the result of a free exercise of the donor's will. "*

15. The corollary to that principle is contained in Clause (3) of Section 16 of the Indian contract Act, 1872 (in short 'contract Act').

16. At this juncture, a classic proposition of law by the Privy Council needs to be noted. In Mst. Farid-Un-Nisa v. Munshi Mukhtar ahmad and Anr. (AIR 1925 P. C. 204) it was observed as follows:

> *"It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies not be confused with other doctrines, such as fraud,duress and actual undue influence, which apply to all persons whether they be pardahnashin ladies or not".*

17. The logic is equally applicable to an old, illiterate, ailing person who is unable to comprehend the nature of the document or the contents thereof. It should be established that there was not mere physical act of the executant involved, but the mental act. Observations of this Court, though in the context of pardahnashin lady in Mst. Kharbuja Kuer v. Jang Bahadur Rai and Ors. (AIR 1963 SC 1203) are logically applicable to the case of the old, invalid, infirm (physically and mentally)and illiterate persons".

14. To similar effect is the judgment of the Supreme Court in State of Andhra Pradesh and another vs. T.Suryachandra Rao, AIR 2005 SC 3110. The Court held:-

> *"8. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. (See Dr. Vimla v. Delhi Administration and Indian Bank v. Satyam Fibres (India) Pvt. Ltd.).*
>
> *9. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See S. P. Chengalvaraya Naidu v. Jagannath).*

10. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including resjudicata. (See Ram Chandra Singh v. Savitri Devi and Ors.)".

"11. … … … … … … … In a leading English case i.e. Derry and Ors. v. Peek (1886-90) All ER 1 what constitutes "fraud" was described thus: (All ER p. 22 BC)"fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false". But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in Khawaja v. Secretary of State for Home deptt. , that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation of statutory law. "fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. "if a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which the power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. "in a

contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain. In public law the duty is not to deceive. (See Shrisht Dhawan (Smt.) v.M/s.Shaw Brothers, 1992(1) SCC 534)."

12. … … … … … … … … … … … … … …

"13. This aspect of the matter has been considered recently by this Court in Roshan deen v. Preeti Lal Ram Preeti Yadav v. U. P. Board of High School and Intermediate Education, Ram Chandra Singh's case (supra) and Ashok Leyland Ltd. v. State of T.N. and Another [2004(3) SCC 1].

14. Suppression of a material document would also amount to a fraud on the court, (see Gowrishankar v. Joshi Amba shankar Family Trust and S. P. Chengalvaraya Naidu's case (supra).

15. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti yadav's case (supra)".

12. In addition, there is sufficient evidence on record which goes to indicate that even as per the admitted case of the defendants themselves, the plaintiffs had executed power of attorney only for the purpose of contesting the earlier litigation with Smt. Ranjan Devi. This is so stated by PW-1 Satya Devi in her examination-in-chief and what is more interesting is that a specific suggestion to the plaintiff has been given in cross-examination to the effect that power of attorney was executed only for the purpose of contesting the litigation with Smt. Ranjan Devi, as would be evident from the following:

" Theek hai ki Mahesha Devi ko mukhtiar case ladne ke liya diya tha..."

13. Further while appearing as DW-1 Mahesha Devi has clearly admitted that the power of attorney was executed by Satya Devi only for the purpose of contesting the litigation with Smt. Ranjan Devi.

14. Interestingly, even in the notice issued by defendant No.1 on 1.11.1995 vide Ex.PW-1/G, it has been specifically stated that Special Power of Attorney was executed by the plaintiffs in favour of defendant No.1 solely for the purpose of contesting the litigation against Smt. Ranjan Devi.

15. In ***Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others AIR 2003 SC 4351***, the Hon'ble Supreme Court has held that when fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, therefore, it was incumbent upon the defendants to prove that there was fair play in the transaction and that too, the sale deeds which were executed by defendant No.1 in favour of defendants No.2 and 3 are genuine and bonafide.

16. As regards the substantial questions of law No.2 and 3 with regard to the plaintiff being a Pardanashin lady, it would be necessary to understand the concept of 'Pardanashin lady'.

17. Admittedly, there are no pleadings regarding the plaintiff being a 'Pardanashin lady', but then it has specifically been pleaded by Smt. Satya Devi (PW-1) that she was illiterate and did not know either Hindi, English or Urdu and only knew 'Pahari'.

18. In ***Parasnath Rai and others vs. Tileshra Kuar, 1965, Allahabad Law Journal 1080,*** the Allahabad High Court held that *"Rules regarding transactions by a Pardanashin lady are equally applicable to an illiterate and ignorant woman though she may not be a Pardanashin. It is not by reason of the Pardah itself that the law throws its protection round a Pardanashin lady but by reason of those disabilities which a life of seclusion lived by a Pardanashin lady gives rise to, and which are consequently presumed to exist in the case of such a lady. But the disabilities which make the protection necessary may arise from other causes as well. Old age, infirmity, ignorance, illiteracy, mental deficiency, inexperience and experience upon others, may by themselves create disabilities that may render the protection equally necessary, if, therefore, it is proved that a woman, although she is not a Pardanashin lady, suffers from the disabilities to which a Pardanashin lady is presumed to be subject, the validity and the binding nature of a deed excuted by her have to be judged in the light of those very principles which are applied to a deed by a Pardanashin lady, where the plaintiff was illiterate and when she executed the deed in question she was not only more than 60 years old but was also hard of hearing and she was described by the defendants themselves as a foolish and rustic woman completely devoid of intelligence, and according to the finding of the lower appellate Court she was correctly described as such, and besides the defendants stood in relation to her in a position of active confidence held that there could be no doubt that she was as such entitled to the protection of the law as a Pardanashin lady".*

19. The settled position of law holding the field of proof of sale made by Pardanashin ladies, which has the applicability also to illiterate ladies hailing from rural background can be traced from the decision of the Privy Council in ***Mt.Farid-un-Nisa Vs. Munishi Mukhtar Ahmad and another AIR 1925, P.C. 204***, wherein it was held as follows:

> *"The law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the granter. In such cases, it must also, of course, be established, that the deed was not signed under duress, but arose from the free and independent will of the granter. The law as just stated too well settled to be doubted or upset.*
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> *** *** ***
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> *The law of India contains well known principles for the protection of persons, who transfer their property to their own disadvantage when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English Law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of law relating to personal capacity to make binding transfers or settlements of property of any kind."*

20. The aforesaid case, in turn was followed by the Hon'ble Supreme Court in **Mst. Kharbuja Kuer** *vs*. **Jangbahadur Rai and others AIR 1963,** ***SC 1203***and ***Krishna Mohan Kul alias Nani Charan Kul and another (2004) 9 SCC 468.***This Court in series of

judgments has followedthe aforesaid case in ***Smt. Kala Wati** vs. **Smt. Vidya Devi and others 2009 (3) SLC 306 = 2009 (2) Latest HLJ 1219***and ***Sulender Singh and others*** vs***. Pritam and others 2013 (1) Latest HLJ 386.***

21. It would be noticed that not only the learned trial Court, but even the appellate Court while affirming the judgment and decree passed by the learned trial Court has taken great pains to discuss not only the pleadings but even the evidence in its entirety. Even though it was not required to do so. Learned Senior Counsel appearing for the appellants has not been able to point out any perversity in the findings rendered by the learned Courts below.

22. Once the defendants themselves acknowledged and admitted that the power of attorney even though termed as General Power of Attorney was executed with the sole intention and purpose of only defending the litigation instituted by one Smt. Ranjan Devi, then there was no further question of defendant No.1 selling the property in favour of defendants No.2 and 3 on the basis of the said power of attorney. Even if the defendants' case is taken at its best, even then, there is nothing on record to suggest that the sale made by defendant No.1 in favour of her son (defendant No.2) and defendant No.3 and the sale consideration in turn had been paid to the plaintiffs. Where the defendants became greedy and dishonest and tried to grab the entire suit property by hook and crook, this is a classical example where instead of waiting for the hen to lay the golden egg, the defendants tried to kill the hen itself.

23. Therefore, on the basis of the aforesaid discussion, it cannot be held that the respondents/plaintiffs were estopped to assail the validity of the power of attorneys Ext. PW-1/A and Ext. PW-1/B even after having allowed the appellant/defendant No.1 to act as General Power of Attorney in the previous litigation.

24. Now, adverting to the question as to what would be the effect of failure of defendants/appellants No. 2 and 3 to step into the witness box, I really failed to understand as to why the appellants should even press this question as it was incumbent upon defendant No.2 (who is none other than the son of defendant/appellant No.1 herein) and defendant No.3 to have proved a valid sale in their favour. Having failed to enter into the witness box and offered themselves for cross-examination by other party, obviously the Court is left with no other option, but to draw an adverse inference, more particularly, when there is no other evidence available on the record to prove the valid sale in favour of defendants No.2 and 3 and additionally when the respondent/plaintiff No.1 has duly proved her case.

All the substantial questions of law are answered accordingly.

26. In view of the aforesaid discussion and for the reasons stated, I find no merit in this appeal and the same is accordingly dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA,J.

Jamna @ Yashodha Devi ….Appellant/Petitioner.
Versus
State of H.P. & others ……Respondents.

LPA No.91 of 2016
Reserved on: 16.07.2019
Decided on: 26.7.2019

Constitution of India 1950 - Articles 14 & 226 – Selection of part time water-carrier in a school – Selection Committee selecting respondent No 5 on basis of material on record including her below poverty line certificate – Subsequently, said certificate found to be false and having been obtained by her by playing fraud and concealing her income –Hon'ble Single Bench though holding BPL certificate to be false, setting aside selection and ordering redrawing of merit list but without considering such BPL certificate of respondent no. 5 – Redrawing of selection list again resulting in selection of respondent No.5 – LPA –Held, a person who secures appointment by concealing information and giving wrong information eventually plays fraud – Once BPL certificate was obtained by her by playing fraud on basis of which she participated in selection process, then entire selection is to be quashed and fresh selection process is to be initiated – Selection process quashed and set aside – Fresh process ordered. (Paras 6&7)

Cases referred:
Chairman and Managing Director, Food Corporation of India and others vs. Jagdish Balaram of India and others, (2017) 8 SCC 670
The State of Bihar and others vs. Kirti Narayan Prasad, JT 2018 (11) SCC 540

For the appellant:	Mr. T.S Chauhan, for the appellant.
For the respondents:	Mr. Vikas Rathore & Mr. Narinder Guleria, Addl. A.G.s with Mr. J.S. Guleria, Dy. A.G. for respondents No.1 to 4. Ms. Devyani Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua,(J)

Feeling aggrieved against the judgment passed by learned Single Judge in CWP No.2303 of 2016, dated 10.05.2016, whereby merit-list for the post of Part Time Water Carrier in Government Senior Secondary School, Namhol, District Bilaspur, H.P, was ordered to be re-drawn after setting aside the appointment of respondent No.5, the writ petitioner has preferred this appeal. Parties are being referred to hereinafter as they were in the writ petition.

2(i). Respondents-State, invited the applications for filling in a post of Part Time Water Carrier in Government Senior Secondary School, Namhol, District Bilaspur, H.P. The petitioner as well as respondent No.5, alongwith various other candidates applied for this post. The interviews were held on 14.02.2012. The result was declared. The score card of the petitioner and respondent No.5 was reflected as under:-

Sr. No.	Name & address	Concerned Panchayat	Distance from Home (as per patwari Cert					Land Donor or Not	Category				Whether belong to un-employed family	Interview/ viva	Total	Remarks
			Max. Marks= 10					MM:05	MM:03				MM:05	MM: 07	T:30	
		Yes/No	1.5 KM	2 KM	3 KM	4 KM	5 KM		SC	ST	OBC	BPL				
	Bifurcation of marks		10	8	06	04	02	5	03	03	03	03	05	07	30	
2. Writ petitioner	Yasodha Devi @ Jamna Devi W/o Late Sh. Gangi Ram Vill Khalota, P.P. Namhol, Tehsil Sadar, District, BLP (H.P.)	Yes	10	-	-	-	-	-	-	-	-	-	05	02	**17**	**BPL certificate dated 16.2.11 not valid (Handicapped) 92%**
7. respondent No.5	Prem Lata w/o Rajesh Kumar V. Sosan P/O Namhol Tehsil Sadar District Bilaspur (H.P.)	Yes	10	-	-	-	-	-	-	-	-	03	05	04	**22**	Pry (DOB) 9.2.79

Respondent No.5, having scored a total of 22 marks as against the petitioner's total of 17 marks was selected as Part Time Water Carrier. The BPL certificate in favour of writ petitioner was not considered as its validity period of six months had lapsed on the date of interview. The appointment letter was therefore issued in favour of respondent No.5 on 12.04.2012, vide annexure R-5/G,pursuant to which respondent No.5 is working as Part Time Water Carrier.

Pleadings of parties:

2(ii). The petitioner feeling aggrieved against the selection and appointment of respondent No.5, challenged the same by way of writ petition. The challenge was primarily on following **grounds**:-

2(ii)(a) Petitioner is a widow and has two children. She is also suffering from 90% hearing disability. She belongs to below poverty line (BPL) family. She has no source of income, therefore, she deserved to be appointed as Part Time Water Carrier, more so, when one of the object of the recruiting Part Time Water Carrier is to provide an opportunity for un-employed youth to work in Government School of their villages and earn decent honorarium.

2(ii)(b) Respondent No.5, had falsely projected herself as belonging to BPL family. In fact, respondent No.5 is owner of a Maruti car and therefore she was not eligible for issuance of BPL certificate, in terms of the guidelines framed for issuance of BPL certificate, which prohibited issuance of the said certificate in favour of those, who owned four wheeler. Respondent No.5 by concealing the fact of her owning four wheeler, has secured the appointment as Part Time Water Carrier. The appointment of respondent No.5 is the result of fraud played upon her and therefore, the appointment needs to be quashed.

2(ii)(c) The father in-law of respondent No.5, namely, Sh. Vijay Ram is an ex-serviceman, whereafter he was re-employed by the State of Himachal Pradesh. After his superannuation, he was getting pension. The family of respondent No.5 is joint. Income of family of respondent No.5 is much more, hence, respondent No.5 is not eligible to be appointed as Part Time Water Carrier.

2(ii)(d) Respondent No.5's family income is much more as compared to the petitioner's. Respondent No.5 and her family is well off. Her husband is a driver, earning handsome money by driving the vehicles. Therefore, it is not respondent No.5, but the petitioner who deserved to be appointed as Part Time Water Carrier.

3. Respondent No.5 filed her reply to the writ petition controverting the allegations levelled in the writ petition:-

3(i) Respondent No.5 denied that her husband is a driver.

3(ii) Allegations of a Maruti car in the name of respondent No.5 was not denied. However, purchase of four wheeler was sought to be justified, on the ground that father in-law of respondent No.5 aged around 66 years, suffers from joint pains, because of which, he frequently visits hospitals. It is her father in-law, who purchased the afore vehicle, out of his money, but in the name of respondent No.5.

3(iii) Respondent No.5 asserted that her family consisting of herself, her husband and children, are living separately from her father-in-law and her father-in-law has not provided anything to their family.

3(iv) Subsequent to filing of the writ petition, the inquiry in respect of income of respondent No.5 was carried out and total income of respondent No.5 from all sources was found to be Rs.13,500/- and therefore, she would still fall in BPL family.

4. Reply to the writ petition was filed by respondent No.4/Sub Divisional Officer-cum-Chairman of the Selection Committee, to the effect, that during inquiry, it has come out that respondent No.5, was owner of Maruti car, bearing Registration No.HP-25-6800, purchased on 24.01.2011 and that respondent No.5 has played fraud by concealing this fact, during selection process for the post of Part Time Water Carrier. Father in-law of respondent No.5, is not residing with her family as per BPL certificate. The official respondents, pursuant to detection of fraud played by respondent No.5, have now ordered

for deletion of her name from BPL list. It was stated in the reply that income certificate of Rs.13,500/- was correctly issued in favour of respondent No.5.

<u>Judgment in writ petition:</u>

5. After going through the pleadings and the documents adduced by the parties, learned Single Judge, quashed the result of selection process so undertaken and also set aside the appointment of respondent No.5. Even though the appointment of respondent No.5 was quashed and set aside and directions were given to revise the merit list on the basis of same selection process after deducting (3) three marks given to respondent No.5 as belonging to the Below Poverty Line; yet the mark-sheet (table extracted earlier), had made it evident that compliance of this direction would have again resulted in the appointment of respondent No.5, as after deduction of (3) three marks, she would still stand at 19 marks (22-3 = 19), therefore, she would still emerge at Serial No.1 of the merit list. Whereas, petitioner's total marks as reflected in the table extracted above are 17. Further, direction in the impugned judgment was to give appointment to the candidate as per re-drawn merit-list.

6. Feeling aggrieved against the judgment passed by learned Single Judge, the petitioner has preferred the **instant appeal.**

6(i). We have heard learned counsel for parties, carefully gone through the pleadings, documents as well as the records of the selection process in question.

6(ii). In compliance to the directions issued by the learned Single Judge, the merit-list has been re-drawn by deducting (3) three marks earlier given to respondent No.5 under the heading 'as belonging to BPL category'. Respondent No.5, however, still standing at Serial No.1 of the revised merit-list with 19 marks has again been appointed as Part Time Water Carrier.

6(iii) **In the present appeal, contention of learned counsel for writ petitioner/appellant is that once fraud played upon by respondent No.5, in obtaining BPL certificate on the basis of which, she participated in the selection process, had come to knowledge, then the only legal option available was to cancel the entire selection process and to order fresh selection process. We find force in the contention of the writ petitioner. The stand of respondent No.5 is that no fraud was practiced by her; the four wheeler in question was not purchased by her, but by her father-in-law, out of his money. Though we not going to the factual aspects, yet it is surprising to note that respondent No.5 had stated before inquiry committee (Annexure R-4/3) that her father-in-law lives separately from her nuclear family consisting her husband & children and that he (father-in-law) does not give them anything; yet** the case projected by her is that this very father-in-law (who allegedly does not give them anything), purchased a four wheeler in name of his daughter-in-law (Respondent No.5) for purpose of going to hospitals on account of his joint pains. In this regard, one cannot loose sight of the fact of allegation levelled by writ petitioner that husband of respondent No.5 is a driver.

6(iv) **Be that as it may. A fact that can not be lost sight of is that respondent No.5 was recorded owner of the four wheeler. The vehicle was in her name prior to her getting the BPL certificate. BPL certificate was issued to her, as she had concealed the fact of her owning the vehicle. This BPL certificate was annexed by her at the time of seeking employment. Mere deductions of (3) three marks, given to her, as belonging to BPL would not be in furtherance of either justice or equity or good conscious. A person who secures appointment by concealing information and by giving wrong information eventually plays fraud. The reply filed by the State has even otherwise**

admitted that respondent No.5 has obtained the appointment by practicing fraud. In this regard, it would be profitable to refer to the judgment passed in (2017) 8 Supreme Court Cases 670, titled Chairman and Managing Director, Food Corporation of India and others vs. Jagdish Balaram of India and others, wherein it was held as under:-

> *"69.3. The decision of this Court in R. Vishwanatha Pillai and in Dattatray which were rendered by Benches of three judges laid down the principle of law that where a benefit is secured by an individual such as an appointment to a post or admission to an educational institution on the basis that the candidate belongs to a reserved category for which the benefit is reserved, the invalidation of the caste or tribe claim upon verification would result in the appointment or, as the case may be, the admission being rendered void or non est."*

In another judgment of Hon'ble Apex Court in JT 2018 (11) Supreme Court Cases 540, titled **The State of Bihar and others vs. Kirti Narayan Prasad**, it was held as under:-

> *"17.* ***In the instant cases the writ petitioners have filed the petitions before the High Court with a specific prayer to regularize their service and to set aside the order of termination of their services. They have also challenged the report submitted by the State Committee. The real controversy is whether the writ petitioners were legally and validly appointed. The finding of the State Committee is that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in Government service surreptitiously by concerned Civil Surgeon-cum-Chief Medical Officer by issuing a posting order. The writ petitioners are the beneficiaries of illegal orders made by the Civil Surgeon-cum-Chief Medical officer. They were given notice to establish the genuineness of their appointment and to show cause. None of them could establish the genuineness or legality of their appointment before the State Committee. The State Committee on appreciation of the materials on record has opined that their appointment was illegal and void ab initio. We do not find any ground to disagree with the finding of the State Committee. In the circumstances, the question of regularization of their services by invoking para 53 of the judgment in Umadevi (supra) does not arise. Since the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise."***

7. In view of above, the present appeal is allowed. The selection and appointment of respondent No.5 as Part Time Water Carrier in Government Senior Secondary School, Namhol, District Bilaspur, H.P, is quashed and set aside. The impugned judgment passed by learned Single Judge on 03.05.2016 is also quashed and set aside. The entire selection process for filling in the post of Part Time Water Carrier in question is also quashed and set aside. Respondents No.1 to 4 are directed to conduct the selection process afresh for appointment to the post of Part Time Water Carrier in Government Senior Secondary School, Namhol, District Bilaspur, H.P. and to take the same to its logical conclusion within a period of three months from today. All the candidates who had earlier appeared in the interview for the post in question including respondent No.5 (if she is otherwise found eligible) would also be at liberty to apply for the post afresh. Appeal stands disposed of, so also, the pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Vinod Kumar Khadia ....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No.66 of 2011
Reserved on: 15.07.2019
Decided on: 26.07.2019

Indian Evidence Act, 1872 – Section 106– Plea of alibi– Proof– Held, mere arrest of accused on next day of offence and at place other than place of incident perse does not prove plea of alibi – On facts, witnesses deposing about presence of accused in his tenanted premises with wooden plank and knife in his hands and where at the relevant time, his wife was lying on floor in a pool of blood – Plea of alibi is not probablised. (Para 8)

Indian Evidence Act, 1872–Section 8– Motive– Absence of- Effect– Held– Absence of proof of motive to commit crime itself is no ground to throw away prosecution case– Absence of proof of motive only demands careful scrutiny and deeper analysis of evidence of prosecution– On facts, killing of wife by accused stands proved beyond all reasonable doubts by cogent and reliable evidence– Absence or presence of motive on part of accused will not be of any significance. (Para 12)

Indian Evidence Act, 1872 – Section 106 – Special circumstances in the knowledge of person only – Onus of proof – Held, accused taking plea of his wife having received injuries by fall from lintel and the same leading to her death – Accused not proving this fact – His presence at place of occurrence established from other evidence on record – Accused failed to explain injuries suffered by his wife and can be inferred to have caused such injuries. (Para 13)

Cases referred:

Ashwani Kumar & another vs. The State of Punjab, 2018 (15) Scale
Gajanan Dashrath Kharate vs. State of Maharashtra, (2016) 4 SCC 604
Harijan Bhala Teja vs. State of Gujarat, (2016) 12 SCC 665
Menoka Malik and others vs. State of West Bengal and others, AIR (2018) SCC 4011
Nizam and another vs. State of Rajasthan, (2016) 1 SCC 550
Sanjeev vs. State of Haryana, (2015) 4 SCC 387
Shamim vs. State (Government of NCT of Delhi), (2018) 10 SCC 509
State of Himachal Pradesh vs. Raj Kumar, (2018) 2 SCC 69
State of Rajasthan vs. Thakur Singh, (2014) 12 SCC 211
Sukhpal Singh vs. State of Punjab, Cr. Appeal No.1697 of 2009 decided on 12.02.2019

For the appellant : Mr. Digvijay Singh, Advocate, as Legal Aid Counsel.
For the respondent : Mr. Vikas Rathore and
Mr. Narinder Guleria, Additional Advocate Generals.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge.

The instant appeal has been preferred by the appellant Vinod Kumar Khadia (hereinafter referred to as the "accused" in short), against the judgment dated 16.02.2011, passed by learned Additional Sessions Judge, Solan, District Solan, H.P., in Sessions Trial No.5-s/7 of 2010, *titled State of H.P. versus Vinod Kumar Khadia,* whereby the accused was convicted for the offence punishable under Section 302 IPC and sentenced to undergo rigorous imprisonment for life, alongwith fine of Rs.20,000/- and in default of payment of fine, the convict has to further undergo imprisonment for one year.

2. **Prosecution Case**:

2(i). The accused, alongwith his wife and three minor children, resided in tenanted premises owned by PW-3 Leela Dutt, at Village & Post Office Garkhal, Tehsil Kasauli, District Solan, H.P.

2(ii). On 23.11.2009, at about 10.45 p.m., accused gave beating to his wife Kiran Bala at his home (tenanted premises) with wooden block Ext.P-1 as well as caused injuries to her with knife Ext.P-2.

2(iii). Elder son of the accused, called their neighbour PW-2 Naresh Kumar Attri by knocking at his door and requested him to save his mother from his father. Noises were also heard by another neighbour PW-1 Sushil Kumar.

2(iv). PW-1 Sushil Kumar and PW-2 Naresh Kumar Attri, reached home of the accused and saw him giving beatings to his wife. The wife of the accused was seriously injured, unconscious and lying on floor. PW-13 Prabhu Dyal, Vice Presidnet of Gram Panchayat, Garkhal-Sanwar, was telephonically informed about the incident by PW-1 Sushil Kumar; whereafter he (PW-13) informed Police Chowki, Garkhal, about the alleged occurrence. PW-13 Prabhu Dyal, also visited the house of the accused.

2(v). Kiran Bala was shifted initially to PHC Dharampur, District Solan, H.P. Statement of PW-1 Sushil Kumar was recorded under Section 154 Cr.P.C. vide Ext.PW-1/A, on the basis of which, FIR Ext.PW-10/B, was registered.

2(vi). On the application (Ext.PW-6/B), moved by PW-6 ASI Yadav Singh, for recording statement of Kiran Bala, Dr. Parvinder Singh (PW-12), issued certificate Ext.PW-6/C, to the effect that injured was not fit to record her statement.

2(vii). Kiran Bala was referred to Regional Hospital, Solan and thereafter to Indira Gandhi Medical College and Hospital, Shimla and finally to PGI, Chandigarh, where she died on 27.11.2009. Her dead body remained unclaimed. It was thereafter handed over to PW-5 Madan Lal (Manager All India Sewa Samiti, Chandigarh) by PW-6 ASI Yadav Singh and the said Samiti cremated the dead body of deceased Kiran Bala.

2(viii). The investigation was carried out by the police. The blood stained clothes; wooden block; knife and pieces of bangles etc., were taken into possession by the police. Photographs Ext.PW-14/A to Ext.PW-14/D were taken vide certificate Ext.PW-14/E. The sketch of wooden block and knife were drawn. Post mortem of the dead body was conducted by Dr. S.P. Mandal (PW-15).

2(ix). The police report was presented under Section 173 Cr.P.C. The accused was charged for commission of offence punishable under Section 302 IPC, to which, he pleaded not guilty and claimed trial.

3. To establish its case, the prosecution examined 15 witnesses and also led documentary evidence.

4(i). The accused did not lead any evidence in defence. His statement was recorded under Section 313 Cr.P.C., wherein, in answer to question No.22, he stated:-

> *"I innocent Sir, my wife had fallen from lentre. I was not present at my home at the time of incident."*

4(ii). Thus, the defence of the accused is to the effect:-

(i) He was not present on the spot at the time of alleged occurrence; and

(ii) His wife had fallen from lintel.

5. Learned trial Court has convicted the accused for offence punishable under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life. Feeling aggrieved, present appeal has been filed by the appellant-accused. Initially, this appeal was allowed by a Division Bench of this Court vide judgment dated 13.10.2014. State of Himachal Pradesh, feeling aggrieved against the judgment dated 13.10.2014, preferred Criminal Appeal No.1827 of 2017, before Hon'ble Apex Court, which was allowed vide judgment dated 25.10.2017. The order of Hon'ble Apex Court is reproduced hereinafter:-

> *"We have heard Mr. D.K. Thakur, learned Additional Advocate General for the appellant. None appears for the respondent in spite of service.*
>
> *It is pointed out that in the circumstances of the case, Section 106 of the Evidence Act, 1872 gets attracted which aspect has not been looked into by the High Court.*
>
> *We are of the view that sicne the High Court has not approached the matter in right perspective, it will be in the interest of justice to set aside the High Court judgment and remand the matter to the High Court for fresh decision in accordance with law. We order accordingly.*
>
> *The matter may be listed before the High Court for hearing on Monday, the 4th December, 2017. The State may produce the respondent before the High Court upon which the High Court may decide whether the respondent is to be released on bail or not.*
>
> *The appeal is accordingly disposed of."*

6. We have heard learned counsel for the parties, on both sides, and gone through the record carefully.

7. Mr. Digvijay Singh, learned defence counsel representing the accused, has raised following points for consideration:-

(i) Absence of the accused from the spot;

(ii) Contradictions in the statements of material witnesses;

(iii) Non-examination of the eldest child of the accused; and

(iv) Absence of motive.

We propose to discuss these points separately hereinafter:-

8. **<u>Plea of Alibi taken by the accused</u>.**

Presence/absence of the accused on the spot.

Learned defence counsel has argued that accused was not present at the scene of occurrence and that is why he was arrested only the next day of alleged incident. To

examine this defence, vis-a-vis case of prosecution, the testimonies of four important witnesses, i.e. (i) PW-1 Sushil Kumar; (ii) PW-2 Naresh Kumar; (iii) PW-6 ASI Yadav Singh; and (iv) PW-13 Prabhu Dyal, need to be referred.

8(i). **PW-1 Sushil Kumar,** has deposed that on 23.11.2009, at about 10.30 p.m., while watching television, he heard noises from house of Leela Dutt (where accused resided as tenant with his family). He heard elder son of the accused crying and knocking at he door of his neighbour PW-2 Naresh Kumar; the elder son was shouting that his father had killed his mother; whereafter, he alongwith PW-2 Naresh Kumar, went to the accused's house and saw him standing there; his wife lying on floor in pool of blood; accused, on asking as to why he killed his wife, told that he had received telephonic call from his native place about elimination of his entire family. He further disclosed that he would, therefore, kill his wife, thereafter his children and lastly himself before somebody else kills his family. On asking as to how he killed his wife, he (accused) informed that he killed his wife with the help of a wooden block and a knife. The wooden block and knife were there on the spot. It has further come in the statement of PW-1 Sushil Kumar that he telephonically called PW-13 Prabhu Dyal, Up-Pradhan of the Gram Panchayat, who in-turn, called the police on spot for further proceedings. The relevant part of the statement of PW-1, in his examination-in-chief, is reproduced hereinafter:-

> *"On 23.11.2009 when I was watching television at about 10.30 PM I heard noises from the house of Leela Dutt. The children were crying. The elder son of the accused was knocking at the door of my neighhbour Naresh Kumar Attri and was shouting that his mother had been killed by his father. Therefter, myself nad Naresh Kumar Attri went to the room of the accused where deceased Kiran Bala wife of accused was lying on the floor in a pool of blood. She was unconscious and the accused was standing there. We enquired from the accused that why he killed his wife. The accused told that he has received telephonic calls from his native place that his entire family shall be eliminated. He further disclosed that he thought before his family is killed by some one else he killed his wife and thereafter he was to kill his children and himself lateron. Rest of family members were saved due to the shouting of elder son of accused. The accused disclosed that he killed his wife with the help of a wooden piece (2 feet in length) and 1 knife."*

8(ii). **PW-2 Naresh Kumar**, corroborating the stand of PW-1 Sushil Kumar, deposed that he visited the room of the accused on request of elder son of the accused saw the accused standing there; in his presence and in presence of PW-1 Sushil Kumar, the accused was beating his wife with wooden block and sharp edged knife. PW-2 has further deposed that the accused, on their inquiry, had told about his intention to finish and kill his wife Kiran Bala. In his examination-in-chief, he (PW-2) states that:-

> *"On 23.11.2009 at about 10.45 PM I was present in my house. The elder son of accused Vinod Kumar present in the court today knocked my door. I opened the door. The boy asked me to save his mother and told me that the accused was beating his wife. I visited the room of the accused, who was a tenant of Leela Dutt. In the meantime PW1 had also come after hearing the noise and we both visited the room of the accused. When we went inside the room of accused, he was beating his wife deceased Kiran Bala with the hep of a wooden piece and was having one sharp edged knife in his hand. The deceased was lying unconscious on the floor. In our presence accused had thrown deceased by pulling her from legs. Thereafter we saw the face of*

injured which was badly injured. The accused on our enquiry told us that he will finish his wife deceased Kiran Bala."

In his cross-examination, PW-2 Naresh Kumar Attri, stated that:-

"The accused in our presence hit the deceased with the help of Ext.P-1 which was held by him by both the hands and there-after I went to my room for making a call to Prabhu Dayal."

8(iii). **PW-13 Prabhu Dyal,** has also corroborated the presence of the accused, at the spot, at the time of his visit to the accused's house. The relevant part of his statement is to the following effect:-

"*For the last 9 years, I am Vice-President of Gram Panchayat, Garkhal, Sanawar. On 23.11.2009, I was at my residence about 10.45 p.m. Sushil Kumar PW-1 telephonically informed me that a quarrel had taken place between the husband and wife who were tenants of Leela Dutt. Thereupon, I telephonically informed at Police Chowki Garkhal. I visited the house of Leela Dutt. Accused Vinod Kumar present in the court today was found present in his room (witness pointed out towards the accused). His wife was lying on the floor. She was unconscious and had sustained injuries on her head which were bleeding. A wooden block strained with the blood and knife lying on the floor. In the meantime, the accused Vinod Kumar fled away from the spot."*

8(iv). **PW-6 ASI Yadav Singh,** has also testified that on his reaching the spot, alongwith other police officials, he found Kiran Bala to be badly injured and unconscious with accused present there. Relevant part of his statement is reproduced hereinafter:-

"I alongwith other police officials rushed to the spot. The deceased was badly injured and was unconscious at that time. Accused Vinod Kumar was also present there."

Observations (Plea of Alibi):

8(v). The accused has taken the plea of alibi in his statement recorded under Section 313 Cr.P.C. The prosecution has established, on record, the presence of the accused on the spot, at the time of alleged occurrence. Be it PW-1 Sushil Kumar or PW-2 Naresh Kumar or PW-13 Prabhu Dyal or PW-6 ASI Yadav Singh; their statements, extracted in previous paragraphs, are unison that they have seen the accused at the place of occurrence with his wife in seriously injured condition, lying unconscious on the floor with blood oozing out and accused standing there with sharp edged knife and wooden block in his hand. The testimonies of these prosecution witnesses are natural; in harmony with each other and inspire confidence. Thus, presence of the accused has been established on the spot at the time of alleged occurrence beyond all reasonable doubt.

8(vi). Learned defence counsel has submitted that the accused was arrested on 24.11.2009, at about 04.00 p.m., from Garkhal Bazar. This fact has also been admitted and is the correct position as has come out in the statement of PW-14 Inspector Ramesh Thakur. But mere arrest of the accused, the next day, will not prove that the accused was not present at the scene of alleged occurrence on 23.11.2009. We have already discussed the statement of PW-1 Sushil Kumar; PW-2 Naresh Kumar; PW-6 ASI Yadav Singh; and PW-13 Prabhu Dyal to the effect that all these material witnesses have seen the accused present at the spot, with PW-2 Naresh Kumar, infact, the eye witness to the occurrence.

8(vii)(a). PW-13 Prabhu Dyal, in his examination-in-chief, stated that accused Vinod Kumar Khadia had later fled away from the spot. He has maintained this factual statement even during cross-examination in following manner:-

> *"We had no time to apprehend the accused since his wife was serious and we worried about her life. The accused ran away from the spot after sometime when I reached at the spot."*

8(vii)(b). Even, PW-6 ASI Yadav Singh had also testified that at the relevant time, when they reached the spot, their entire focus was to provide medical treatment to the deceased, who was very serious and therefore, in this process, they were not able to arrest the accused, who had fled away. Resultantly, the accused could be arrested only on the following day.

8(vii)(c). These witnesses have also given a plausible reason for not catching hold the accused at the time of alleged occurrence. The reason being deceased Kiran Bala was seriously injured and in immediate need of medical help and their all focus was to provide her medical treatment. The reason is plausible.

8(viii). In ***2018 (15) Scale***, titled ***Ashwani Kumar & another versus The State of Punjab,*** Hon'ble Apex Court observed as under:

> ***"8.*** *We are not persuaded to overturn the concurrent findings of the courts below. As observed by the High Court, there is no motive for the police officials to falsely implicate the appellants. The case of the second appellant is one of alibi. She has not discharged her burden to show that she was elsewhere. On the other hand, there is evidence of the police officials that after committing the crime, the appellants came out and proclaimed that they have accomplished what they wanted. They were apprehended. In such circumstances, we see no reason to allow the appellants to rely upon the statement of the first appellant under Section 313 Cr.P.C or upon the deposition of D.W.1. No doubt, the High Court has taken the view that D.W.1 has not given complaint to the higher police officers. The High Court no doubt also finds fault with the first appellant in not disclosing the name of the person with whom his wife was found to be in a compromising position. Even proceeding on the basis that he may not have known the name of the person it still does not detract from us reposing confidence in the testimony of the police officer. The presence of the second appellant and her being apprehended by the police officers, has been believed by both the Courts and this is completely inconsistent with the case set up by the appellants. In such circumstances, we see no reason to interfere. The appeal fails and stands dismissed."*

It was for the accused to establish his plea of alibi. There is no evidence on record to prove that the accused was not present on the spot at the time of occurrence. Rather, overwhelming evidence is there to the contrary. Point raised by learned defence counsel is answered accordingly.

9. **Actual Commission of Crime/Contradictions in the Statements of Material Witnesses:**

9(i). Mr. Digvijay Singh, learned defence counsel, has contended that prosecution has not been able to establish that the accused was actually guilty of offence punishable under Section 302 IPC, in killing his wife. In support of this contention, he has pointed out certain

contradictions in the statements of the prosecution witnesses. The contradictions as pointed out in the statements of prosecution witnesses are:-

9(ii). PW-1 Sushil Kumar stated that he, alongwith PW-2 Naresh Kumar, had reached the house of the accused almost at the same time. On reaching the spot, he saw deceased Kiran Bala lying on floor in pool of blood, in practically unconscious state, with accused standing there. Whereas, PW-2 Naresh Kumar's statement was that accused was beating his wife inside his room with wooden piece and knife; deceased was lying unconscious on floor; accused had thrown deceased by pulling her from legs. Learned defence counsel relied upon following specific portion of the statement of PW-1 Sushil Kumar to point out the contradictions:-

> "*It is incorrect that when I reached in the room of the accused, he was beating the de-ceased with a wooden piece. It is correct that deceased was saved by us from the clutches of the accused. It is correct that accused was proclaiming in our presence that he will kill the deceased. I can identity the piece of wooden knife if shown to me in the court today.*"

Learned defence counsel further submitted that in comparison to above statement, PW-2 Naresh Kumar, has stated that he actually saw the accused beating his wife Kiran Bala with a wooden block and a sharp edged knife. The difference in the statement of PW-1 Sushil Kumar and PW-2 Naresh Kumar has been contended to be a major contradiction by learned counsel for the accused.

9.(iii). Hon'ble Apex Court in (***2018) 10 SCC 509,*** *titled* ***Shamim verus State (Government of NCT of Delhi****)*, observed as under:-

> *"12. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it."*

In **AIR (2018) SCC 4011**, titled ***Menoka Malik and others v. State of West Bengal and others***, Hon'ble Apex Court held as under under:-

*"......**14**. It is a well-settled position of law that the testimony of a witness cannot be discarded in toto merely due to the presence of embellishments or exaggerations. The doctrine of falsus in uno, falsus in omnibus, which means "false in one thing, false in everything" has been held to be inapplicable in the Indian scenario, where the tendency to exaggerate is common. This Court has endorsed the inapplicability of the doctrine in several decisions, such as Nissar Ali v. State of Uttar Pradesh, AIR 1957 SC 366, Ugar Ahir v. State of Bihar, AIR 1965 SC 277, Sucha Singh v. State of Punjab, (2003) 7 SCC 643: (AIR 2003 SC 3617), Narain v. State of Madhya Pradesh, (2004) 2 SCC 455: (AIR 2004 SC 2751) and Kameshwar Singh v. State of Bihar, (2018) 6 SCC 433: (AIR 2018 SC 1916). In Krishna Mochi v. State of Bihar, (2002) 6 SCC 81: (AIR 2002 SC 1965), this Court highlighted the dangers of applying the doctrine in the Indian scenario:*

"51....The maxim falsus in uno, falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is, that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P. [AIR 1957 SC 366: 1957 Cri LJ 550]... The doctrine is a dangerous one, specially in India, for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. [(1972) 3 SCC 751: 1972 SCC (Cri) 819]: (AIR 1972 SC 2020) and Ugar Ahir v. State of Bihar [AIR 1965 SC 277: (1965) 1 Cri LJ 256].) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood."

***15.** It is not uncommon for witnesses to make exaggerations during the course of evidence. But merely because there are certain exaggerations, improvements and embellishments, the entire prosecution story should not be doubted. In Ranjit Singh v. State of Punjab (1974) 4 SCC 552 (Sic (2013 AIR SCW 6515 (Para 25)), this Court observed:*

"26. It is trite that even when exaggerations and embellishments are galore the courts can and indeed are expected to undertake a forensic exercise aimed at discovering the truth. The very fact that a large number of people were implicated in the incident in question who now stand acquitted by the High Court need not have deterred the High Court from appreciating the evidence on record and discarding what was not credible while accepting and relying upon

what inspired confidence. That exercise was legitimate for otherwise the Court would be seen as abdicating and surrendering to distortions and/or embellishments whether made out of bitterness or any other reason including shoddy investigation by the agencies concerned. The ultimate quest for the court at all times remains "discovery of the truth" and unless the court is so disappointed with the difficulty besetting that exercise in a given case, as to make it impossible for it to pursue that object, it must make an endeavour in that direction."

This Court in State of Punjabh v. Hari Singh (1974) 4 SCC 552: (AIR 1974 SC 1168), observed as follows:

"16. As human testimony, resulting from widely different powers of observation and description, is necessarily faulty and even truthful witnesses not infrequently exaggerate or imagine or tell half truths, the Courts must try to extract and separate the hard core of truth from the whole evidence. This is what is meant by the proverbial saying that Courts must separate "the chaff from the grain". If, after considering the whole mass of evidence, a residue of acceptable truth is established by the prosecution beyond any reasonable doubt the Courts are bound to give effect to the result flowing from it and not throw it overboard on purely hypothetical and conjectural grounds."

***16.** Thus, it cannot be doubted that it is the duty of the Court to separate the chaff from the grain. Moreover, minor variations in the evidence will not affect the root of the matter, inasmuch as such minor variations need not be given major importance, inasmuch as they would not materially after the evidence/credibility of the eye witnesses as a whole......."*

9(iv). In the backdrop of above legal position, we have seen complete statements of the material witnesses, including PW-1 Sushil Kumar, PW-2 Naresh Kumar, PW-6 ASI Yadav Singh and PW-13 Prabhu Dyal. PW-2 Naresh Kumar is the direct eye witness to the crime and has deposed that he has seen accused beating his wife with wooden block & knife and further that in their (PW-1 & PW-2) presence, accused had thrown deceased Kiran Bala by pulling her from legs and that they had, at that time, seen the victim Kiran Bala seriously injured. It is though correct that PW-1 Sushil Kumar, in his statement, recorded under Section 154 Cr.P.C., had stated that in their presence accused had given beatings to his wife, however, on this particular aspect he had resiled from his statement, while appearing as PW-1. He was accordingly confronted with his such statement Ext.PW-1/A. Nonetheless, this variation will not weaken prosecution case as PW-1 Sh. Sushil Kumar, while appearing as PW-1, has otherwise admitted the entire prosecution case; admitted to accused beating his wife; he has implicated the accused with the murder of Kiran Bala in no uncertain terms by stating that deceased was saved by them (PW-1 & PW-2) from the clutches of the accused; claiming that the accused had proclaimed in their presence that he will kill the deceased; saw the witness deceased lying on the floor in pool of blood with the accused standing there; professing that he has killed his wife and will kill his children and thereafter himself before they got killed by someone else.

9(v). This entire stand is also corroborated by PW-13 Prabhu Dyal also. Therefore, the alleged contradictions pointed out by learned defence counsel are of no significance in the facts and circumstances of the case, more particularly, in view of the statement of PW-2, the eye witness to the alleged occurrence.

10. **Medical Examination/Injuries:**

PW-15 Dr. S.P. Mandal, who conducted the post mortem of deceased Kiran Bala, found antemortem injuries on the body of deceased. According to him, the injuries, as reflected in his autopsy report, could have been caused by wooden block Ext.P-1 and knife Ext.P-2. In his cross-examinatin, he stated that deceased was not having any fracture in the skull. The Doctor (PW-15) finally opined that deceased Kiran Bala died due to shock and head injury caused with blunt weapon. Here it is noticeable that defence of the accused is that deceased had fallen from the lintel.

11. **NON EXAMINATION OF SON OF THE ACCUSED**:

11(i) Learned counsel for the appellant-accused, has contended that the elder son of the accused was a material witness in this case and his non-examination will cause a major dent in the prosecution case. In the peculiar facts and circumstances of the case, in our considered view, non-examination of son of accused will not weaken the prosecution case.

11(ii). True it is, that it was the elder son of the accused, who knocked at the door of PW-2 Naresh Kumar, seeking his help for rescuing his mother from his father, yet, his non-examination has been explained by PW-14 Inspector Ramesh Thakur, in his cross-examination, the relevant portion of which is reproduced below:-

> "The children of the accused were present in adjoining house when I went to the spot. I met the children on spot. I had enquired from the children but they could not understand since they were small and had some language problem. The children were weeping and were not able to understand my quaries and communicate the reply. It is incorrect that eldest son of accused was aged 9-10 years. Volunteered he was approximately 5-6 years old. The children are not cited as witnesses since they could not understand my quaries."

The elder son of the accused was stated to be of approximately 2-3 feet height and aged about 3-4 years by PW-1 Sushil Kumar. As per PW-2 Naresh Kumar, the elder son of the accused was about 3-4 feet in height and aged about 9-10 years. As per PW-14 Ramesh Thakur, the elder son of the accused was approximately 5-6 years of age.

Thus, the elder son the accused, being very young and because of inability to comprehend the language, was not examined by the prosecution. The explanation is plausible. Even otherwise, the prosecution has been able to prove its case against the accused beyond all reasonable doubt, without the elder son having been cited as witness.

11(iii). The defence has not led any evidence either to prove the age of elder son of accused or his ability to comprehend what was going on and, therefore, could appear as a witness.

11(iv). The statements of witnesses, namely, PW-1 Sushil Kumar, PW-2 Naresh Kumar and PW-13 Prabhu Dyal (eye witnesses), are sufficient to implicate the accused with the alleged offence of murdering his wife without elder son of accused stepping into the witness box.

12. **Motive:**

Another argument raised by learned counsel for the appellant-accused, is that there was no motive for the accused to commit murder of his wife. As per him, the professed case of the prosecution is that accused killed his wife and also wanted to kill his entire family because he received a telephonic call from his native place about elimination of his

entire family, therefore, the accused took upon himself the task of eliminating his family before it was accomplished by someone else.

Hon'ble Apex Court in ***Cr. Appeal No.1697 of 2009***, titled ***Sukhpal Singh verus State of Punjab***, ***decided on 12.02.2019***, held as under:-

> *"**15**. The last submission which we are called upon to deal with is that there is no motive established against the appellant for committing murder. It is undoubtedly true that the question of motive may assume significance in a prosecution case based on circumstantial evidence. But the question is whether in a case of circumstantial evidence inability on the part of the prosecution to establish a motive is fatal to the prosecution case. We would think that while it is true that if the prosecution establishes a motive for the accused to commit a crime it will undoubtedly strengthen the prosecution version based on circumstantial evidenced, but that is far cry from saying that the absence of a motive for the commission of the crime by the accused will irrespective of other material available before the court by way of circumstantial evidence be fatal to the prosecution. In such circumstances, on account of the circumstances which stand established by evidence as discussed above, we find no merit in the appeal and same shall stand dismissed."*

In ***(2015) 4 SCC 387***, titled ***Sanjeev*** versus ***State of Haryana,*** Hon'ble Apex Court has held as under:-

> ***"16***. *It is settled principle of law that, to establish commission of murder by an accused, motive is not required to be proved. Motive is something which prompts a man to form an intention. The intention can be formed even at the place of incident at the time of commission of crime. It is only either intention or knowledge on the part of the accused which is required to be seen in respect of the offence of culpable homicide. In order to read either intention or knowledge, the courts have to examine the circumstances, as there cannot be any direct evidence as to the state of mind of the accused."*

In ***(2016) 1 SCC 550***, titled ***Nizam and another*** *versus* ***State of Rajasthan****,* Hon'ble Apex Court has held as under:-

> *"**12**. Based on the evidence of PWs 1 and 2, courts below expressed the view that motive for murder of Manoj was the lust for the money which Manoj was carrying. Courts below based the conviction of the appellants on the circumstances "last seen theory" as stated by PWs 1 and 2 along with recovery of bilty and receipt by PW-6 on which the name of the accused person (Nizam) was printed. The appellants are alleged to have committed murder of Manoj for the amount which Manoj was carrying. But neither the amount of Rs.20,000/- nor any part of it was recovered from the appellants. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence lending assurance to the prosecution case. But even if the prosecution has not been able to prove the motive, that will not be a ground to throw away the prosecution case. Absence of proof of motive only demands careful scrutiny and deeper analysis of evidence adduced by the prosecution."*

In the present case also, prosecution has been able to prove its case on record against the accused beyond all reasonable doubt by leading cogent and reliable evidence.

Therefore, absence or presence of motive on the part of the accused in killing his wife will not be of any significance in the facts of this particular case.

13. **SECTION 106 OF THE INDIAN EVIDENCE ACT:**

Mr. Digvijay Singh, learned defence counsel, relying upon **(2005) 11 SCC 133,** titled **Murlidhar and others** versus **State of Rajasthan**, has contended that Section 106 of the Indian Evidence Act, is not attracted in the present case.

13(i). As has observed earlier, Hon'ble Apex Court, vide order dated 25.10.2017, had remanded the matter to this Court, observing therein that aspect relating to Section 106 of the Indian Evidence Act (hereinafter referred to as the "Act" in short) had not been looked into by this Court in its earlier judgment dated 13.10.2014.

13((ii). In the instant case, it is the accused who had taken the plea of alibi and he has projected the theory of his wife having suffered injuries on account of falling from the lintel. The prosecution has established its case in respect of presence of the accused at the place of occurrence and has conclusively implicated the accused in the offence of murder of his wife Kiran Bala. Under these circumstances, Section 106 of the Act definitely gets attracted. Resultantly, it was for the accused to prove and establish his plea of alibi that his wife suffered fatal injuries on account of fall from the lintel, which he failed to do so.

13(iii). In this regard, reference can be made to **(2014) 12 SCC 211,** titled **State of Rajasthan** versus **Thakur Singh.** Hon'ble Apex Court, in the judgment, held as under:-

> ***15**. We find that the High Court has not at all considered the provisions of Section 106 of the Evidence Act, 1872.[1] This section provides, inter alia, that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.*
>
> ***16**. Way back in Shambhu Nath Mehra v. State of Ajmer this Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well nigh impossible or extremely difficult for the prosecution to prove that fact. It was said: (AIR p.406, para 11).*
>
> *"11.This [Section 101] lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."*

17. *In a specific instance in Trimukh Maroti Kirkan v. State of Maharashtra[3] this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said: (SCC p.694, para 22)*

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

18*. Reliance was placed by this Court on Ganeshlal v. State of Maharashtra[4] in which case the appellant was prosecuted for the murder of his wife inside his house. Since the death had occurred in his custody, it was held that the appellant was under an obligation to give an explanation for the cause of death in his statement under Section 313 of the Code of Criminal Procedure. A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant was a prime accused in the commission of murder of his wife.*

19. *Similarly, in Dnyaneshwar v. State of Maharashtra[5] this Court observed that since the deceased was murdered in her matrimonial home and the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband to explain the grounds for the unnatural death of his wife.*

20.*In Jagdish v. State of Madhya Pradesh[6] this Court observed as follows: (SCC p.503, para 22)*

"22....It bears repetition that the appellant and the deceased family members were the only occupants of the room and it was therefore incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt."

21*. More recently, in Gian Chand v. State of Haryana[7] a large number of decisions of this Court were referred to and the interpretation given to Section 106 of the Evidence Act in Shambhu Nath Mehra was reiterated. One of the decisions cited in Gian Chand is that of State of West Bengal v. Mir Mohammad Omar which gives a rather telling example explaining the principle behind Section 106 of the Evidence Act in the following words: (Mir Mohammad Omar case, SCC p.393, para 35)*

"35. During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise."

***22**. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts."*

In **(2016) 4 SCC 604,** titled **Gajanan Dashrath Kharate** versus **State of Maharashtr**a,Hon'ble Apex Court, held as under:-

*"**14**. In Trimukh Maroti Kirkan v. State of Maharashtra, it was held as under:- (SCC pp.694-95, para 22).*

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of H.P.(1972) 2 SCC 80 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Dr. Ravindra Prakash Mittal (1992) 3 SCC 300 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after

sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill- treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of T.N. v. Rajendran (1999) 8 SCC 679 the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.

Same view was reiterated by this Court in State of Rajasthan v. Parthu ."

In **(2016) 12 SCC 665,** titled **Harijan Bhala Teja** versus **State of Gujarat,** Hon'ble Apex Court, held as under:-

> *"19. Section 106 of the Evidence Act, 1872 provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it is proved on the record that it was only the appellant who was staying with his wife at the time of her death, it is for him to show as to in what manner she died, particularly, when the prosecution has successfully proved that she died homicidal death."*

In ***(2018) 2 SCC 69***, titled ***State of Himachal Pradesh** versus **Raj Kumar***, Hon'ble Apex Court has held as under:-

> *"16. As pointed out by the Sessions Judge, deceased Meena Devi was last seen alive in the company of accused Raj Kumar and the accused did not satisfactorily explain the missing of deceased Meena Devi and the same is a strong militating circumstance against the accused. Meena Devi who was residing in the same house with the accused and was last seen alive with the accused, it is for him to explain how the deceased died. The accused has no reasonable explanation as to how the body of Meena Devi was found hanging from the tree. As held in Kashi Ram case, it is for the accused to explain as to what happened to the deceased. If the accused does not throw light on the fact which is within his knowledge, his failure to offer any explanation would be a strong militating circumstance against him."*

14. In view of the above discussions and observations, we find that the prosecution has been able to prove its case on record against the accused beyond all reasonable doubt. No interference is required in the findings of conviction against the accused returned by learned trial Court. Accordingly, the appeal filed by the appellant-convict, is dismissed and

the judgment of of conviction passed by learned trial Court against the appellant-convict for committing offence punishable under Section 302 IPC, is upheld.

The appeal stands disposed of accordingly, so also the pending miscellaneous application(s), if any.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Shri Mohan Lal ………. Petitioner
Versus
State of Himachal Pradesh & Others …Respondents

CWP No.536 of 2018
Reserved on: 12.07.2019.
Decided on: 19.07.2019

Constitution of India, 1950- Article 226- Claim for damages on account of wrongful act of functionaries of State Govt. – Writ jurisdiction – Maintainability – Petitioner filing writ of mandamus for directing State Govt. to pay damages to him for damage caused to his building and as consequence of which its being declared unsafe for human habitation– Also claiming damages occurring because of his tenants leaving that building– State filing reply and denying any negligence on part of its officials leading to damage to petitioner's building – Held, matter involves serious dispute as to factual matrix of case and damage to his building, causes thereof and liability to pay damages and extent thereof – Writ jurisdiction cannot be availed when there is dispute as to facts of case – Petition dismissed with liberty to petitioner to avail appropriate remedy. (Para 6)

Cases referred:

ABL International Ltd. and Another. vs. Export Credit Guarantee Corporation of India Ltd. and Others, (2004) 3 SCC 553
Gunwant Kaur and others vs. Municipal Committee, Bhatinda and Others, (1969) 3 SCC 769
Joshi Technologies International INC vs. Union of India & Others, (2015) 7 SCC 728
Municipal Corporation of Delhi vs. Uphaar Tragedy Victims Association, (2011) 14 SCC 481
Rabindra Nath Ghosal vs. University of Calcutta and others, (2002) 7 SCC 478
Real Estate Agencies vs. State of Goa and others, (2012) 12 SCC 170
Rudul Sah vs. State of Bihar and Another, (1983) 4 SCC 141
Sanjay Kumar Jha vs. Prakash Chandra Chaudhary & Ors., Civil Appeal Nos.11857-11859 of 2018
Satija Rajesh N vs. State of H.P. & others, LPA No.48 of 2011
State of Bihar and others vs. Jain Plastics and Chemicals Ltd., (2002) 1 SCC 216
State of Kerala and others vs. M.K. Jose, (2015) 9 SCC 433

For the petitioner: Mr. B.C. Negi, Sr. Advocate, with
Mr. Mohinder Zharouick, Advocate.
For the respondents : Mr. Anil Jaswal, Additional Advocate General,
for respondents No.1, 2 & 4.

Mr. Raman Jamlta, Advocate, for respondent No.3/HRTC.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

Instant writ petition has been filed, claiming following releif(s):-

> *"a) That a writ in the nature of mandamus may kindly be issued directing the respondent-authorities make payment on account of damage caused to the building of the petitioner (on account of collapsing of the HRTC Booking Office Building), situated at Khasra Nos.679 and 680 below H.R.T.C. Building at Bus Stand, Theog amounting to Rs.34.00 lacs alongwith interest @ 12% from the date of damage.*
>
> *b) That a writ in the nature of mandamus may kindly be issued directing the respondent-authorities to make good the loss of Rs.30,000/- per month being incurred by the petitioner on account of rent being received from the erstwhile tenants who post damage to the building left the same as the same was declared unsafe and unfit for human habitation."*

2(i). The reliefs reproduced above, have been prayed, primarily on the following factual matrix:-

2(ii). Rapat No.028 **(Annexure P-1 C*olly***), dated 10.07.2017, was filed at Police Station, Theog, District Shimla, on the basis of a telephonic information supplied by Shri Mohinder Mahinder Jharaiak, son of the petitioner, to the effect that:- at Theog Bus Stand, the existing HRTC building has already been declared unsafe; it can collapse at any time during rainy season; and the house of the informant is situated below this building, where tenants also reside.

2(iii). On the basis of this information, another Rapat No.031, dated 10.07.2017**,** was entered to the effect that:- on the spot, building owned by Shri Mohinder Jharaik was below HRTC building, in which cracks had developed; its foundation was displaced; as per *Adda-Incharge,* the building had been declared as unsafe; this was also confirmed by the Regional Manager, HRTC, on telephone, who further informed that the SDO and JEE, HPPWD, would be inspecting the spot; and the tenants were informed about their safety.

2(iv). The HRTC building collapsed on 04.08.2017. F.I.R. No.0138 (Annexure P-2) was registered on 04.08.2017, at Police Station, Theog, Distt. Shimla.

2(iv). After the collapse of HRTC building, the Sub Divisional Magistrate, Theog, District Shimla, vide **Annexure P-3**, dated 05.08.2017, directed the Executive Officer, Nagar Parishid, Theog, to inspect all such buildings, which were in dilapidated conditions, whether belonging to Government/ Municipal Council /Private and which needed to be declared as unsafe. The Municipal Council was further directed to submit report of such unsafe structures. It was also asked to serve notices upon the owners for vacation of such unsafe structures. Petitioner's building figured in this letter, as the one requiring immediate inspection and in case it was found unsafe, notice was required to be given to the owner for its vacation for protecting the lives and property.

2(v). In compliance to the directions of the Sub Divisional Magistrate, the Executive Officer, Municipal Council, Theog, vide communication dated 05.08.2017,

Annexure P-3, directed the petitioner to vacate his building, observing therein that the land strata under the building adjoining to the collapsed HRTC building had become loose, thereby endangering petitioner's building.

2(vi). Petitioner got his building evaluated from a private Valuator vide **Annexure P-4**, dated 21.08.2017, wherein cost of the building has been assessed at Rs.33,16,140/- and Rs.10,00,000/- has been assessed as cost of transportation and for removal of the debris.

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

4(i). Mr. B.C. Negi, learned senior counsel, has contended that the petitioner has suffered damages to his property on account of ill maintained and dilapidated HRTC building, which eventually collapsed, in-turn causing damage to petitioner's property. Post such damage, 11 tenants residing in petitioner's building left, causing him a rental loss of Rs.30,000/- per month. Learned senior counsel further argued that petitioner is entitled for damages as prayed for. He submitted that the petitioner is at least entitled for interim compensation in exercise of writ jurisdiction.

4(ii) In support of his contentions, learned senior counsel, relied upon:- **(i) (1983) 4 SCC 141, titled Rudul Sah versus State of Bihar and Another; (ii) (2002) 7 SCC 478, titled Rabindra Nath Ghosal verus University of Calcutta and others; (iii) (2012) 12 SCC 170, titled Real Estate Agencies versus State of Goa and others; and (iv) (2011) 14 SCC 481, Municipal Corporation of Delhi versus Uphaar Tragedy Victims Association.**

4(iii)(a). The writ petition is resisted on behalf of respondents No.3 & 4 by filing their separate replies. No reply to the writ petition has been filed on behalf of respondents No.1 & 2.

4(iii)(b). Respondent No.4, i.e., Sub Divisional Officer(C), Theog, District, Shimla, in its reply, it has stated that sudden collapse of HRTC building resulted in loss of four lives and damaged the adjoining building of the petitioner and that compensation for the damaged building to the tune of Rs.1,00,000/- has already been paid to the petitioner.

4(iii)(c). The reply filed by respondent No.3/HRTC, is relevant in respect of the issues raised by the writ petitioner, as it is respondent No.3/HRTC, which is the main contesting party. In its reply, HRTC, has disputed all factual averments made in the writ petition. This reply disputes the alleged location of petitioner's building, does not admit it to be located below HRTC building. Reply infact asserts that petitioner's building was itself in dilapidated condition and therefore, damage, if any caused to it, is because of its own precarious condition. It has been denied by HRTC that their building fell over the petitioner's building and in-turn caused any loss to it. It is the specific stand of HRTC that petitioner's building was itself in precarious condition and that is why the petitioner had already got his building vacated from the tenants. The valuation report, got prepared by the petitioner from the Valuator, has not been admitted by HRTC. The reply of HRTC, is that it does not admit any damage having been caused to the petitioner's building by HRTC building.

Thus, in short, the stand of the HRTC is that disputed question of facts are involved in the writ petition. The case of the petitioner fixing liability for the alleged damages to his building, if any, on the part of the HRTC, is not admitted; and it is further asserted by HRTC that even if some damage has been caused to the petitioner's building,

then reasons thereof have to be proved by him, the liability to pay such damage has to be fixed and established, which can be done only by leading cogent and reliable evidence besides determining actual damages, in a Competent Court of Law.

4(iii)(d). In support of its defence, Mr. Raman Jamalta, learned standing counsel representing the HRTC, has relied upon (**2004) 3 SCC 553, titled ABL International Ltd., and another vs. Export Credit Guarantee Corporation of India Ltd. and others.**

4(iii)(e). Learned standing counsel has also relied upon judgment delivered by a Division Bench of this Court in **LPA No.48 of 2011 titled Shri Satija Rajesh N vs. State of H.P. & others.**

5(i). In my considered view, the law relied upon by learned senior counsel for the petitioner, pertains to grant of compensation, in case of claim in public law for contravention of human rights by resorting to constitutional remedies provided for enforcement of fundamental rights. The compensation can be granted, of course, when the Court comes to a definite conclusion that there has been a violation of fundamental right under Article 21 of the Constitutional of India. However, in the present case, the Municipal Council, Theog, has though declared the petitioner's building as unsafe, but, **(a)** whether any damage has been caused to petitioner's building or not; **(b)** whether alleged damage is on account of dilapidated condition of HRTC building or not; **(c)** whether petitioner's building was already existing in precarious condition and suffered damage on its own; **(d)** determination of damage etc.,all these factual aspects need to be gone into for determination of the damages caused to the petitioner's building; extent of damage caused to the petitioner's building; the reasons for such damage; and the liability to pay for the alleged damages. The issues are required to be framed for determination of these complex & disputed facts. The evidence is also required to be led to prove the issues. It is only thereafter that the findings on these points can be arrived at. The decision on these points, on disputed and complex questions of facts, will not be possible in this writ petition, merely on the basis of contentions of the petitioner, which are disputed by the contesting respondent. It will be appropriate in this regard to refer to:

5(ii). **(2015) 7 SCC 728, titled Joshi Technologies International INC verus Union of India & Others.**

> "69.*The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:*
>
> *69.1. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
>
> *69.2. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
>
> *69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.*
>
> ---
>
> *70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of*

which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.”

5(iii). **In (2015) 9 SCC 433, titled State of Kerala and others versus M.K. Jose,** Hon'ble Apex Court considered the issue of maintainability of writ petition on disputed facts and observed as under:-

“13. A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved.”

After taking note of various pronouncements on issue, including **(2002) 1 SCC 216**, titled **State of Bihar and others verus Jain Plastics and Chemicals Ltd.; (1969) 3 SCC 769**, titled **Smt. Gunwant Kaur and others versus Municipal Committee, Bhatinda and Others**; and **(2004) 3 SCC 553**, titled **ABL International Ltd. and Another. vs. Export Credit Guarantee Corporation of India Ltd. and Others**, It was held by Hon'ble Apex Court:-

“20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in ABL International was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract.”

5(iv). **Civil Appeal Nos.11857-11859 of 2018,** titled **Sanjay Kumar Jha versus Prakash Chandra Chaudhary & Ors.,** decided by Hon'ble Apex Court on 05.12.2018. Relevant para of the judgment is reproduced as under:-

“13. It is well settled that in proceedings under Article 226 of the Constitution of India the High Court does not adjudicate, upon affidavits, disputed questions of fact. In arriving at the finding that the land offered by respondent Prakash Chandra Chaudhary was located within Giriyama Mauza of Falka Block the learned Single Bench embarked upon adjudication of a hotly disputed factual issue, which the High Court, while exercising its writ jurisdiction, does not do.”

5(v). A Division Bench of this Court, while deciding LPA No.48/2011, observed as under:-

“29. *The disputed questions of facts have been raised by the writ petitioners, particularly in paras 8, 9 and 10 of the writ petition, which cannot be gone*

through by the writ Court. It was for the writ petitioner to prove, at least, prima facie, the grounds taken in paras 8, 9 and 10 of the writ petition.

30. *The writ Court has made discussions in the judgment as if it was determining a civil suit, after going through the entire trial, i.e. after framing issues and leading evidence.*

31. *The writ Court has also brushed aside the affidavit filed by the Chief Executive Officer of writ respondent No. 2-HIMUDA, who has mentioned in the affidavit that the bid of the successful bidders-appellants in LPA No. 1 of 2011 was received on 14th September, 2006. How the writ Court came to the conclusion that the affidavit of the Chief Executive Officer is not correct or it should have been supported by other affidavits. It appears that the writ Court has fallen in error in returning findings on disputes questions of facts.*

32. *The Apex Court in a case titled as D.L.F. Housing Construction (P) Ltd. versus Delhi Municipal Corpn. and others, reported in AIR 1976 Supreme Court 386, has held that the disputed question of facts cannot be gone through by the writ Court and the writ Court cannot return findings on disputed questions of facts. It is apt to reproduce para 18 of the judgment herein: "18. In our opinion, in a case where the basic facts are disputed, and complicated questions of law*

and fact depending on evidence are involved the writ court is not the proper forum for seeking relief. The right course of the High Court to follow

was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may if so advised, seek their remedy by a regular suit."

33. *The same principle has been laid down by the Apex Court in Daljit Singh Dalal (dead) through L.Rs. Versus Union of India and others, reported in AIR 1997 Supreme Court 1367 and Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others versus Smt. Sukamani Das and another, reported in AIR 1999 Supreme Court 3412.*

34. *The Apex Court in a case titled as State of Karnataka & Ors. versus KGSD Canteen Employees Welfare Association & Ors., reported in 2006 AIR SCW 212, has held that High Court should not exercise its powers under Article 226 of the Constitution of India in cases where disputed questions of facts have been raised.*

It is apt to reproduce paras 37 and 40 of the judgment herein:

"37. In a case of this nature, where serious disputed questions fact were raised, in our opinion, it was not proper for the High Court to embark thereupon an exercise under Article 226 of the Constitution. The High Court in its judgment relied upon a large number of decisions of this court,

inter alia, in Reserve Bank of India (supra) and State Bank of India and others v. State Bank of India Canteen Employees' Union (Bengal circle)

and others (AIR 2000 SC 1518) ignoring the fact that all such disputes were adjudicated in an industrial adjudication.

38. ....

39. ....

40. It was, furthermore, reiterated that a disputed question of fact normally not be entertained in a writ proceeding."

35. *The same view has been taken by the Apex Court in Orissa Agro Industries Corporation Ltd. and others versus Bharati Industries and others, reported in AIR 2006 Supreme Court 198 and Rajinder Singh versus State of Jammu and Kashmir & Ors., reported in 2008 AIR SCW 5157."*

5(vi). In (**2012) 9 SCC 552, paras 176 & 177, the Apex Court relying upon AIR 1952 SCC 12 and (1983) 4 SCC 625,** has held that an interim relief can be granted only in aid of, and as ancillary to, the main releif which may be available to the party on final determination of his right in a suit or proceeding. But power to grant temporary injunction was conferred in aid or as ancillary to the final relief that may be granted. If the final relief cannot be granted in terms, as prayed for, temporary relief in same terms can not be granted.

6. In the facts and circumstances of instant case, there is a serious dispute of facts between the parties about any damage having been caused to the petitioner's building because of collapse of HRTC building; reasons for alleged damages, if any, caused to petitioner's building allegedly already itself standing in dilapidated and precarious condition; liability to pay for such damages; quantification of damages etc.; it is, therefore, not within the writ jurisdiction of this Court to entertain and decide this case on merits under Article 226 of the Constitution of India. Hence, the writ petition is dismissed. However, liberty is reserved to the petitioner to seek appropriate remedy, in accordance with law, for claiming the relief(s) sought for by him. It is, however, made clear that any observation made above is only for the purpose of deciding present writ petition and will not affect the rights and contentions of the parties to be adjudicated by the competent Forum. It is also made clear that period spent in present litigation will not be counted towards limitation for petitioner's availing appropriate remedy by approaching the competent Forum.

With the aforesaid observations, the writ petition stands disposed of, so also the pending miscellaneous application(s), if any.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Ranjha Ram and others .....Appellants/Defendants
Versus
Pankaj Sharma and others ......Respondents/Plaintiffs

RSA No.572 of 2014
Decided on: 19.07.2019

Specific Relief Act, 1963- Section 5- Suit for possession on strength of title– Proof – Trial court decreeing suit for possession – First appellate court dismissing defendants appeal– RSA– Defendants contending that local commissioner was never authorized to demarcate land and demarcation report so furnished should not have been considered- Held, trial court had appointed local commissioner for getting lands demarcated – Said order was accepted by defendants– Demarcation is not shown to be in violation of procedure required to be

followed in demarcation of an estate– Defendants accepted demarcation by signing report– Demarcation revealing encroachment of defendants over suit land– Decree based on said report of local commissioner– Defendants cannot assail order of trial court appointing local commissioner in this appeal– RSA dismissed- Decrees of lower courts upheld. (Para 5)

Cases referred:
Bali Ram vs. Mela Ram and another, AIR 2003 HP 87
Hari Dass vs. State of H.P., 1996 (2) SLC 370
State of H.P. vs. Laxmi Nand and others, 1992 (2) SLC 307

For the appellants: Mr. R.K. Sharma, Sr. Advocate, with Mr. Arun Kumar, Advocate, for the appellants/defendants.
For the respondents: Mr. Jyotirmay Bhatt, Advocate, for the respondents.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(Oral)*

Having suffered two consecutive decrees, the defendant has filed the present second appeal.

2(i). Initially the suit was filed by the respondents (plaintiffs) seeking permanent prohibitory injunction for restraining the defendant (appellants) from 'interfering, causing nuisance and damage and discharging the dirty water of their kitchen, bathroom and latrine towards the suit land comprised in Khata Khatoni No.199/267, Khasra No.3067/2747 measuring 00-06-00 Bighas situated at Mauza Sanchuie, Pargna and Tehsil Bharmour, District Chamba'.

2(ii). The plaint was instituted on 16.05.2009. During the pendency of this Civil Suit No.959 of 2013, the plaintiff moved an application on 22.04.2010, for appointment of local commissioner under Order 26 Rule 9 of Code of Civil Procedure, to report about discharge of dirty water from kitchen, bathroom, latrine etc., onto the land of plaintiff. Defendant also agreed for appointment of the local commissioner.

2(iii). Vide order dated 5.07.2010, learned trial Court appointed Tehsildar Bharmour as the local commissioner to visit the spot and demarcate the entire suit land comprised in Khasra No.3067/2747 measuring 00-06-00 Bighas situated at Mauza Sanchuie, Pargna and Tehsil Bharmour, District Chamba.

2(iv). In compliance to afore order, the local commissioner submitted his demarcation report dated 07.04.2011, Ex. PW2/A. After demarcating the land, the local Commissioner came to the conclusion in Paragraph-9 of his report that defendants had encroached 00-00-14 bighas (14 biswansis) out of the suit land comprised in Khasra No. 3067/2747, which he depicted as Khasra No.3067/2747/1 measuring 0-0-6 bighas and Khasra No. 3067/2747/2, measuring 0-0-8 bighas (in all the 14 biswansis).

2(v) **Plaintiff on the basis of this demarcation report, showing defendants to have encroached 14 biswansi out of the suit land owned by him (plaintiff), with the permission of the learned trial Court, instituted an amended plaint, wherein, he inserted additional paragraph 6-A to the effect that defendant has forcibly taken possession of 00-00-14 bighas of the suit land of the plaintiff, during the pendency of the suit. Accordingly, in addition to earlier sought for decree of permanent prohibitory**

injunction, decree for possession of 00-00-14 bighas was also prayed by the plaintiff. The written statement to the amended plaint was filed by the defendant, where, in response to the newly incorporated paragraph-6A, the demarcation report dated 07.4.2011 was alleged to be the result of connivance between revenue officials and the plaintiff.

2(vi). Parties led their evidence. On the basis of pleadings and evidence led by the parties, learned trial Court, vide its judgment dated 30.04.2014, decreed the suit of the plaintiff. The decree has been affirmed in appeal by the learned first Appellate Court on 18.09.2014. Feeling aggrieved against the concurrent judgments and decrees against him, the defendant has filed instant second appeal before this Court. This appeal was admitted on 01.04.2015 on following substantial question of law:-

> "1) Whether on account of misappreciation of the pleadings and misreading of the oral as well as documentary evidence available on record the findings recorded by learned lower appellate Court are erroneous and as such the judgment and decree impugned in the main appeal being perverse and vitiated is not legally sustainable?"

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

4. Mr. R.K. Sharma, learned senior counsel for the appellants has raised only one issue in the present appeal in context of above question of law regarding mis-appreciation & misleading of evidence. The contentions of learned senior counsel are:-

4(i). **The application was moved by plaintiff seeking appointment of local commissioner for inspecting discharge of dirty water by defendants onto plaintiff's land. Whereas learned trial Court vide order dated 5.7.2010, while appointing local commissioner had wrongly directed him to demarcate the suit land.**

4(ii). Learned trial Court wrongly observed that defendant had not filed objections to the report of local commissioner, whereas same were actually filed.

4(iii). Decision & rejection of such objections by learned first Appellate Court has deprived the defendant/appellant benefit of judgment of learned Trial Court, causing him prejudice.

4(iv) No other point has been urged by learned senior counsel.

4(v) Mr. Jyotirmay Bhatt, learned counsel, for the plaintiff has supported the judgments and decrees in favour of plaintiff.

5. I have carefully gone through the record. In my considered view, the contentions raised by Mr. R.K. Sharma, learned senior counsel for the appellants/defendants, vis-a-vis the question of law, merit rejection:-

5(i). **The order dated 5.7.2010, passed by learned trial Court, appointing the local commissioner & directing him to demarcate the suit land had been accepted by the defendant. He accordingly, pursuant to this order participated in entire demarcation exercise, conducted by the local commissioner. And thereafter put his signatures in the demarcation report, treating it as correct. Having done so, now, it is not open to the defendant to contend that local commissioner should not have been ordered to demarcate the suit land. More so, when encroachment over the suit land to the extent of 14 biswansi by the defendant has come to fore in the demarcation report. It would also be profitable to refer to the judgment passed in AIR 2003**

Himachal Pradesh 87, titled as Bali Ram, V. Mela Ram and another, wherein it was held as under:-

> "13. Rule 9 of Order 26 of the Code of Civil Procedure (hereafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case."

5(ii). In any case, the plaint had been amended on the basis of the report of local commissioner with the permission of the learned trial Court. To this amended plaint, the defence in the written statement on the aspect of report of local commissioner was that the same is the result of connivance between the plaintiff and the revenue officials. It was for the defendant to prove the alleged connivance, which he failed to prove.

5(iii). Also, no prejudice could be said to have been caused to the defendant by the learned trial Court not specifically rejecting his objections against the report of the local commissioner. True it is, that learned trial Court had erroneously observed that defendant had not filed any objection to the report of local commissioner, yet a perusal of the judgment passed by the learned trial Court shows that it has effectively dealt with the report of local commissioner. Learned trial Court also considered the fact that demarcation report Ex-PW2/A has been signed by defendant and the same was treated to be correct by him.

5(iv). The report has also been discussed at length by the learned first Appellate Court. In fact, the objections of defendant against the report of local commissioner were discussed thread bare and rejected by learned first Appellate Court. It has been rightly held by learned first Appellate Court that the demarcation of the suit land has been carried out by the local commissioner in accordance with prescribed procedure. The report of the local commissioner is in accordance with procedure prescribed, as per instructions contained in **(i)** Chapter 10 Sub Clause 10.2 by the F.C. Revenue, in the H.P. Land Records Manual as well as in accordance with **(ii)** directions of this Court in case titled as **Hari Dass Vs. State of H.P**. 1996 (2) SLC 370 & in case titled as State of **H.P. vs. Laxmi Nand and others**: 1992 (2) SLC 307. Due notices to both the parties as well as to the adjoining land owners were given by the local commissioner. The demarcation was conducted on the basis of triangular method after fixing three pucca points with the consent of the parties. Pucca points were verified and accepted by both the parties, whereafter, the suit land and the adjoining land was measured. Thereafter, the demarcation report was prepared, wherein, it was found that the defendant had encroached upon 14 biswansis shown in tatima as Ex.PW2/D out of the suit land owned by the plaintiff. This was admitted to be correct by the parties as well as adjoining land owners and the statements to this effect were recorded vide Ex.P2/B. After accepting the demarcation report as correct and putting signatures on

the report, it is not even otherwise open for the defendant/appellant to contend that demarcation report is not correct.

5(v). The local commissioner Shri Vijay Kumar, Tehsildar, had also stepped into witness box as PW-2 and stated that demarcation report Ext.PW-2/A is prepared in accordance with prescribed procedure. No fault with the procedure adopted by the local commissioner for demarcating the suit land could be pointed out by the defendant at any stage. It was also not the case of the defendant that he was not present on the spot or that he had not signed demarcation report treating it as correct.

5(vi). Evenin this appeal, it has not been pointed out, as to how report of the local commissioner is not in accordance with prescribed procedure & law and as to how prejudice has been caused to the defendant.

6. There has been no mis-appreciation & misreading of pleadings and evidence by the learned Courts below. Substantial question of law is answered accordingly.

7. No other point has been raised on behalf of the appellants.

8. In view of the above discussions, the present appeal is devoid of merit and the same is accordingly, dismissed.Pending application(s), if any, also stand disposed of accordingly.

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

Prem Singh …Petitioner.
Versus
Kuldeep Singh and another ….Respondents.

Civil Revision No. 212 of 2018
Reserved on:19.7.2019
Decided on : 25.7.2019

Code of Civil Procedure, 1908– Order XXXIX Rules 1 & 2– Temporary injunction– Grant of– Held, where necessary pleadings and material on record do not suggest existence of prima facie case and balance of convenience in favour of party, it is not entitled for temporary injunction. (Para 5)

For the Petitioner: Mr. G.C Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the Respondents: Mr. Sumeet Sood, Advocate, for respondent No.1.
Mr. Naresh K Gupta, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

During, the pendency of the plaintiff's suit (i) wherethrough the plaintiff/ respondent No.1 herein (for short the plaintiff), strived for rendition of a decree for permanent prohibitory injunction, and, mandatory injunction, vis-a-vis, the purported

unauthorized construction raised, upon, the defendants' building comprised in khasra No. 120, situated at Mohal Totu, Tehsil and District Shimla (for short "suit property"), (i) hence, the plaintiff through an application, cast under Order 39 Rule 1 and 2, strived to obtain relief, of, ad-interim injunction, for, hence, during, the pendency of the suit, the defendant being restrained, from, raising the afore purported unauthorized construction, upon, the suit property.

2. The learned trial Court, declined, the apt relief to the plaintiff, and, the aggrieved plaintiff, upon, motioning the learned District Judge begot success upon CMA No. 46-S/14 of 2017, and, the defendant being aggrieved therefrom, hence, has instituted the instant petition before this Court.

3. The learned counsel(s), appearing for the contesting litigants, made a forthright submission before this Court, that, vis-a-vis, the purported unauthorized construction, raised by the defendant, upon, the suit property hence statutory proceedings standing drawn against him, by the Municipal Commissioner, of, MC Shimla. However, the drawing of, the, afore statutory proceedings, against the aggrieved defendant, would not constitute, any, valid embargo against the plaintiff, to, within the ambit of law, espouse for obtaining the relief of mandatory, and, permanent prohibitory injunction, nor, the plaintiff would be barred to, during the pendency of the apposite Civil Suit, (a) make strivings for an order being made qua, during, the phase of lis being sub judice, before the learned trial Court, hence the defendant being restrained, from, raising any purported unauthorized construction, upon, the suit property. Moreover the statutory bar, against the Civil Court(s) hence entertaining any suit for declaring void, the, drawing(s) of apposite statutory proceedings, by learned Commissioner, would work, only against the defendant, and, would not work against the plaintiff.

4. Be that as it may, as afore-stated, dehors the drawing of statutory proceedings against the defendant, the rearing of apt proceedings, yet, for the purpose of legitimizing, the, afore declining of relief, vis-a-vis, the plaintiff, enjoins apt pleadings being borne, in the plaint vis-a-vis (a) upon the defendant hence not leaving the requisite setbacks, in the, apposite portion hence segregating, his, building from the building of the plaintiff, thereupon, valuable right(s) of the plaintiff, appertaining to easementary right(s), of air and light rather being the imminent causality (b) also apposite material with evident display therein qua in contemporaneity, vis-a-vis, casting of the afore application, hence engendering, a, conclusion, qua hence, a, prima-facie case exists in favour of the plaintiff, qua besides, balance of convenience being loaded, vis-a-vis, the plaintiff, and, also hence irreparable loss and injury being encumbered, upon the plaintiff, if, the espoused relief is declined qua him. Consequently the afore would ensure, the, making of a firm conclusion qua hence equity being loaded, vis-a-vis, the plaintiff, and, would also ensure, the, making of an invincible inference qua the plaintiff, rather holding an indefeasible right, qua the espoused relief being granted to him, during, the phase of, the, lis being sub judice, before the learned trial Judge.

5. Though the learned trial Court, made an apt conclusion, from the pleadings, and, material existing thereat, yet the learned District Judge has, dehors pleadings in satiation, vis-a-vis, the afore imperative parameters, and, obviously, dehors, any material existing rather for satiation being meted, vis-a-vis, the afore trite tests, has proceeded to disturb, the, order pronounced, by the learned trial Court. In making the afore conclusion, the learned District Judge has made, an, allusion to a plethora of judgments, as, stood recited in the impugned order. However, a perusal of the afore judgment, coaxes an inference, that though the plaintiff, being entitled to cast a suit for rendition of decree, of mandatory as well as of a permanent prohibitory injunction, and, also during, the phase of,

the, lis being sub judice before the learned trial Court, the latter being empowered to grant temporary injunction, for, therethrough the defendant being temporarily restrained, to proceed with the purported unauthorized construction, yet the afore legal latitudes or enable-ments bestowed threthrough, upon the plaintiff, are, restricted, and, trammeled by (a) imperative pleadings being cast in the application, vis-a-vis, upon purported violation, of, the apposite bylaws hence prejudice, injury or harm being caused, upon, the defendant and (b) material in consonance therewith being adduced, and, rather its displaying qua the afore triplicate tests hence prima-facie begetting apt satiation(s), (c) whereas, as aforestated the afore requisite pleadings remained uncast in the suit, and, also in the application, and, nor when obviously, no material in satiation thereof, is appended, with the plaint or with the extant application, (d) thereupon when there was a dire necessity, even, in the citations referred, by the learned District Judge, in, the impugned order, hence cast, upon, the plaintiff to therethrough hence make a valid striving(s) to claim, the espoused relief, whereas, the afore dire necessities, remaining unrecoursed, by the plaintiff, (e) thereupon the citations alluded to by the learned District Judge in the impugned order were workable only, upon, the afore being recoursed, (f) whereas the lerned District Judge, without delving deep, into, the afore necessities, cast therein, upon, the plaintiff, and, when the afore necessities, for the reasons afore-stated, rather remained both un-recoursed, and, unmeted satiation, (g) thereupon, the learned District Judge, has committed, a gross fallacy, in merely, upon, placing reliance upon the judgments mentioned in the impugned order, and dehors the afore imperative necessities being recoursed, to hence proceed to make, the, impugned order.

6. In view of the above, there is merit in the petition. The same is accordingly allowed. Impugned order is quashed and set aside. All pending applications stand disposed of accordingly.

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

Union of India …Petitioner

Versus

M/s Vij Enginer & Construction Pvt. Ltd …Respondent

CARBC No. 5 of 2018

Reserved on 18.7.2019

Decided on : 25.7.2019

Arbitration and Conciliation Act, 1996– Section 31 (7)– Interest– Award of, with respect to pre-arbitration period– Held, arbitrator is empowered to award interest on defaulted sum(s) falling in the interregnum since accrual of cause of action till the date award is made by him. (Para 1)

For the petitioner : Mr. Balram Sharma, Central Government Counsel.

For the respondent : Mr. Rakesh Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner herein, stands aggrieved, by the award pronounced by the

sole Arbitrator, hence through, the instant petition, cast under the provisions of 34 of the Arbitration and Conciliation Act, 1996, it, strives, to, beget its reversal. The learned Arbitrator, vis-à-vis, the contesting claims, reared before him, by the litigants, had dis-allowed claim No. 1(a), and, vis-à-vis, claim No. 1(b), appertaining to levying of interest, on the defaulted amount, proceeded, to, on anvil of Section 31(7) of the Act, provisions whereof, stand extracted hereinafter, and, in consonance therewith hence levied interest thereon:

> *"**31. Form and contents of arbitral award:** (7) (a) Unless otherwise agreed by the parties, here and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the awards is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made".*

Therethrough, a statutory leverage, stands purveyed, to him, to award interest, on, the defaulted sum(s), a) at such rates, as deemed, reasonable, b) levying of interest, on the awarded sum(s), covering the periods, falling in the interregnum, since the accrual of cause of action, and, the date whereat the award, is, made, (c) hence the latter portion of the apt statutory provisions, empowers the Arbitrator, to award even pre-adjudication interest, or he stands empowered, to levy ante lis interest, on the relevant adjudicated sum(s), of, money. Further more, since the respondents, in their pleadings, borne in para-2, visibly acquiesce, to the afore levying of interest, vis-à-vis, the defaulted sum(s) of money, (d) thereupon hence in the sole Arbitrator, vis-à-vis, claim No. 1(b), rather levying pre-reference interest, upon, the acquiesced defaulted amount, has not committed, any impropriety or illegality. Consequently, the apposite levying(s), of, pre-reference interest, in the manner, as borne in para-45, and, 46, of the Award, as rendered by the Sole Arbitrator, does not merit, any interference.

2. Furthermore, the Sole Arbitrator, vis-à-vis, the claim reared therebefore, by the respondent herein, and, working towards escalation, and, Damages, had depended, upon, the concurrent therewith, admissions made by the petitioner herein, and, hence under the afore head of claim, he, awarded a sum of, Rs. 831853/- to the respondent herein. Consequently, hence with the afore claim, being admitted, by the petitioner herein, thereupon the relief granted, qua therewith, vis-à-vis, the respondent herein, is, both, just and fair, and, warrants no interference, besides, the quantum, of, levying(s) of interest, thereon is also not interfereable.

3. In addition, the Sole Arbitrator, vis-à-vis, the claim reared by the respondent herein, and, appertaining, to, loss of profit, vis-à-vis, the afore statutory claim, had awarded, a sum of Rs. 30,63,277/-,and the reasons assigned, for, his awarding, the afore sum(s) of money, under, the afore head, (a) ensues from, the petitioner(s) herein, evidently, failing to perform their part, of contract(s), (b) and also when the awards of money(s) under the afore recorded claims, of, the respondents herein, is not reared, as a, ground before this Court, for it hence making an intereference therewith, therefrom the awarding, of, claim No. 3, by the sole Arbitrator, vis-à-vis, the respondent herein, also does not, merit any interference.

4. Be that as it may, since, sum Rs. 4,37,000/- was also determined, vis-à-vis, the respondents herein, under claim No. 5, appertaining to profit Loss, on balance work, due to foreclosure, and, since apposite grounds, for casting any challenge thereon, rather remained un-constituted herebefore, thereupon the afore portion, of, the award, is, also

maintained. The cost of reference, under claim No. 7, is, also upheld.

5. The awarding(s) qua supplementary claim, No. 1, vis-à-vis, the respondent herein, and, arising from introduction of GST, remains un-contested, by the respondent/petitioner herein, (i) thereupon awarding of sum(s) of Rs. 11,50,002/-, under, the afore head also does not warrant any interference.

6. Even though, the petitioner herein, did not rear, any objections, vis-à-vis, the espoused claims, on anvil, qua theirs being time barred, (i) yet, during the course, of, hearing of this petition, the learned counsel for the petitioner, has contended, that the recoursing(s) by the respondent herein, hence, the aegis, of, Arbitration, rather being time barred (i) and also he has made a concomitant therewith espousal, before this Court, that, the entering upon reference(s), rather by the learned Arbitrator, upon time barred claims, being invalid, consequently, also the awarding of sum(s), under certain heads, being stained, given the requisite claims being time barred, (ii) however, since the afore objections, are raised only before this Court, thereupon they are impermissible, for being reared herebefore iii) moreso, when even at the stage of the sole Arbitrator, hence entering, upon, the reference made to him, by the contracting parties, no apposite objection therewith, rather stood raised, by the petitioner herein, nor even when at the afore stage, the petitioner herein, through, making recoursing(s), to all the legal processes, hence strived to seek, an order for restraining the sole Arbitrator, to enter upon a purportedly time barred reference, c) thereupon the afore objection, is, construed, to be surmisely raised, and, also, hence the petitioner is estopped, to, at this belated stage, hence make the afore contention, d) as any permission, to the petitioner/herein, to raise the afore objection, only at this belated stage, rather would gravely prejudice, the, respondent herein, to, despite certain sum(s), of, money, being awarded, qua the claims, reared by him, before the learned Arbitrator, his being, on the afore purported stain, being deprived, to, seek realization thereof.

6. Even otherwise, the merit of the afore claims is to be adjudged, on anvil of the respondent herein, making repeated endeavors, even prior, to the reference, and, even prior to the entering thereinto, hence, by the sole arbitrator, (i) the apt repeated, and, umpteen recorded correspondence(s) made with the petitioner herein, for therethrough the latter relenting, to, liquidate to him, the un-contested claims, and singularly appertaining, to the works, already completed, by him (ii) and, when no evidence has emerged, vis-à-vis, the afore un-contested claims, of, the respondent/Contractor, not appertaining, to, certain admitted claims of the Contractor, or being not anchored, upon the afore factors, rather when qua therewith, the respondent herein, had, made recorded abortive umpteen correspondences, with, the petitioner, (iii) thereupon, the, time, of, accrual of cause of action, vis-à-vis, the claims reared by the Contractor, against, the petitioner herein, commences from the stage whereat the petitioner, made dis-affirmative responses, qua the recorded umpteen correspondences, made with it, by the petitioner/herein, and, when therefrom, the rearing of claims, is, within the realm limitation, thereupon the claims, are, not construable to be either time barred, nor the award, can be stained with any vice of any illegality.

7. Consequently, there is no merit in the petition and the same is dismissed. All pending application(s), if any, are also disposed of. No costs.

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

Sh. Krishan Chand and others …. Petitioners.

Versus

Sh. Gian Chand and others. ….Respondents.

CMPMO No. 141 of 2019
Decided on : 24.7.2019

Himachal Pradesh Land Revenue Act, 1954 –Section 130– Partition of joint holding - Mode of partition – Objections thereto– Held, objections to mode of partition should be raised at the earliest– Objection not raised before revenue officer(s) cannot be permitted to be raised by way of petition under Article 227 of Constitution- Petition challenging mode of partition on grounds not raised before revenue officer(s) dismissed. (Paras 2 & 3)

For the Petitioners: Mr. Rajesh Mandhotra, Advocate.
For the respondents: Mr. Ajay Chandel, Advocate, for respondents No. 1 to 6.
Mr. Hemant Vaid, Addition al Advocate General with Mr. Vikrant Chandel and Mr. Yudhveer Singh Thakur, Deputy Advocate General(s) for respondent No.7.
Ms. Tim Saran, Advocate, for respondents No. 8 to 13.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Through the instant petition, cast under article 227, of Constitution of India, the petitioners challenge, the, order borne in Annexure P-7, wherethrough, the petitioners' Revision Petition No. 78 of 2018, hence, stood dismissed. The dispute engaging the contesting litigants, appertains, to the validity of drawing of mode of partition, vis-a-vis, the joint holdings comprised in Khewat/Khatauni No. 58/66-67, Kita 6, area measuring 2-70-76 hectare, situated in village Khudla/488, illaqua Hatali, Sub Tehsil Baldwara, Tehsil Sarkaghat, District Mandi, H.P (for short "joint holdings").

2. The genesis of the afore dispute, arose, in the year 1998, whereat the predecessor-in-interest of the respondents herein, had, instituted an application, before the Revenue Officer concerned, hence, seeking therethrough dismemberment of the joint estate, inter-se, them and the petitioners herein, rather through metes and bounds. However, the afore endeavor of the predecessor-in-interest of respondent No.1 herein, stood, hotly contested, by the petitioners herein, on, the ground of theirs acquiring title, vis-a-vis, the joint holdings rather by adverse possession, (i) and, thereupon they espoused that the predecessor- in-interest of respondent No.1 herein, held no valid title in the joint holdings, nor, hence he can motion the Revenue Officer concerned, for, seeking dismemberment of the joint holdings, rather through metes and bounds. However, In paragraph 7 of Annexure P-7, the afore plea was negated by all the Revenue Courts, and, also this Court vide its judgment of 17.10.2014, hence, upheld the pronouncements made by the Revenue Courts, and, thereupon, it is invincibly concluded that (a) the respondents held, a, valid, and, subsisting right qua the joint holdings, and, also they had, a, valid right to seek its dismemberment, through, the aegis of Revenue Officer(s), rather, through metes and bounds. Since conclusivity, vis-a-vis, the findings qua the afore facets, is hence acquired, thereupon, an,

alike therewith challenge, cast by the petitioners herein, warrants its rejection, as otherwise, it would make conflict with the solemn principle, of res judicata, and, of the principle of estoppel.

3. Further more, the objections raised by the petitioners herein, vis-a-vis, the afore motion of the respondents herein, (i) statutory motions whereof, were, contested by the petitioners herein, by raising objections, vis-a-vis, the validity, of, the drawing of mode of partition, (ii) however, as concluded in paragraph 8, of, the impugned order, the objections raised therein, are not, the ones which stand nowat raised, by the petitioners herein, (iii) thereupon, when at the initial stage of the petitioners objecting to the drawing(s) of the mode of partition, they had an opportunity, to, raise all objections inclusive the one raised hereat, and, when they omitted to raise objections, vis-a-vis, the validity of drawing of mode of partition, (iv) thereupon, theirs rearing fresh objections to the mode of parties, despite conclusivity standing acquired, vis-a-vis, the earlier order hence rejecting their objections, is, squarely and directly hit, by the principle constituted, in, Order II Rule 2 of Code of Civil Procedure, wherein it is graphically postulated, vis-a-vis, all objections being rearable at the outset, also, the afore principle rather barring them, to, rear fresh cause of action or rather fresh objections.

In view of the above, the present petition stands dismissed alongwith all pending applications.

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

Swaroop Thakur .....Petitioner

Versus

Chaman Lal & others ....Respondents.

CMPMO No. 495 of 2018
Reserved on 15.7.2019
Date of decision : 25.07.2019

Code of Civil Procedure, 1908– Order XXXIX Rules 1 & 2– Temporary injunction– Grant of- Plaintiff filing petition against order of trial court declining temporary injunction to him- Held, in previous litigation, plaintiff was denied relief of injunction by court– Second litigation also on same facts-Plaintiff, his brothers and sisters already in possession of land in excess of their shares- Their possession not under any valid family arrangement– Plaintiff not entitled for temporary injunction. (Paras 2 to 4)

For the petitioner: Mr. G. D. Verma, Sr. Advocate with Mr. Ramesh Verma, Advocate.

For the respondents: Mr. B. S. Chauhan, Sr. Advocate with Mr. Munish Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The aggrieved plaintiff, has, through the instant petition, hence cast a challenge, upon, the concurrently recorded verdicts, upon, his application, cast under the provisions, of Order 39 Rules 1 and 2 CPC, wherethrough, the espoused relief, vis-a-vis, an interim injunction being pronounced, vis-a-vis, the suit khasra numbers, and, against the defendants, rather stands declined qua him.

2. The learned counsel, appearing for the petitioner, has contended, with much vigor, before this Court, (i) that, with the suit property being undivided, amongst the contesting litigants, thereupon, in consonance therewith, hence, an, enjoined necessity, stood cast, upon, both the learned courts below, to accord the espoused relief, vis-a-vis, the plaintiff, (a) unless cogent material stood therebefore, hence adduced, in display, vis-a-vis, the plaintiff, petitioner herein, hence in the joint khata/khasra numbers, raising construction rather beyond or in excess of his share therein, (b) or unless, the defendants also standing displayed rather by apposite cogent material qua theirs' raising construction, upon, a portion, of, purported jointly owned suit property, hence, carrying equivalent, and, comparable monetary value(s), vis-a-vis, the value of the contested portion, of, the purportedly undivided suit property, (c) thereupon, the, declining(s), vis-a-vis, the plaintiff, the relief of injunction, would ensure qua equity being balanced, (d) whereas, he contends that with the plaintiff raising construction, within his share, in the undivided suit property, and, also with the defendants, completing constructions, upon, a portion of the suit property, hence, holding co-equivalent monetary value, vis-a-vis, the contested portion, of, the undivided suit property, (e) thereupon, it was un-befitting, for, both the learned courts below, to, decline the espoused relief, vis-a-vis, the plaintiff.

3. However, the afore contentions, reared before this Court, by the learned counsel for the petitioner, are, illusory as (i) there does not exist any material on record, for, hence succouring the afore espoused relief, (ii) rather a perusal of the concurrent verdicts, rendered, by both the courts below, making disclosure(s), qua, given consclusivity, and, finality, standing acquired, vis-a-vis, an earlier pronouncement, recorded, upon, Civil Suit No. 7 of 2011, (iii) and, with the contesting litigants thereat being similar, vis-a-vis, the contesting litigants hereat, (iv) and, also the suit khasra numbers therein, being similar, and, analogous, vis-a-vis, the suit khasra numbers, rather hereat, (v) thereupon all the requisite effects, of, the afore conclusive, and, binding verdict, spurring from, the afore similarity(ies) inter-se the thereat pleadings, and, vis-a-vis, the ones' raised in the instant suit, and, in the instant application, hence gain the apt galvanised momentum, (vi) thereupon both the learned courts below, in, recording concurrent verdicts against the plaintiff, and, resting their verdicts, upon, the afore assigned reasons, do not, ovbiously commit any impropriety, (vii) and, the concomitant effect thereof, is qua, when it is also borne out, from the records qua (viii) allotment of the suit land, was hence not made, vis-a-vis, the plaintiff, rather through any valid family arrangement, (ix) and, also with the earlier hereto relief of injunction being declined, vis-a-vis, the plaintiff, (x) given the plaintiff and his brothers and sisters, holding hence possessions, in the joint khewat, rather in excess, of their shares therein. In aftermath the afore espousals made before this Court, are unmeritworthy, and, hence stand rejected.

4. In view of the above observations, there is no merit in the instant petition, and, the same is accordingly dismissed, and in sequel, the impugned orders, are, affirmed, and, maintained. However, it is clarified that in case, the apt computation, vis-a-vis, the plaintiff, exceeding or not exceeding, his shares in the land jointly, held by him along with the defendants, and, as maybe required to be made, from khewat/khata/suit khasra numbers, other than the ones, qua, wherewith, the relief is espoused in the instant suit, and, in the instant application, (i) and, if the afore pleadings, do not exist, in the instant

suit, (ii) thereupon the plaintiff may, if permissible under law, and, with the leave of the court, cast an application, before the learned Civil Judge concerned, and, if the afore leave, in accordance with law, is granted by the learned Civil Judge concerned, (iii) thereafter, at an appropriate stage, it may be permissible for the plaintiff, to strive, to modify the impugned order, concurrently recorded, by both, the learned courts below.

5. Any observation made herein above, shall not, be taken as an expression of opinion, on the merits of the case, and, the trial judge shall decide the matter uninfluenced, by any observation, made, hereinabove.

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

Sanjay Sharma and others …Petitioners.

Versus

Smt. Sudarshana Devi Sood and another ….Respondents.

Civil Revision No. 44 of 2019
Reserved On: 18.7.2019
Decided on : 25.7.2019

Code of Civil Procedure, 1908– Order XI Rules 1, 2 & 4- Interrogatories, what are and purpose of? Held, interrogatories are questions posed by a party to its adversary with a view to elicit any matter in question– Interrogatories must have reasonably close connection with matter in question– Any material which can be elicited through cross examination of adversary cannot construed to be necessary or relevant for purpose of interrogatories– Nor the purpose of serving interrogatories is to obtain an answer, what will be evidence of other side or what evidence it intends to lead in support of its case? Whether eviction suit is bonafide or not can be got elicited by tenant during cross examination of landlord and his witnesses– Dismissal of application of tenant for serving of interrogatories on landlords qua number of building owned by them in Shimla town, is proper– Petition dismissed. (Paras 4 & 5)

For the Petitioners: Mr. Rakesh Chaudhary, Advocate.
For the Respondents: Mr. Sumit Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The landlords/respondents herein, instituted petition, before the Rent Controller, Shimla, District Shimla, H.P., seeking therethrough eviction, of, the tenants/petitioners herein, from the, demised premises, on the ground, that, they bonafidely require it, for, their personal use. The afore petition was contested by the tenants/petitioners herein. On the contentious pleadings of the contesting parties, the learned Rent Controller framed the requisite issues. When the afore petition had reached, at the stage, of adduction of the petitioners' evidence, applications cast, under the provisions of Order 11 Rules 1,2 and 4 readwith section 151 CPC, stood instituted, before the learned Rent Controller, seeking therethrough meteing of answers, to, certain interrogatories, hence

(a) devolving upon the landlords' petition for eviction, vis-a-vis, the demised premises, being not bonafide, given, the afore premises being not required by them, for, theirs establishing therein, any commercial enterprise, (b) and, for also purportedly repulsing the landlords hence propagation, qua, within 5 years, from, the date, of, filing of the petition theirs, hence vacating any commercial establishment, occurring, within the jurisdiction of Municipal Corporation, Shimla. Reiteratedly, therethrough, the tenants/applicants/petitioners herein strive, to, stain the aforestated grounds, with an aura of malafides, and, obviously also concert, to, bely the afore endeavors. However, as afore-stated, upon, the apposite issue the discharging evidence thereon rather remained un-adduced by the petitioners herein, and, obviously, onus, after closure of the petitioners'/landlords' evidence, rather thereat, the respondents, may, avail an opportunity, to, adduce evidence in rebuttal, to, the discharging evidence, hence adduced by the petitioners therein, vis-a-vis, the relevant issue, (c) besides obviously also through meteing suggestions, to the petitioners'/landlords' witnesses, during, the course of each being cross-examined, hence apt strivings were recourse-able, for, belying the afore-stated grounds, for, eviction hence purveyed, in, the apt eviction petition.

2. Be that as it may, the interrogatories wherefrom the discovery of evidence, for, succoring the tenants/petitioners herein propagation, are, extracted hereinafter:-

"1. How many non residential premises are owned by father in law of the petitioner No.2 namely Sh. Narender Kumar Sood within the urban area of M.C. Shimla including the property owned by him and inherited by him.

2. How many accommodations have legally fall in the share of Narender Kumar Sood within the urban area of M.C Shimla.

3. That how many storeys/floors are therein in the said building.

4. How many rooms in each storeys of the said building are constructed.

5. How many rooms/shops are rented out in the building owned by Sh. N.K Sood.

6. How many rooms in the said building owned by Sh. N.K Sood are rented out for commercial purpose/shops guest house, boutique readymade garments stores or for any other commercial purposes.

7. How many rooms in the first floor, i.e above the road level floor are rented out for residential purpose and how many rooms are rented out for non-residential/commercial purpose and who are the tenants and what is the nature of use of the premises in the building of Sh. N.K Sood.

8. What is the Municipal number of the building owned by the father in law of the petitioner No.2 Smt. Archna Sood namely Sh. Narender Kumar Sood.

9. How many floors/stories are there in the building owned by said Sh. Narender Kumar Sood.

10. How many tenants have been inducted in the building of Sh Narender Kumar Sood Ram Bazar Shimla.H.P.

11. How many rooms are there in each stories of the said building of Sh. Narender Kumar Sood.

12. How many rooms/shops are rented out in the said building of Sh. Narender Kumar Sood.

13. How many rooms in the said building of Sh. Narender Kumar Sood are rented out for commercial purpose/shops, guest house, boutique readymade garments stores or for any other commercial purposes.

14 How many rooms in the first floor i.e above the road level floor are rented out for residential purpose and how many rooms are rented out for non-residential commercial purpose and who are the tenants and what is the nature of use of the premises in the said building of Sh. Narender Kumar sood.

15. How many premises in the said building of Sh. Narender Kumar Sood are lying vacant and how many are being occupied alongwith the details of the tenants and the nature of use of the premises and the business being carried from the non-residential/commercial premises.

16. Whether any petition or case for eviction against Sh. Surjan Singh Kukreja owner/proprietor of Frontier Cloth House, Lower Bazar Shimla has been initiated by Sh. Narender Kumar Sood.

17. If so what is the ground on which the eviction of the tenant Sh. Surjan Singh Kukreja is sought by Sh. Narender Kumar Sood.

18. What is the status of the case filed against Sh. Surjan Singh Kukreja by Sh. Narender Kumar Sood.

19. Whether Sh. Rupain Sood has obtained any CST or GST number for the purpose of doing any business.

20. Whether Sh. Rupain Sood has obtained licence from M.C Shimla or any other competent authority under shop and commercial establishment act to run the shop/business.

21. What is the Municipal number of the premises in which Sh. Rupain Sood is residing.

22. What is the address given by Sh. Rupain Sood before the different authorities with regard to the address of his shop/business.

23. What is the qualification of the petitioner No.2.

24. Whether the petitioner No.2 had an course or diploma in the business or trade.

25. How many floors/stores have been rented out to M/s Ram Chander Rewa Nand in the building owned by Narender Kumar Sood with complete description of the accommodation and the floors/stories running the business of grocery and using the rented premises for store/godown."

3. Upon the afore applications, an order of dismissal was pronounced by the learned Rent Controller, and, the petitioners herein being aggrieved therefrom, cast a challenge thereon, by theirs instituting the instant petition before this Court.

4. Initially, the expostulations of law appertaining to the justifiability of the afore application are encapsulated, in a judgment, reported in AIR 1972 SCC 1302, rendered in a case titled as Raj Narain v. Indira Gandhi, relevant paragraph 27 thereof, is extracted hereinafter:-

"27. **Questions that may be relevant during cross-examination are not necessarily relevant as interrogatories. The only questions that are relevant as interrogatories are those relating to "any matters in**

question". The interrogatories served must have reasonably close connection with "matters in question". Viewed thus, interrogatories 1 to 18 as well as 31 must be held to be irrelevant

5. A perusal thereof makes a candid echoing, vis-a-vis, (a) question(s) borne in the interrogatories rather when, can be, endeavored for elicitation, of, answers thereto, through cross-examination(s) of adversar(ies) evidence, thereupon hence theirs being construable to be not necessary or relevant, unless the interrogatories appertain, to, the matter in issue (b) theirs bearing, a, close connection with the matter in issue, (c) besides the afore expostulations, of, law, stand, also borne in a judgment, the Delhi High Court, carried in a decision reported in 1995 (2) RCR, decision whereof, is, encapsulated in case titled as Jagdish Chandra Chawla versus 111rd Additional District Judge, (d) wherein also, further expostulations, are, cast vis-a-vis the justifiability, of, leave being granted, upon, the requisite application, the trite postulations whereof, (e) are qua the purpose of serving interrogatories being not to obtain an answer, as to what will, be the evidence of the other side or what evidence he intends to lead in support of his case. Combining the effects of the afore expostulations of law, borne in the judgments supra, (i) alongwith, the, hereat contentious issue erupting inter-se, the litigants hereat, and, it rather appertaining to the bonafide requirement of the landlord to seek eviction, from, the demised premises, of, the tenants/petitioners herein, (ii) on the ground, of, the former requiring, it, for theirs therein hence establishing therein, a, commercial establishment, (iii) and with the afore espousal, being contested besides when the petition, has arrived, at the stage, of, adduction, of, the petitioners' discharging evidence, vis-a-vis, the afore issue, (iv) and, when thereat the afore, through, meteing of suggestions, during, the course of theirs' holding the petitioners' witnesses, to cross-examination, hence may concert to bely the afore bonafides (v) and, even upon the stage of theirs' adducing rebuttal evidence, if need be, vis-a-vis, the relevant issue, it being also permissible for them, to, adduce evidence, for, thereupon theirs belying the afore constituted grounds, (vi) whereas visibly with the apposite petition, being, rather at a premature stage, and, with the afore endevours, being un-recoursed, whereas, upon, theirs being recoursed, and, rather therethrough(s) the apposite belyings' being available to be secured, through, apt suggestions or apt rebuttal evidence. In aftermath hence within the ambit of, the, judgment supra rendered by the Hon'ble Apex Court, (a) it appears that when the endeavor of cross-examination, is, an appropriate recoursing, for, the tenants, to, strive to strip the landlords' apt bonafides, and, to also hence empower them to succor their espousal, (b) besides when also within the ambit supra of verdict, rendered by the Hon'ble Apex Court, the gravamen, of, the interrogatories rather wherethroughs discoveries of evidence, is, sought, rather not appertaining, to, hence within the legal limits of MC Shimla, any commercial establishment, (c) being owned by the landlords rather with the interrogatories are, vis-a-vis, commercial establishments, occurring, within the limits of MC Shimla, hence being owned, by the father in law, of, petitioner No.2, namely Mr. Narinder Kumar of Sood, (d) thereupon when the demised premises, is not, owned by Mr. Narinder Kumar Sood, rather are owned by respondent No.2 herein, and, when the landlords purportedly require the demised premise(s), for their bonafide use, (e) and, hence seek eviction of the tenants therefrom, (f) thereupon the afore prime factum probandum, galvanizes, an inference that the interrogatories, hence, hold no connection or nexus, vis-a-vis, the core issue hence engaging the parties at lis. Consequently, the reasons assigned by the learned Rent Controller, are, well merited.

In view of the above, there is no merit in the petition, and, the same is accordingly dismissed. Impugned order is maintained and affirmed. All pending applications stand disposed of accordingly.

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

Prem Singh …Appellant

Versus

Kiran Prakash …Respondents

Cr. Appeal No.498 of 2018
Reserved on :10.7.2019
Decided on : 25.7.2019

Negotiable Instrument Act, 1881– Section 138- Dishonour of cheque– Complaint– Dismissal thereof and acquittal of accused by trial court - Appeal against– Held, all scribings on cheque, words as well as figures to be in handwriting of accused, not denied by him– Mere suggestion that cheque was not issued for discharging any debt or liability, not sufficient to rebut presumption that cheque was issued for consideration– No evidence adduced qua discharge of debt taken by accused from complainant– Material on record proving case of complainant– Acquittal of accused simply on ground that dishonour of cheque for want of funds not proved is not correct inasmuch as return memo clearly showed dishonour of cheque for want of funds– Appeal allowed– Accused convicted. (Paras 8 to 10)

For the appellant: Mr. Anirudh Sharma, Advocate.
For the respondent : Mr. O.C. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, stands directed, by the respondent/complainant, against the judgment rendered by the learned Adll. Chief Judicial Magistrate, Kasauli, District Solan, H.P. in complaint No. 139/3 of 2018/16, whereupon, he returned findings of acquittal, upon the accused/convict, in respect of charges framed, under, Section 138, of, the Negotiable Instrument Act.

2. The facts relevant to decide the instant case are that in the month of January, 2015, accused borrowed a sumof Rs. 2,50,000/- from the complainant for his business/contractual work and in order to discharge his liability towards the complainant, the respondent/accused issued cheque bearing No. 871328, amounting to Rs. 2,50,000, dated 9.12.2015, drawn on Jogindra Central Co-operative Bank Ltd. Dharampur, Tehsil Kasauli, District Solan with the assurance that the said cheque under all circumstances would be honoured and encashed on its presentation in the bank. As per the assurance given by the accused, the complainant presented the said cheque in the bank for its encashment and the bankers of the complainant informed the complainant vide memo dated 23.12.2015, alongwith memo of the respondent bank dated 21.12.2015 that the said cheque has been dishonoured due to insufficient funds in the account of the respondent/accused. The respondent/accused was informed about the same by the complainant but he flatly refused to make the payment and thereafter the complainant got issued a legal notice to the respondent/accused through his counsel on 12.1.2016 but despite the service of notice, the respondent failed to pay the cheque amount within the stipulated period. With these

averments the complainant seeks that the respondents/accused be tried and punished in accordance with law.

3. On perusing the preliminary evidence, adduced by the complainant, the Court, of, the learned JMIC, Kasauli, took cognizance, against the accused, and, the accused was summoned. Notice of accusation was put to the accused, on 31.1.2017, qua commission of an offence, under, Section 138 of the Negotiable Instruments Act, whereto he pleaded, not guilty, and claimed trial. The complainant in support of his contention, examined himself, as, CW-1, and, also examined CW-2 Harish Sharma, Branch Manager, Jogindra Central Bank, Parwanoo. After closure of complainant's evidence, the statement of the accused, was recorded, under Section 313 of Cr. P.C., wherein, the accused claimed innocence, and, pleaded false implication, in the case, and, thereafter examined, one witness, in defence.

4. On an appraisal of evidence on record, the learned trial Court, recorded findings of acquittal upon the accused.

5. The complainant/appellant, is aggrieved, by the judgment of acquittal recorded by the learned trial Court. The learned Counsel appearing, for the appellant, has concertedly and vigorously contended qua the findings of acquittal recorded, by the learned trial Court standing, not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of acquittal, being reversed, by this Court in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of conviction.

6. On the other hand, the learned counsel appearing for the respondent, has, with considerable force and vigour, contended that the findings of acquittal, recorded by the Court below standing based on a mature and balanced appreciation by it, of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

8. The cheque borne in Ext. CW1/B, carries a sum of Rs. 2,50,000/-, and, all the scribings thereon in words and figures, are not, contested to be not authored, by the accused. The complainant, while stepping into witness box, and, during the course, of, his examination-in-chief, tendered into evidence, his affidavit, borne in Ext. CW1/A, with clear echoing(s) borne therein qua, upon, presentation, of, the afore cheque, for its encashment, it, through memo, of, 23.12.2015, wherewith stood accompanied an endorsement, hence displaying, qua owning to insufficient funds, in the accounts, of the accused, in contemporaneity, vis-à-vis, its presentation, by the complainant, hence before the banker(s) concerned, the latter declining to honour it. The afore solemn affirmation, embodied in Ext. CW1/A, was apparently, (i) given the counsel for the accused, not protesting, vis-à-vis, the afore exhibition mark, being made thereon, hence acquiesced, by the learned defence counsel, conspicuously, qua its veracity. Furthermore, even during, the course of cross-examination, of the complainant, by the learned defence counsel, only, a mere suggestion stood meted to CW-1, rather holding unfoldments, a) qua therethrough only a frail attempt hence being made, by the respondent/accused, to rebut, the statutory presumption, embodied in Section 149, of the Negotiable Instrument Act, qua issuance of cheque, borne in Ext. CW1/B, being not towards, any subsisting, and, enforceable contractual or legally liability interse both, b) yet the afore suggestion, also stood dispelled, and, rebutted by the complainant, and, when no further evidence, stands adduced, by the accused, to succor his espousal, vis-à-vis, there being misuse, of Ext. CW1/B, by the complainant, (b) given the

cheque, borne in Ext.CW1/B, standing issued, merely as a security, and, despite liquidation, of all, the borrowings, made by the accused, from the complainant, rather the complainant, misusing the cheque, borne in Ext. CW1/B, (c) and, also when the best evidence in respect thereof, stood constituted, in receipts, bearing out the afore espousal, vis-à-vis, the apt liquidation, being made, also remained rather un-adduced, (d) thereupon, the apt conclusion therefrom, is qua, the statutory presumption, as embodied in Section 149 of the Act, remaining intact, and, also acquiring conclusivity.

9. Nonetheless, despite the exhibition mark, without any denial being permitted, hence, by the accused, to be made, on, affidavit, borne in Ext. CW1/A, and, it carrying the afore echoing(s), vis-à-vis, the dishonour, of, Ext. CW1/B, hence occurring, upon, its presentation before the banker concerned, (a) and when thereafter also the learned counsel, omitted, to rebut the efficacy, of, the afore recitals, borne in Ext. CW1/A, (b) nor when he thereafter concerted to elicit, from, the banker(s) concerned, the requisite endorsement, with echoing(s), therein, vis-à-vis, upon presentation, of, the cheque, before the banker concerned, it being not for wants, of, sufficient funds, in the accounts, of the accused, hence being declined to be honoured.

10. Consequently, when rather therethrough, the, learned trial Magistrate, was enjoined to make, an order of conviction, upon the accused, it merely, for the complainant, failing to adduce, the apt discharging evidence, vis-à-vis, upon presentation of Ext. CW1/B, before the banker concerned, hence occurring, within the statutory period, (i) and also, upon his failing to adduce, the discharging evidence, vis-à-vis, upon its presentation, before the banker concerned, it, for want of sufficient funds, hence thereat, in the accounts of the accused, it rather being declined, to be honoured, and, the afore evidence, rather being comprised, in the apposite endorsement, being tendered, and, exhibited, whereas, the afores remaining unadduced, the learned trial Judge, rather made an order, of, acquittal (a) despite Ext.CW1/A remaining un-contested, and its containing recitals, qua upon its presentation before the banker concerned, it being evidently declined to be honoured, for want of sufficient funds, occurring thereat, in the account(s) of the accused. The afore reason, is outside, the domain of the afore un-contested factum, as stood embodied, in the affidavit, sworn by the complainant, and, tendered into evidence, during, the, examination-in-chief, of, the complainant and, when echoings are borne therein, for, meteing tenacity vis-à-vis, the afore *factum probandum (b)* besides when the afore relevant echoing(s), borne therein, also remain hence for reasons aforestated, omitted, to be rebutted, by the complainant, by the latter meteing suggestions, in consonance therewith, nor when thereafter, the, requisite records, from the banker concerned, remained un-strived, to be elicited, by the accused (c) thereupon the afore echoing(s), borne in Ext. CW1/A, hence for want of the afore recoursings, by the complainant, rather constituted, adduction of, apt discharging evidence, (d) qua upon, presentation of cheque, embodied in Ext. CW1/B, it being aptly declined, to be honoured. The natural corollary thereof, is qua with the afore requisite evidence, hence being adduced, for therethrough(s) holding the charge against the accused, and, rather it stands erroneously concluded, by the learned trial Court (e) that for want, of tendering(s) of, and, for want, of, exhibition marks, being made on the relevant endorsement, the accused, deserving, qua a verdict of the acquittal, being pronounced upon him.

11. For the reasons which have been recorded hereinabove, this Court holds, that the learned trial Court, has not appraised, the entire evidence, on record in a wholesome, and, harmonious manner apart therefrom, the analysis of the material, on record by the learned appellate Court, suffers from a perversity or absurdity of mis-appreciation, and, non-appreciation of evidence on record.

12. There is merit in the appeal, and, the same is allowed. The impugned judgment is quashed and set aside. The accused/respondent be produced before this Court, for his being heard on quantum of sentence, on 5.8.2019. All pending application(s), if any, are also disposed of.

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

Cr. Revisions No. 379 of 2014 and
Cr. Revision No. 302 of 2015
Reserved on : 12.7.2019
Decided on 25.7.2019

Negotiable Instruments Act, 1881 (Act)- Section 138– Dishonour of cheque– Complaint– Revision against concurrent findings of guilt and sentence– Petitioner contending wrong appreciation of evidence on part of lower courts– On facts, held complainant a company engaged in hire and purchase had financed vehicle loan to accused – Taking of loan and dishonour of cheque for want of funds not denied by him– Plea of accused that he repaid loan to complainant and company is misusing cheque which was given as security not probablised by him - Presumption of consideration attached with cheque not rebutted by him. (Para 7)

Negotiable Instruments Act, 1881 (Act)- Section 138– **Himachal Pradesh Registration of Money Lenders Act**, **1976**- Section 3- Dishonour of cheque- Complaint- Requirement of registration of money lender(s) – Non-compliance and effect on complaint filed under Act – Held- Bar stipulated in Section 3 of H P Registration of Money Lenders Act, works only against institution of suits for recovery of money by lenders against borrowers – It does not oust mandate of relevant provision of Act. (Para 10)

Cr. Revision No. 379 of 2014

Nikka Ram …Petitioner
Versus
New Jagdambay Finance and another …Respondents

Cr.Revision No. 302 of 2015

Nikka Ram …Petitioner
Versus
New Jagdambay Finance Corporation and another ..Respondents

For the petitioner : Mr. J.L. Bhardwaj, Advocate, for the petitioner in both the criminal revision petitions.
For the respondent: Mr. Divya Raj Singh, Advocate, for the respondent No. 1 inboth the revision petitions.
Mr. Hemant Vaid, Addl. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The petitioner/convict, upon, being convicted by the learned Judicial Magistrate, 1st

Class, Court No. III, Una, in complaint No. 249-1-2001/125-II-2001 RBT No. 249-1-2001/127-II/06-2001, vis-à-vis, his committing an offence, constituted under the provisions of Section 138, read, with Section 141 of the Act, and also, in consequence whereto, he stood sentenced, to undergo simple imprisonment, for a period of six months, and, also stood directed, to pay compensation, borne in the sum of Rs. 2,50,000/-, to the complainant, (a) obviously stood aggrieved therefrom, and hence preferred, an appeal, before the learned Sessions Judge, Una. The complainant also standing aggrieved, vis-à-vis, the afore compensation, assessed qua it, by the learned trial Magistrate, also proceeded to rear an appeal, therefrom hence before the learned appellate Court. The appeal preferred by the complainant, stood accepted, whereas, the appeal preferred by the petitioner/convict, stood dismissed, by the learned appellate Court. Through the instant criminal revision, the convict challenges the concurrently recorded pronouncement(s), of, conviction against him, by both the learned Courts below, and, also challenges the acceptance of the appeal, preferred before it, by the complainant, wherethrough, hence, the compensation amount, initially assessed, vis-à-vis, the complainant by the learned trial Magistrate, and, borne in a sum of Rs. 2, 50,000/-, stood enhanced in, appeal, to Rs. 3,00,000/-. Since both the criminal revision petitions are inter-linked, involving common questions of law and facts, hence, both are amenable, for, a common verdict, being pronounced thereon.

2. Brief facts of the case are that the complainant is a Finance Corporation and running a business of hire purchase. The parties entered into hire purchase agreement appertaining to vehicle i.e. truck bearing registration No. HP-20-0725, in lieu of his liability against the complainant the accused issued a cheque No. 175081 dated 8.10.2001 for Rs. 1,75,000- in favour of the complainant of his account maintained with United Commercial Bank, (in short UCO Bank) Swarghat, District Bilaspur. The complainant presented the said cheque to its banker i.e. Canara Bank, Una, for collection but the same was dishonoured for want of sufficient funds in the account of the accused and was returned back by the Canara Bank in original vide letter dated 30.10.2001 alongwith return memo dated 20.10.2001. Thereafter, the complainant served a legal notice dated 3.11.2001 upon the accused through his counsel through registered post asking him to make the payment of the cheque amount within 15 days and despite that the accused has not paid the amount till today.

3. Accordingly, the complainant preferred, a complaint, under Section 138 read with Section 141 of Negotiable Instrument Act, against, the accused. On the basis of preliminary evidence, led by the complainant, cognizance was taken against the accused. On appearance of accused in Court, notice of accusation was put to him, for the said offence whereto he pleaded not guilty. Five witnesses were examined by the complainant, in support, of his contention. After the evidence of the complainant standing adduced, the accused, was examined under Section 3134 Cr. P.C., wherein he pleaded his innocence, and, pleaded false implication. In support, of, his defence, the accused has examined three witnesses.

3. On an appraisal of evidence, on record, the learned trial Court, recorded findings of conviction against the accused.

4. The accused/appellant is aggrieved, by the judgment of conviction recorded, by, both the learned Courts below. The learned Counsel appearing, for the appellant, has concertedly, and vigorously contended qua the findings of conviction, as recorded, by the learned Courts below, standing not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the 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 hence replaced by findings of acquittal.

5. On the other hand, the learned counsel appearing for the respondent, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, standing based on a mature and balanced appreciation, by it, of evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

7. **The cheque borne in Ext. C-1, is not, contested by the petitioner/convict, to not carry thereon, his valid signatures, nor he raised any contest, vis-à-vis, the scribing(s), of, all words, and, figures hence borne thereon. The afore cheque, stood, through memo, borne in Ext. CW1/B, returned to the holder thereof, (a) visibly for want of sufficient funds, occurring in the accounts of the petitioner/convict, in contemporaniety, vis-à-vis, its presentation, before the banker concerned, (b) thereupon, prima-facie, the holder of the cheque, borne in Ext. C-1, is enabled to draw the apposite legal succor, from the provisions, borne in Section 139 of the Negotiable Instrument Act, provisions whereof stand extracted hereinafter:**

> *"**Presumption in favour of holder**:- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque ofl the nature referred to in section 138 for the discharge, in whole orin part, of any debt or other liability."*

(c) an incisive reading, whereof, unveil, qua hence a rebuttable statutory presumption, being attached, vis-à-vis, the holder of the cheque, qua his holding it, in discharge, of, in whole, or in part, of, any debt or any other liability. Since, as aforestated, the afore statutory presumption, assigned vis-à-vis, the holder of the cheque, is a rebuttable presumption, (d) thereupon the learned defence counsel, during, the course, of, subjecting, CW-3, to an ordeal, of an exacting and, rigorous cross-examination, proceeded to put suggestions, to him, a) vis-à-vis, Ext. C-1, being issued, merely as a security, b) and it being misused by the complainant, despite, his liquidating hence all borrowings, made by him, from, the respondent/complainant. The afore suggestion, as meted to CW-3, in his cross-examination, stood denied, and, are also merely bald suggestions, remaining un-accompanied, by any statement of accounts, bearing any contemporaniety, vis-à-vis, the issuance, and, presentation of cheque, Ext. C-1, (c) and with the clear graphic disclosures borne therein, vis-à-vis, despite the afore liquidation(s), by the accused, of, all his borrowings, from the complainant, (d) rather, the afore cheque, standing issued, merely, as a security, and, on its presentation, by the banker concerned, who hence declined to honour, it, there was, thereat hence, no existing or subsisting any legally enforceable debt or any other liability, interse, him and the respondent/complainant, (e) rather, thereupon Ext. C-1 being misused and, thereupon the afore statutory presumption, assigned vis-à-vis, the holder of the cheque, also coming to be rebutted. The sequel, of, the afore omission, or non-existence of the afore best evidence, for hence succoring, the afore espousal, of the petitioner/convict, hence garners an inference, qua the afore-referred statutory presumption, as embodied in Section 139 of the Act, remaining intact, and, obviously, it, acquiring conclusivity.

8. Dehors the above, the learned counsel appearing for the petitioner/convict, has

made a vociferous espousal, before this Court, that with the respondent/complainant, being engaged, in the business of money lending, thereupon in conformity, vis-à-vis, the provisions, borne in Section 9, of, the Himachal Pradesh Registration of Money Lenders Act, 1976, provisions whereof are extracted hereinafter:

> "**9. Further registration and licensing of money-lender after expiry of period forl which licence was cancelled**- A money-lender may, after the termination of the period for which his licence has been cancelled, apply for registration and for the grant of a license, to the Collector who shall, on his furnishing such particulars as may be prescribed, register his name on payment of a fee of Rs. 10/-; and shall grant him a licence for such period, in such form and subject to such conditions and on payment of such fees, as maybe prescribed."

(a) wherein the afore statutory coinage is/are assigned, the, connotations, vis-à-vis, its including hence within its domain, any person or firm, as the respondent/complainant, obviously is (b) thereupon there was also a further statutory necessity, for adherence vis-à-vis, the contemplation, occurring in Section 3, of, the Himachal Pradesh Registration of Money Lenders Act, provisions whereof stands extracted hereinafter:

> ***"3. Suits and applications by money-lenders barred, unless money-lender is registered and licensed:***
>
> *Notwithdtanding anything contained in any other enactment for the time being in force a suit by a money-lender for the recovery of a loan, or an application by money-lender for the execution of a decree relating to a loan, shall, after the commencement of this Act, be dismissed, unless the money-lender, at the time of the institution of the suit or presentation of the application for execution, or at the time of decreeing the suit or deciding the application for execution-*
>
> *(a) is registered: and*
>
> *(i) holds a valid license, in such form and in such manner as may be prescribed; or*
>
> *(ii) holds a certificate from a Commissioner granted under section 10, specifying the loan in respect of which the suit is instituted, or the decree in respect of which the application for execution is presented; or*
>
> *(b) if he is not already a registered and licensed money-lender, satisfied the court that he has applied to the Collector to be registered and licensed and that such application is pending;*
>
> *Provided that in such a case, the suit or application shall not be finally disposed of until the application of the money-lender for registration and grant of license pending before the Collector is finally disposed of."*

(c) conspicuously, qua the respondent/complainant firm, being validly registered, for hence being facilitated, to legitimately advance loans to the petitioner/convict, and with the afore provisions, also mandating qua, for, the afore want(s), of, the requisite statutory registration, (d) thereupon, the concomitant thereto statutory bar, a contemplated under Section 3, of the Registration Act, against a suit being hence brought, by the money lenders, for recovery of loan(s) advanced, to the borrowers concerned, standing squarely attracted, (e) thereupon the

petitioner/convict, being required, to be acquitted, by this Court.

9. For determining, the vigor of the afore espousal, an allusion is to be made, to the deposition, as exists in the cross-examination, of CW-3, for hence therefrom rather determining, vis-à-vis, the respondent/company, holding the requisite registration or not, (a) though, in the testification of CW-3, as occurs, during the course, of, the learned defence counsel, holding him to cross-examination, rather unveilings, hence emerge (b) qua the requisite suggestion, vis-à-vis, the respondent/company, not holding, the requisite registration, rather being put to him, yet a reply in the dis-affirmative thereto, rather emanating from CW-3, and, his thereafter, also volunteering to state, that, he has not, brought, the requisite documents in Court, as, appertaining to the requisite registration, as they remained, un-summoned or un-requisitioned. The afore meteing, of, dis-affirmative answers, by CW-3, to the afore suggestions meted, to him by learned defence counsel, during, the course of the latter, subjecting him to cross-examine, does, prima-facie, garners strengthened vigor, for, hence negating the accused's afore espousal vis-à-vis, its vigor, (c) and when vigor thereof, would rather become blunted, only, upon, the accused/convict, thereafter, seeking through the aegis of the Court, elicitations, of, all the records, appertaining to the registration, of, the complainant/firm. However, with the learned defence counsel, rather omitting to recourse, the afore endeavors, and, whereupon the afore omissions, rather beget, an inference, qua the afore negativing ,by CW-3, of, the afore suggestions put to him, by the learned defence counsel, qua the respondent/complainant, not holding, the requisite registration, hence carrying the apt uneroded tenacity, and, vigor.

10. **Be that as it may, even otherwise, the statutory bar, contemplated in Section 3 of the Act, works only against institution, of, suits, for, recovery(s), of money, hence by the lenders, against the borrowers, and visibly does not, oust the mandate, of the relevant provisions, of the Negotiable Instrument Act, as no apt statutory provision(s), is/are borne, in the Negotiable Instruments Act, wherethrough, the bar contemplated in Section 3, of, the Act, stands revered and, meted deference. In sequel, no capitalization, can be drawn, by the learned counsel, for the petitioner/convict, from, the statutory contemplation(s), borne, in Section 3, of, the afore Act.**

11. For the reasons which have been recorded hereinabove, this Court holds that both the learned Courts below, have appraised the entire evidence, on record, in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record by the learned appellate Court, does not, suffer from perversity or absurdity of mis-appreciation, and, non-appreciation of evidence on record.

12. Consequently, there is no merit in the instant revision petitions, which are accordingly dismissed. The Judgment(s) impugned before this Court are maintained and affirmed. Records be sent back forthwith.

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

Harbans Lal ...Petitioner
Versus
State of H.P. ...Respondent

Cr. Revision No. 18 of 2010

Reserved on :19.7.2019
Decided on : 25.7.2019

Indian Penal Code, 1860- Section 326 – Grievous hurt with sharp edged weapon– Proof– Accused assailing concurrent judgments of conviction of lower courts on ground of wrong appreciation of evidence – Held, independent witnesses 'VD' and 'PC' having reached place of occurrence on hearing shrieks and cries not made witnesses in case – 'MR' to whose house victim was taken immediately after assault also not cited as witness – Statement of eye witness recorded by investigating officer belatedly and said witness improving version during trial - Other witnesses interested one– Accused himself handing over Darat to police in police station – Such recovery not admissible in evidence – Conviction being based on inadmissible evidence, set aside– Appeal allowed – Accused acquitted. (Paras 9 to 12 and 14)

For the appellant: Mr. Satyen Vaidya, Senior Advocate with
Mr. Vivek Sharma, Advocate.
For the respondent : Mr. Hemant Vaid, Addl. A.g. with
M/s Yudhvir Singh Thakur and Vikrant Chandel, Dy.AGs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant revision petition, stands, directed by the accused/convict, against, the judgment rendered by the learned Additional Sessions Judge (Fast Track Court), Kangra, at Dharamshala, in criminal RBT Appeal No. 4-d/05/2003, wherethrough he affirmed the judgment, rendered on 27.5.2003/28.5.2003, by the learned Judicial Magistrate 1st Class, (I), Dharamshala, in case No. 108-II/02, whereupon, the latter returned findings of conviction, against, the accused/convict qua charges framed, under Section 326 IPC, and, consequently sentenced him, to, undergo six months simple imprisonment, and, to pay a fine of Rs. 15,000/-, and in default, was sentenced, to undergo simple imprisonment, for, one month.

2. The facts relevant to decide the instant case are that on 25.10.2002 at about 10:30 p.m. at village Haler, Police Station, Shahpur, complainant Chuni Lal was present in his house alongwith his sons Ravinder, Sunil Kumar and other family members. In the meantime, his nephew accused/appellant Harbans Lal came in the state of intoxication and asked the complainant why they were making noise. Upon this, son of Chuni Lal, Ravinder Kumar went to the Court-yard and asked the accused to go back. Consequently, accsued went to his house and came back with darat (sickle) in his hand and gave its blow to Ravinder Kumar on his right hand. Ravinder Kumar raised alarm after sustaining injuries. Blood started oozing out of the injury. Thereafter, accused fled away from the spot. The occurrence as reported to the Police and initially Rapat was lodged. Injured Ravinder was medically examined and his MLC revealed that he has sustained grievous injury having been caused by sharp weapon. In the light of said medical opinion, the relevant FIR was registered. After carrying out the necessary investigation, the challan was prepared and presented in the Court. The accused was produced to face the trial. The learned trial Court vide impugned judgment convicted and sentenced the accused/appellant under Section 326 IPC.

4. The accused, was charged, by the learned trial Court, for his, committing offence(s) punishable, under Section 326 IPC. In proof of the charge, the prosecution examined 11 witnesses. On conclusion, of recording, of, prosecution evidence, the statement

of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the trial Court, wherein the accused claimed innocence, and, pleaded false implication, in the case, and, thereafter examined two defence witnesses.

5. On an appraisal of evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein. The learned first appellate Court dismissed the appeal, filed by the convict, and rather affirmed the judgment rendered by the trial Court.

6. The accused/appellant is aggrieved by the concurrently recorded judgment of conviction, by both the learned Courts below. The learned Counsel appearing for the accused/appellant, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court standing, not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the 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. On the other hand, the learned Additional Advocate General, has, with considerable force and vigour, contended that the findings of conviction recorded by the Court below, standing based on a mature and balanced appreciation, by it, of the 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. The convict, with, the user of Ext.P-1, recovered through memo Ext. PW9/A, signatured by the accused, and, witnesses thereto, one Piar Singh and one Des Raj, hence is alleged to inflict, the, relevant injuries, upon, the victim, one Ravinder Kumar. The injuries, inflicted by the convict, upon, the afore victim, are borne in Ext.PW1/A, authored by PW-1. During the course of his examination-in-chief, PW-1, rendered echoing(s), qua the injuries, occurring in Ext.PW1/A, being causable, upon, the victim rather by user, of, Ext. P-2, exhibit whereof stood shown to him, during, the afore course, of, his rendering his deposition. Since, the victim, in his examination-in-chief, rendered, a, testification, hence corroborating his earlier version, recorded in writing, (i) thereupon, and, when his testification, stood corroborated, by PW-3, his father (ii) and, with the deposition(s), of, each of the afore witnesses, being free from any stains, of, any interse contradictions, comprised in their deposition(s), embodied, in, their respective examinations-in-chief, vis-à-vis, their respective cross-examinations. Also, when their respective deposition(s), are, free, from any taint of any interse contradictions, and, also with in corroboration(s) thereto, hence testimony of the doctor, who, stepped into witness box, as PW-1, proves, the user of Ext. P-2, upon, the person of the victim, (iii) thereupon it is contended that the impugned verdict, recorded by both the learned Courts below, rather being not interferable, by this Court, in the exercise of its revisional jurisdiction. However, for the reasons to be assigned hereinafter, despite, the afore taints, not existing, in the respective testification(s), of PW-2, and, of PW-3, (iv) this Court, is rather coaxed, to make an inference, qua both PW-2, and of PW-3, hence rendering interested versions, qua the occurrence, as PW-2, in his cross-examination, has made bespeaking(s), qua, at the relevant time, qua upon his making shrieks, and, cries, hence, one Veena Devi and Prakash Chand, rather arriving at the relevant site of occurrence, and despite the afore, being enjoined to be cited as witness, hence by the prosecution, they were neither cited nor stepped into witness box, whereas only, upon, the afore being cited, they may have unearthed the truth, vis-à-vis, the relevant occurrence.

10. The further effect of theirs, being omitted, to be cited as prosecution witnesses, rather engenders, an inference, qua hence the prosecution, striving to, smother the truth of the occurrence, and, the corollary thereof, is qua this Court, being constrained, not to accept a smothered, and, suppressed version qua the relevant incident. PW-3 also, in his cross-examination, has made, hence echoing(s), qua after the completion, of, the occurrence, his lifting the body, of, PW-2, to the house of one Milkhi Ram, and, thereafter even, the, afore Milkhi Ram was enjoined to be cited, as, a prosecution witness, for his rendering, an, unequivocal version qua the occurrence, (i) however, the afore Milkhi Ram stood neither cited, as, a prosecution witness nor obviously he stepped into witness box, (ii) whereas, upon, his being cited as a prosecution witness, he may have made, truthful revelation(s), vis-à-vis, the genesis of the prosecution case. Contrarily, hence this Court is constrained to garner an inference, qua, the prosecution, depending upon suppressed, camouflaged, and, doctored version(s), vis-à-vis, the relevant occurrence, obviously, thereupon, no reliance, can be placed, by this Court.

11. Be that as it may, the another purported eye witness to the occurrence, also cannot be construed to render a truthful version, qua therewith, as a) his statement stood belatedly recorded, b) his improving upon his earlier statement recorded in writing, comprised in his making, an echoing, in his examination-in-chief, vis-à-vis, the accused/convict, striking, a, sickle blow at him, (c) whereas, with the afore echoing remaining un-articulated, in his previous statement recorded in writing, hence engulfs his testimony, with a stain, of, improvement. Even otherwise, with his being an interested witness, and, his being closely related, to PW-2, and to PW-3, and, when no independent witnesses, vis-à-vis, the relevant occurrence, despite, theirs' being evidently available rather remained un-associated by the Investigating Officer, (d) and, wherefrom this Court is constrained, to draw, a conclusion, vis-à-vis, the prosecution, presenting rather a doctored, camouflaged, and, suppressed version(s), vis-à-vis, the relevant penal occurrence, hence also constraining this Court, not to proceed, to, mete any credence, vis-à-vis, the testification of PW-4.

12. Even though, a perusal of Ext. PW9/A unveils, qua Ext. P-1, being presented before the Investigating Officer, in the Police station, by the accused/convict. However, Ext. P-1, comprises, no admissible incriminatory piece of evidence, given any confession qua with user thereof, the accused inficiting injuries, reflected in Ext. PW1/A, upon, the person(s), of, the victim, is, barred under Section 25, of, the Indian Evidence Act, provisions whereof are extracted hereinafter:

> "***25. Confession to police officer not to be proved-***
>
> *No confession made to a police officer, shall be proved as against a person accused of any offence.*

(a) and when for proving, the, afore confessional factum, to, hence fall within the domain, of, validation, it was enjoined, to be proven, to also fall, hence within the ambit of Section 27, of, the Indian Evidence Act, provisions whereof stand extracted hereinafter:

> *"**27 How much of information received from accused may be proved**-Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

(i) wherewithin rather the afore apposite excepting provisions, vis-à-vis, the provisions, of, Section 25, of, the Indian Evidence Act, stand borne, (ii) and

theirs' make a graphic, and, clear echoing(s), qua the accused, after making the purported relevant confession, his ensuring apt recovery(s), at his instance, and, vis-à-vis, the Investigating Officer, qua the relevant weapon of offence, (ii) contrarily when Ext. PW9/A, is, not a composite disclosure statement, whereafter the weapon of offence, as stood concealed, by the accused/convict, hence stood recovered rather in sequel thereto, (iii) also when the accused stood arrested, only on 3.11.2002, and, with the preparation of Ext. PW9A, occurring on 3.11.2002, (iv) thereupon also when at the time, of, preparation, of, Ext. PW9/A, the accused/convict, was not, in police custody, nor has made any confessional statement, nor could hence lead, the, Investigating Officer concerned, vis-à-vis, the place, of, his keeping and, concealing Ext. P-1, whereupon also rather Ext. PW9/A may assume validity. Contrarily, when the drawing, of, Ext. PW9/A, has occurred rather at a stage whereat the accused, was not, in police custody, thereupon no probative vigor, can be assigned, vis-à-vis, it given it, being hit, by Section 25, of, the Indian Evidence Act, (v) and it also does not attract thereon, rather the excepting therewith mandate, as encapsulated, in, Section 27 of the Indian Evidence Act, (vi) as reiteratedly in contemporaneity, vis-à-vis, preparation, of Ext. PW9/A, hence the accused, was not in police custody, nor hence the prosecution can contend, that, the mandate, borne in Section 27, of, the Indian Evidence Act, hence begets any attraction or satiation.

13. Moreover, no opinion, stood rendered, by the FSL concerned, vis-à-vis, the blood stains occurring on the shirt, borne in Ext. P-2, bearing compatibility, with the blood group of the victim, thereupon, also Ext. P-2, does not form, any valid apt incriminatory evidence, against, the convict.

14. For the reasons which have been recorded hereinabove, this Court holds that both the learned Courts below, have not appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom the analysis of the material on record by the learned Courts below, suffers, from a perversity or absurdity of mis-appreciation, and, non-appreciation of evidence on record.

15. The appeal is allowed. The impugned judgment is quashed and set aside. The accused is acquitted. Case property be destroyed after the expiry of the period of limitation, for filing an appeal. Fine amount, if deposited by the accused be forthwith refunded to him. Personal and surety bond(s) be forthwith discharged.

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

Cr. Revisions No.81 and 83 of 2019
Decided on : 10.7.2019

Juvenile Justice (Care and Protection of Children) Act, 2015- Sections 12 & 15- Heinous offences – Child in conflict with law in category of 16-18 years– Bail– Jurisdiction of Juvenile Justice Board (JJB) –Held, jurisdiction under Section 12 of Act to grant bail either by JJB or Children Court would be valid only after strict compliance with provisions of Section 15 (1) of Act regarding preliminary assessment of child in conflict with law by JJB – Grant of bail by JJB before that would amount to granting bail at inchoate stage – Order of JJB granting bail is set aside. (Para 3)

Cr.R. No. 81 of 2019

State of H.P. ...Petitioner

Versus

Satish Chauhan .....Respondent

Cr.R. No. 83 of 2019

State of H.P. .....Petitioner

Versus

Nikhil Manta .....Respondent.

For the petitioner : Mr. Hemant Vaid, Addl. A.G.

For the respondent(s : Mr. Manoj Pathak, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

Since, the instant criminal revision petitions, arise, from a common incident, hence, both are amenable, for a common verdict, being pronounced thereon.

2. Through the instant criminal revision petitions, the state of H.P., challenges the orders, recorded, by the Principal Magistrate, Juvenile Justice (Care and Protection) Board at Shimla, District Shimla, on 11.10.2018, in case No. 66-22 of 2018, and in case No. 67-22 of 2018, (i) wherethrough vis-à-vis, the offences, constituted, under the provisions of Section(s) 302, 341, 323 and 506, read with Section 34 of the IPC and Section 3(1)(s) of SC & ST (POA) Amendment Act, 2015, the juveniles in conflict with law, were granted the facility of bail. The juveniles in conflict, with law, un-controvertedly, at the time contemporaneous vis-à-vis, theirs hence committing, the, afore offences, were aged 16 years. Consequently, the mandate, borne in Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015, (hereinafter referred to as "the Act", for short), provisions whereof are extracted hereinafter:

> ***"15. Preliminary assessment into heinous offences by Board:***
>
> ***(I) Incase of a heinous offence alleged to have been committed by a child, who has completed or his above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he alleged committed the offence, and may pass an order in accordance with the provisions of sub-*****section (3) of Section 18.**

as applicable vis-à-vis, the stage, contemporaneous to the juveniles in conflict with law, hence committing the afore offence, is required to be extracted, for, (i) hence therefrom making a determination, whether, without adherence rather by the Juvenile Justice Board, vis-à-vis, the mandate borne therein, the order impugned, is, valid or invalid. A perusal of the mandate, borne in Section 15, of, the Act, (ii) underscores that, vis-à-vis, the occurrence of heinous offence(s), as is/are the one(s), hence allegedly committed, by the juvenile/child, in conflict with law, and, with the latter being, at the stage of theirs allegedly committing the

offence, hence, aged 16 years, as evidently, the children, hereat, are (iii) thereupon it being incumbent, upon, the Board, to, hence ensure, the, conducting, of the, mandatory preliminary assessment, a) with regard to their mental, and, physical capacity hence to commit such offence, b) vis-à-vis, ability to understand, the, consequences of the offence, and, c) the circumstances in which they allegedly committed, the offences, (d) and, thereafter rather power is bestowed, upon, the juvenile justice Board, to make an order, in accordance, with the provisions of sub-Section (3) of Section 18 of the Act, provisions whereof are extracted hereinafter:

> ***"18(3)Orders regarding child found to be in conflict with law- Where the Board after preliminary assessment under Section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."***

Also perusal thereof rather makes a clear graphic underlining(s), vis-à-vis, after, the Board receiving the afore preliminary assessment, it being empowered, to determine qua, hence any necessity arising, for the child being tried, as an adult, (b) and also it being further empowered, to make, an order for transferring the case, to the Children's Court, hence holding the jurisdiction, to try, the requisite offences. Furthermore, Section 19 of the Act, stipulates, the powers bestowed, upon, the Children's Court, and, one amongst the powers, as embodied in sub-clause (ii) of sub-Section (1) of Section 19 of the Act, provisions whereof stand extracted hereinafter:

> **"19(1)(ii) Powers of Children's Court: there is noneed for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of Section 18."**

And, bestowed upon the Children's Court, is qua it, making a conclusion, for theirs' being no need for trial of the child, as an adult, and, thereafter, it, being bestowed, with the jurisdiction, to conduct, an inquiry as a Board, and, pass appropriate orders, in accordance with the provisions, of, Section 18, of, the Act.

3. Even though, the afore mandate, borne in sub-clause(ii) of sub-Section (1) of Section 19, of the Act, (a) hence may be construable to be a bestowal upon, the Children's Court, to pass/render all orders, alike the one, which are renderable, under Section 12 of the Act, (b) yet, the afore powers, are, exercisable by the Children's Court, only after strictest adherence being meted, vis-à-vis, the mandate, enshrined in Section 15 of the Act, (c) and, when adherence, vis-à-vis, the mandates, borne in Section 15 of the Act, enjoins mandatory, and, strictest compliance, vis-à-vis, the apt statutory contemplation(s), appertaining to, holding, of, preliminary assessment(s), vis-à-vis, the afore facets, (d) and, even though, sub-section (2) of Section 15 of the Act, bestows also upon the Board, upon the latter, receiving hence the preliminary assessment(s), vis-à-vis, the afore facets, rather, also the apt empowerment hence to inquire into the offences, allegedly committed, by the juveniles in conflict with law, (e) and, when hence, thereafter the exercise of jurisdiction, under, Section 12 of the Act, either by the Children Court, or by the Juvenile Justice Board, rather would be valid, (f) nonetheless, when the afore mandatory hence precursory(s), for therethrough the Board rather validly exercising, the apt jurisdiction, bestowed upon it, under Section 12 of the Act, and, mandatory precursory(ies) whereof enjoin(s) it, to, given

the child, evidently, at the relevant stage, of, his committing the offence(s), being aged 16 years, (g) rather to ensure the conducting, of, a preliminary assessment, vis-à-vis, the afore facets, and, whereas the afore statutory precursory(ies), rather remaining un-recoursed, by the Juvenile Justice Board, (h) thereupon, when hence the apt statutory satisfactions, within, the ambit of Section 15 of the Act, remaining not recorded, by the Juvenile Justice Board, nor thereafter, vis-à-vis, upon the Juvenile Justice Board, hence applying its judicial mind, vis-à-vis, the preliminary assessment of the child, rather deeming it fit, to make a reference to the Children's Court, for enabling the latter, to mete adherence, vis-à-vis, the mandate of Section 19 of the Act, for thereafter, hence ensuring qua the Children's Court, upon its making a conclusion, within, the ambit, of sub-clause (ii) of sub-Section (I) of Section 19, vis-à-vis, it rather inquiring, into, the allegedly committed offences, (h) whereupon, it, may be capacitated to make an order, hence within the ambit of Section 12 of the Act. Consequently, for all the afore statutory omissions, and, when only upon the apt statutory recoursing(s), hence being made, would rather render validated the, exercise of jurisdiction, under, Section 12 of the Act, by the Board, (I) whereas, non-recoursing(s) thereof, render, the impugned order, to be made hence at an inchoate stage. Consequently, the impugned order is quashed and set aside. However, liberty, is reserved, to, after conclusion, of, the preliminary assessment, of, the juvenile in conflict with law, hence his/their moving, the appropriate application, either before the Juvenile Justice Board, or the case may, before the Children's Court, and upon the afore motion being made either therebefore(s), hence the afores, are directed to, in accordance with law, render an appropriate order thereon.

4. In view of this, the revision petition is disposed of. Also, the pending application(s),if any, are also disposed of. No costs.

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

Sri Sanatan Dharam Pratinidhi Sabha ….Non-applicant/plaintiff.
Versus
State of H.P. & others …Applicants/defendants

OMP No. 245 of 2015
in Civil Suit No.5 of 2008
Reserved on 2.7.2019
Date of decision: 25.7.2019

Indian Evidence Act, 1872 - Section 65– Secondary evidence– Leave of court– Grant of - On facts, held, despite their best effort defendants not able to trace the original resolution deed - No material on record to suggest negligence on part of defendants in producing original deed within reasonable period– Application allowed– Leave granted to lead secondary evidence. (Para 7)

For the non-applicant: Mr. Bhupinder Gupta & Mr. Anand Sharma, Sr. Advocates with Mr. Karan Sharma, Advocate.
For the applicants: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The plaintiff educational institution, nomenclatured as, Sanatan Dharam Education Society Baijnath, District Kangra, H.P., stands, averred in the plaint, to, hence through, an, illegal, and, arbitrary, notification, hence issued on 4.1.2007, rather standing taken over by the defendant State. Consequently, a, declaratory decree is canvassed, for, hence setting aside, the taking over, of the afore nomenclatured institution, hitherto owned by the plaintiff, and, also rendition of, a, decree, to the extent of Rs. 2.40 crores, along with interest at the rate of 18%, besides, the, handing over, of, the original FDR No. RDW 551515 PNB Baijnath, amounting to Rs. 5,00,000/- qua it, and, pledged by the plaintiff society, and, lying with defendant No.5, Registrar, H.P. University, Summer Hill, Shimla, along with upto date interest and interest pendente-lite upon the suit amount, is also espoused in the plaint.

2. The plaintiffs' suit, stands contested, by the defendants, (i) by their instituting, a, written statement to the plaint, (ii) wherein they contend qua the taking over, of, the afore nomenclatured educational institution, of, the plaintiff, being preceded by obtaining, the, necessary permission, and, involving the administrative staff of the college, and, also the afore permission standing incorporated, in notification No. Cha(15)3/86-Shiksha-ka, of, 25.8.1994. Furthermore, it is averred in the written statement, instituted to the plaint, that, the taking over of the afore nomenclatured educational institution, being also preceded, by, valuation, of, of all the assets, and, liabilities.

3. On the basis of the pleadings, of the, contesting parties, this Court had struck the following issues, for determination:-

i) Whether the notification dated 4.1.2007taking over the suit property, issued by defendants is illegal, void and not binding on the interests of the plaintiff? OP parties.

ii) Whether the notification dated 4.1.2007 is unconstitutional as it deprives the plaintiffs of their property without due process of law? OP Parties.

iii) Whether the plaintiffs are entitled to the recovery of the suit amount as prayed for, if so to what extend? OPP.

iv) Whether the plaintiffs are entitled to any interest, as prayed for? OPP.

v) Whether the suit is not maintainable as pleaded by the defendants in their written statement? OPD.

vi) Relief.

4. During, the course of adduction of evidence, by the contesting litigants, and, particularly during the course of recording of the deposition, of, Sh. Ajay Lakhanpal, Principal, PSR Government College Baijnath, District Kangra, H.P., the latter adduced, a, photocopy of resolution, of, 28.9.2002, bearing Mark 'X', as, passed by the hitherto Management Committee, of, the afore college, wherein, echoings are borne, vis-a-vis, the prevalent reason, for, resolvings being madeto hand over the college, to, the defendants. At the outset, it is of extreme relevance, to state, that incontemporaneity, of institution, of the written statement, to the plaint hence, by the defendants, (i) neither the afore photocopy, of, the resolution stood appended therewith nor in the list of reliance, the afore document, is, mentioned. It appears that since the defendants acquired knowledge of the afore resolution,

only upon, Sh. Ajay Lakhanpal, Principal of the afore college, during, the course of his making, a, testification before this Court, rather adducing a photocopy thereof, (ii) thereafter, subsequently, hence, an application, being cast before this Court, constituted under the provisions, of, Section 65 of the Indian Evidence Act, for therethrough, leave being strived, for, hence permitting adduction, of, the afore photocopy of the resolution, and, the projected grounds therein, for, the defendants hereat, hence, seeking the afore leave, of, this Court, are, embodied, (a) in the original of resolution of 28.9.2002, being not either traceable nor the original thereof, being either with the government nor being with the Directorate of Education nor, in, the H. P. Secretariat, rather at the time of filing of the written statement, it, hence remaining untraceable, whereupon, the defendants were constrained, to, make the afore ommission, to, hence in contemporaneity, vis-a-vis, theirs instituting written statement, rather append therewith or enter, it, in the list of reliance, (b) despite a high powered committee being constituted, on 26.2.2015, for hence locating or tracing, the original records appertaining to the afore document, yet, the original of the afore document remaining unlocated, and, untraced, (c) the possession, of, original resolution of 28.9.2002, remaining incontemporaniety, vis-a-vis, the defendant State, through, its Administrator rather taking over the management, and, the control of all the assets, and, liabilities of the plaintiffs', afore nomenclatured educational institution, rather being retained by the erstwhile management, (d) and hence, the disappearance or the mis-location of the original, of, the afore resolution hence occurring, at, the stage whereat rather, the, erstwhile management hence held custody thereof. The afore application was resisted, and, contested by the non-applicant, and, upon the contentious pleadings reared upon the afore application, this Court struck, the hereinafter extracted issues:-

i) Whether there are sufficient grounds to allow the application filed under Section 65 of the Indian Evidence Act as alleged? Onus upon applicants.

ii) Whether applicants have no cause of action to file the application as alleged? Onus upon non-applicant.

iii) Relief.

5. In pursuance to the afore pleadings, cast in the apposite application, AW-1 Sh. Duni Chand Rana, stepped into the witness box, and, during the course of his examination-in-chief, he made echoings, vis-a-vis, vigorous efforts, being made, to trace, the original of the resolution of 28.9.2002, and, a report, in concurrence therewith, embodied in Ext. AW-1/A, was also permitted to be tendered, and, was also acquiesced, by the counsel for the non-applicant, for, making embossing(s) thereon,of, the afore requisite exhibition mark. Likewise, AW-2 Dr. Ram Chand Verma, during, the course of his examination-in-chief, has testified, qua his signatures occurring thereon, at circles A&B, and, has also proceeded, to, testify qua Dr. Shiv Kumar, the President of the Managing Committee, making his signatures thereon, at Sr. No.1 of page No.1, hence personificatory, of, apposite attendance being hence at page No.2, at, Sr. No.1. Thereafter, he has also proceeded, to testify, qua after the signatures of all persons present in the meeting, being obtained the copies of the afore resolution, being despatched to Secretary Education, Director of Secondary Education, and, to the Vice Chancellor of the University, and, thereafter, the resolution register being taken over, by the management committee, and, thereafter the administrator, being appointed, by the defendants, hence for managing the afore nomenclatured educational institution. During the course of his cross-examination, he has acquiesced, to, a suggestion, as stand meted to him, by the counsel for the non-applicant, vis-a-vis, the appointment, of, an administrator, to control the management, of the afore college (a) and, thereafter, he also named one Mast Ram, wheretowhom rather

stood assigned the afore designation, (b) also, upon meteing to him, of, a suggestion, by the counsel, for, the non-applicant, qua incontemporaniety, vis-a-vis, the taking over of the plaintiffs' afore nomenclatured educational institution, there existing a system, of, diarizing, whereto he rendered an answer in the affirmative, (c) however, he voluntarily stated, that, the register diarizing, vis-a-vis documents, and, also the despatch register, being available in the office of the Principal. He has also in his deposition, comprised, in his cross-examination, made an echoing, qua mark AW-1/A, being not falsely prepared, merely to obtain, the permission, to lead secondary evidence, and, also echoed qua non association, of any person, from the afore college, to ascertain, whether any such resolution hence standing passed or not by the college, rather being not deliberate.

6. AW-5, Sh. P. C. Dhiman, has meted succor, and, has also corroborated, the, deposition of AW-1, and, though has proven, the contents, borne in the application, constituted under Section 65 of the Indian Evidence Act. He has also proven, in his examination-in-chief, qua records vis-a-vis, the despatch of photocopy of the resolution, by Dr. Ajay Lakhanpal, to the, Government of H.P., and, also with respect, to receipt thereof, by the Government of H.P., being available with the Principal, and, by official concerned, working in the establishment of Principal Secretary Education, Government of H.P. In his cross-examination, he has denied the suggestion, rendered to him, qua even earlier, to, the preferment, of the instant application, the defendants being aware, of the custody, of the photocopy ,of the resolution. The emergence(s), from, the deposition, of the afore applicants witnesses are (i) despite best efforts being made to locate the original of the resolution, the requisite resolution being untraceable, (ii) the mislocation, of, the original, of, the afore resolution rather arising from, vis-a-vis, incontemporaneity, vis-a-vis, its drawing rather the records appertaining, therewith, being possessed by the erstwhile management, and, there being, a, possibility, of, misplacement, and, mis-location of the original thereof hence , at, the afore stage. From the afore emergence(s), hence emanating, from the deposition, of the applicants witnesses, hence enjoin this Court, to, fathom therefrom, qua rather, the, imperative statutory ingredients, cast in Section 65, of, the Indian Evidence Act, being or not not satiated, provisions whereof, are, extracted hereinafter:-

> "***65. Cases in which secondary evidence relating to documents may be given.—***Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—
>
> (a) When the original is shown or appears to be in the possession or power—
>
> of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court,
>
> or
>
> of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time
>
> (d) when the original is of such a nature as not to be easily movable
>
> (e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

7. Given the afore underscorings, made in the depositions, of the applicants witnesses, qua incontemporaniety, vis-a-vis, the misplacing, of, the requisite resolution, the possession, of, the apt original being, with, the erstwhile management, (i) and, thereupon rather thereat, it, being misplaced or mislocated, besides when its photocopy , is, strived to, with the leave of the Court, hence tendered into evidence, as, secondary evidence thereof (ii) , and, when despite best efforts being made, by the defendants, to trace the original, it, remaining un-located or untraceable, (iii) and prior to the recording of the deposition, of Dr. Ajay Lakhanpal, rather the defendants holding no knowledge, vis-a-vis, its existence, (iv) and, nor when the defendants, deliberately omitted, to, incontemporaniety, vis-a-vis, theirs' instituting, a, written statement(s) to the plaint, hence append, the afore photocopy, with the written statement or making disclosures qua therewith, in, the list of reliance, thereupon also the belated endeavor of the defendants, obviously cannot, be construed to fall outside, the, ambit of Clause (c) of Section 65 of the Indian Evidence Act, and, thereupon, with hence, the, ingredients thereof, being satiated, (d) hence this Court deems it fit to, afford, the espoused relief, vis-a-vis, the applicants, for theirs tendering the photocopy, of, the apposite resolution, in proof of the original, (e) the latter being misplaced and mislocated, preemiently also, the, belated endevour, of, the applicants, is not, construable, to arise, from any default or negligence on their part, to hence produce, it, in a reasonable time.

8. In view of the afore observations, the instant application is allowed and the applicants/defendants are permitted to lead secondary evidence, of, the afore resolution, of, 28.9.2002, and, the afore is permitted, to be, proven in accordance with law.

9. Any observation made herein above, shall not, be taken as an expression of opinion, on the merits of the case, and, the matter shall be decided uninfluenced, by any observation, made, hereinabove.

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

Reliance General Insurance Company Limited. ...Appellant.
Versus
Parmod Parkash and others. ....Respondents.

FAO No. 97 of 2019
Reserved On : 19.7.2019
Decided on : 25th July, 2019

Motor Vehicles Act, 1988– Section 166- Motor accident- Claim application- Permanent disability– Amputation of right leg below knee– Effect– Held, claimant was doing diploma in Mechanical Engineering in ITI– Amputation of leg below right knee would deprive him to perform any avocation relating to Mechanical Engineering- Functional disability would be 100%- Assessment as done by Tribunal toward loss of future income on this basis not interfered with- Appeal of insurer dismissed. (Para 5)

For the appellant:	Mr. Jagdish Thakur, Advocate.
For the Respondents:	Mr. S.D Gill, Advocate, for respondent No.1.
	Mr. Anand Sharma, Sr. Advocate with Mr. Karan Sharma, Advocate, for respondent No.3.
	Respondent No.2 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, is, directed by the insurer of the offending vehicle, whereuponwhom, stood hence saddled, the, indemnificatory liability, vis-a-vis, the compensation amount, as, determined under the impugned award, rendered by the learned Motor Accident Claims Tribunal-III, Solan, District Solan, H.P (for short "Tribunal"), upon, MAC Petition No. 30FTC/2 of 2010, and, hence for begetting, its, reversal it has, constituted the instant appeal before this Court.

2. The learned counsel for the appellant, has, not contested the validity of the findings returned, upon, (a) the issue appertaining to the deceased claimant, suffering disability(s) sparked by the rash, and, negligent driving, of, the offending vehicle hence by respondent No.1, and (b) nor he contests the validity of the findings returned, upon, the issue, appertaining to the driver, of, the offending vehicle not possessing a valid and effective driving licence, to, at the relevant time, hence drive it, (c) besides he does not contest the validity of the findings returned, vis-a-vis, the offending vehicle rather not at the relevant time, possessing a valid Registration certificate, and, fitness certificate, besides, a valid route permit. However, the appellant herein has only wrangled, vis-a-vis, the quantum of compensation, assessed under the head appertaining, to loss of future income, (a) and, qua wherewith he contests, with vehemence, before this Court that an exorbitant sum of Rs.7,77,600/- stands assessed, (b) and, his afore submission is anvilled, upon, the learned Tribunal rather making, an, inapt conclusion, vis-a-vis, a cent-percent disablement, being encumbered, upon the claimant, despite, the claimant pleading qua in, the, relevant mishap, his being encumbered, with amputation of lower part, of his right leg, and, with the afore admission, also, being succored, by Ex. PW5/C, wherein it is reflected qua the left upper limb of the claimant, being already amputated in childhood, (c) thereupon, the reflections borne in PW-7/A, vis-a-vis, the claimant suffering amputation, of, right shoulder being neither relatable, nor it holding any nexus or connection, vis-a-vis, the relevant mishap (d) and further thereunder, it, also displaces the further echoing made therein, qua hence, a, 100% disability being encumbered, upon the claimant, (e) and, thereupon he makes a vigorous contention, that, only the disability appertaining, to the amputation of his right knee, hence, being reckonable, for, determining qua (i) the capacity of the claimant to, in future, perform the relevant works, appertaining to his successfully prosecuting the discipline of mechanical engineering at ITI Solan, and, also in case the entailment, of, the afore disability, upon, the claimant, has stalled his completing, the afore course of

Mechanical Engineering, in the ITI concerned, (ii) rather the evidence on record, not forthrightly displaying qua his being completely interdicted or prohibited, to perform the afore avocations/works, of, the Mechanical Engineering, and, hence he contends that apt determination, under, the head "loss of future income" of compensation, and, borne in the afore sum, rather, being amenable for interference by this Court.

3. However, upon, this Court traversing, through, the echoings, borne in Ex, PW-7/A, appertaining to amputation, of right shoulder of the claimant, marshals the ensuing therefrom inference, qua, yet, the further disability pronounced therein, and, appertaining to amputation of the portion below right knee, (i) rather continuing to operate, as completely, and, absolutely precluding the claimant, to, complete, the, hitherto prosecuted discipline, of, Mechanical engineering, at the IIT concerned, (ii) and, also leaning this Court to make a conclusion, that, the afore disability working, towards rendering incapacitated, the claimant, to, even perform, in future, the, work of Mechanical Engineering (iii) and, hence, therefrom, the afore disability, as, encumbered upon the claimant, hence, in the relevant occurrence also obviously working towards carrying, the, completest interdicting apposite effects, and, rather hence a cent percent disability standing entailed, upon, the claimant.

4. The vigor of the afore conclusion drawn, by this Court, is strived, to be unsettled by the learned counsel, for the appellant, by his drawing, the, attention of this Court, to the deposition of PW-2 (Virender Kumar) (i) who in his examination-in-chief has made voicings purportedly holding leanings vis-a-vis the injured, however, the afore contention, is, misfounded and misplaced, (ii) as a reading, of, the examination of PW-2, rather makes a clear reflection, qua, in consequence to the injuries entailed, upon, the claimant, his being baulked to complete the discipline, of, Mechanical Engineering, at the ITI concerned, and, he also therein makes a deposition qua rather upon the claimant, completing his training at the institution concerned, his assuredly getting employment, in, Government or private college, whereas, the disabling injuries fully precluding, all, the afore prospects.

5. Be that as it may, the learned counsel, for the insurer has not halted his submission, and, rather has continued, to make a vociferous submission, before this Court, that, with PW-4 Vikas Saini, in his examination-in-chief rather making a deposition, vis-a-vis, the claimant, remaining his student since 2009 to 2011, (a) and, with the relevant disabling injuries being entailed, upon, the claimant hence in June, 2010, therethrough the learned counsel for the appellant, contends, that there, was no, apposite prohibition encumbered upon the claimant, in sequel to his gaining injuries, as stand pronounced, in the disability certificate, comprised in Ex. PW-7/A. Even through the afore inter-se contradiction, in, the testimonies of PW-2, and, of PW-4, the, afore submission, is, scuttled , as, (b) with PW-2 stepping in the witness box earlier, to, PW-4, and, with during the recording, of, the subsequent thereto testification, of PW-4, rather, the, latter remaining unconfronted therewith, (c) besides also when the Doctor concerned, has while, stepping into the witness box as PW-5, rather made an unequivocal echoing, in his cross-examination qua, the, gravity of disabling injuries, rather precluding the claimant, to, perform even his routine works, (d) thereupon, it is to be concluded that, dehors, only the disability, of, amputation of portion below right knee, being encumbered, upon, the claimant, in sequel to the relevant mishap rather the afore injuries also operating to completely forbid and preclude, the claimant to even perform, any routine jobs, (e) and, the further sequel thereof is that the reliance placed by the learned counsel, upon, a verdict recorded in 2011, ACJ, 444, titled as ***Kailash*** v. ***Jayoti Ram***, wherein in paragraph 13, which stands extracted hereinafter, it stands echoed, qua dehors, the disability entailed, upon, the claimant therein,

rather not precluding him, to, perform jobs other than cleaner, hence, the quantum of compensation assessed being hence reduced, (f) rather also not holding any sway or clout, vis-a-vis, the afore evidence, pronounced in the cross-examination of PW-5, who, has therein vehemently voiced qua the completest, and, fullest prohibition being entailed, upon, the claimant, to, in sequel to the disabling injuries, rather, hence, perform even his routine jobs, (g) whereupon, the quantum, of, compensation assessed, under, the head appertaining to loss of future income, is, meritworthy.

> "In the instant case, the appellant was aged 17/18 years at the time of accident. He was a cleaner in the truck. His left leg from the knee was amputated, as, stated by Dr. Manoj Kumar Thakur, Assistant Professor of Department of Orthopedic and Surgery, thereby suffered 85% permanent disability of the lower limb qua his profession. Thus, because of this disability, he cannot perform the job of cleaner, but certainly it is not as it he has become incapacity to earn any amount by doing some other job. He is still capable to manage the agricultural operations, run the shop where only sitting is required, but this cannot be lost sight that his earing capacity and further prospects has been impaired substantially.

6. In view of the above, I find no merit in this appeal, and, the same is accordingly dismissed. Accordingly, the impugned award is maintained and affirmed. All pending applications stand disposed of accordingly. Records be sent back.

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

National Insurance Company Ltd. …Petitioner
Versus
Rajinder Kumar and another …Respondents

FAO No.166 of 2018
Reserved on :4.7.2019
Decided on : 12.7.2019

Employees Compensation Act, 1923- Section 3– Expression 'Employment'– Scope - Held - There is no bar that father cannot employ his son as a driver in vehicle owned by him– No presumption can be drawn that son was not employee and he did not suffer injuries while performing duties as an employee. (Para 3)

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate with M/s Ishant Sharma and Mayank Sharma, Advocates, for the appellant.
For the respondent(s) : Mr. Vijay Kumar Sharma, Advocate, for respondent No. 1.
Mr. Pradeep Kumar Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

Through the instant appeal, the insurer of the vehicle concerned, concerts to seek reversal of the findings, returned upon issue No. 1, and, also upon his not meteing any

success, vis-à-vis, the afore espousal, hence seeks modification, of, the amount of compensation, determined in the impugned award, and, wherethrough, the apposite indemnificatory liability, stood fastened, upon, the Insurer of the offending vehicle.

2. During the course of hearing of the instant appeal, and with the consent of the counsel(s), appearing for the contesting parties, the hereinafter formulated substantial questions of law, arise for determination:

i) Whether the petitioner being employee of respondent No. 1 suffered permanent disability by driving vehicle No. HP-64-0322 in the course of his employment, as alleged? OPP

ii) Whether petitioner is entitled for compensation, if so, from whom? OPP

Substantial question of law No. 1

3. During the purported course of employment, of, the claimant, under respondent No. 1, and, whereat he was driving vehicle bearing No. HP 64-0322, he sustained hence disabling injuries, upon, his person, injuries whereof, find reflection in, the disability certificate, embodied in Ext. PW1/E. A perusal of the disability certificate, embodied in Ext. PW1/E, proven by PW-2, underscores, vis-à-vis, the disabled claimant, standing entailed, with a 10% permanent disability of loco-motor, (i) and, hence the compensation amount, in the manner computed, in parapgraph-23 of the impugned verdict, stood assessed, upon him. The learned counsel for the Insurer, whereupon whom the, apposite indemnificatory liability, stood fastened has, contended with much vigor, before this Court, that the mandate embodied, in, Section 3 of the Workmen Compensation Act, 1923, and, provisions whereof stand extracted hereinafter:

> "3. **Employer's liability for compensation**-(i) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

(i) enjoin adduction of firm and cogent evidence, hence making a visible display vis-à-vis, the disabling injuries, partial or total entailed, upon the person concerned, both arising out of, and during, the course of employment of the person concerned hence with his employer. He contends that since the disabled claimant, is the son, of the owner of the afore vehicle, (ii) thereupon, pers se, the extant petition being collusive, and, it being engulfed, with a pervasive vice, of, malafides (iii) and hence he also espouses, vis-à-vis, the disabled claimant, though suffering the disabling injuries upon his person, during, the accident involving the ill-fated vehicle, yet thereat he was not performing his duties, as, an employee, of his father, arrayed, as, respondent No. 1. The afore submission, is, contested, by the respondent herein, given hence RW-1, during, the Course, of, his cross-examination, rather acquiescing to a suggestion, vis-à-vis, there being no bar in the policy of insurance, as stood, executed interse the insurer, and the insured, (iv) whereupon the latter stood barred, to engage his son as a driver, upon, the relevant vehicle. Besides, also upon his being cross-examined, therein rather his rendering, an echoing, vis-à-vis, their being no documentary evidence, vis-à-vis, there existing no relationship of employer and employee, interse the disabled claimant, and, his father, arrayed, as respondent No. 1. Since, even though, the discharging onus, vis-à-vis, issue No. 1 was cast, upon, the disabled claimant, and, when during his testification, as rendered, vis-à-vis, issue No. 1, he during the

course of his examination-in-chief, rather tendered his affidavit, borne in Ext. AW1/A, and, wherein, the afore echoing(s) are borne, (v) and, when the afore testification, was not endeavored to be belittled, vis-à-vis, its veracity, by the learned counsel for the Insurer, (vi) besides when the afore testification, also, during the course of cross-examination of RW-1, rather sequelled from the latter, an echoing, vis-à-vis, there existing no documentary proof, vis-à-vis, the lack of existence of any relationship of employer and employee, interse, the petitioner, and, the respondent No. 1, (vii) besides with the ill-fated vehicle, standing evidently, and, un-controvertedly, categorized, hence as a goods vehicle, cumulatively, thereupon, the disabled claimant, for earning his livelihood, from his being engaged thereat, as a driver by respondent No. 1, his father, is to be concluded to be, hence engaged, under, an apt remuneration, rather by his father, arrayed as respondent No. 1. Since, no evidence, rather exists, vis-à-vis, any collusion, interse the disabled claimant and respondent No. 1, his father, rather when RW-1, did not, either step into the witness box, nor obviously, rendered any testification, supporting the afore contention of the insurer, vis-à-vis, his colluding with his son, (viii) thereupon, per-se, upon anvil of the disabled claimant, being son of respondent No. 1, cannot, muster any conclusion, qua there existing no statutory relationship, of employer and employee, between the petitioner, and, the respondent, nor hence it can be concluded, that, the insurer of the vehicle concerned, not being amenable, for the apposite indemnificatory liability standing fastened, upon, it. Substantial question of law No. 1 is answered accordingly.

Substantial question of law No. 2

4. The relevant accident, occurred on 28.11.2007, and the statutory provisions, appertaining, to the computation of compensation are, hereat hence strived, to be the ones, rather holding prevalence thereat, or being in vogue thereat. However, the learned Commissioner appears, to, in paragraph-23 of the impugned verdict, hence compute compensation, not in tandem, with the governing therewith provisions, inasmuch, as the provisions governing, the, computation of compensation, vis-à-vis, disabled claimants, stood embodied, in Explanation-II of Section 4, of the Workmen Compensation Act, 1923, and, as brought into effect, since 1.7.1984, the apt provisions whereof stands extracted hereinafter:

"**4. Amount of compensation:-**(i) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

(a) Where death results from the injury	(i) An amount equal to [fifty percent] of the monthly wages of the deceased workman multiplied by the relevant factor; or an amount of [eighty thousand rupees] whichever is more;
(b)Where permanent total disablement results from the injury: (c) where permanent partial disablement results from the injury	An amount equal to [sixty percent] of the monthly wages of the injured workman multiplied by the relevant factor, Or An amount of [ninety thousand rupees] whichever is more

Explanation I. For the purposes of clause (a) and clause (b)"relevant factor", in relation to a workman means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed

years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due.

Explanation II:- Where the monthly wages of 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;

(c) where permanent partial disablement results from the injury	(i) in the case of any injury specified in Part II of Schedule 1, 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 any 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."

Accepting the testification rendered by the disabled claimant, vis-à-vis, at the relevant time, his drawing a per-mensem salary of Rs. 5000/-, thereupon with apposite explanation-II, mandating, qua thereon, for, the purpose of clause-(a), and clause-(b) of Section 4 of the Workmen's Compensation Act, his being, statutorily presumed, to draw a per mensem salary, borne in a sum of Rs. 4000/- only, (i) thereupon with the disabled claimant, being declared, to stand entailed, with a total permanent disablement, hence, in consonance, with clause-(b) of Section 4 of the Workmen's Compensation Act, the amount of compensation, is, to be computed, in the hereinafter manner:

i) Age of the petitioner at the time of accident: 29 years

ii) Monthly salary of deceased : Rs. 4000/-

(60% of which comes to Rs. 2400/-

iii) Relevant factor as schedule IV of the Act: 209.92

iv) Disability 10%

v) Compensation amount= $\frac{2400x10x209.92}{100}$

= Rs. 50,380/-

The substantial question of law No. 2 is anwered in favour of the Insurer concerned. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants, are, held entitled to a total compensation of Rs. 50,380 /- along with interest at the rate of Rs. 12% , w.e.f. 28.12.2007, one month after the date of accident, till making, of, the deposit of the compensation amount. Also, the pending application(s), if any, are also disposed of. No costs.

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

FAO No. 201 of 2015 a/w FAO No 451 of 2015
Reserved on : 11.7.2019
Date of decision:25.7.2019

Motor Vehicles Act 1988- Section 166 – Motor accident– Claim application – Defence of deceased being gratuitous passengers in goods vehicle – Proof- Insurer disputing its indemnificatory liability as fastened by Tribunal on ground that deceased were travelling in goods vehicle as gratuitous passengers– Held, on facts documentary evidence clearly shows that offending vehicle was laden with garlic bags and furniture owned by deceased– Deceased were not travelling as gratuitous passenger in goods vehicle, rather they were aboard as owner of goods– Findings of Tribunal fastening liability on insurer not wrong. (Para 3)

1. **FAO No. 201 of 2015**
   Shriram General Insurance Com. Ltd. .....Appellant
   Versus
   Sangeeta Devi & others ....Respondents.
2. **FAO No. 451 of 2015**
   Shriram General Insurance Com. Ltd. .....Appellant
   Versus
   Dev Dassi & others ....Respondents.

Case referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the appellant: Mr. Jagdish Thakur, Advocate, for the appellants in both the appeals.

For the respondents: Mr. Ramesh Sharma, Advocate, for respondents No. 1 to 4 in FAO No. 201 of 2015.
Mr. Dibender Ghosh, Advocate, for respondents No. 5 to 7 in both the appeals.
Mr. Manoj Pathak, Advocate, for respondents No. 1 to 4 in FAO No. 451 of 2015.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Since both, FAO No. 201 of 2015, and, FAO No. 451 of 2015, respectively appertain, to, the, ill-fated mishap, hence involving the offending vehicle concerned, and, when the aggrieved therefrom, the, insurer whereuponwhom, the, apposite indemnificatory liability stand fastened, rests, a, common contest qua therewith, in, both the afore appeals, thereupon, both the afore appeals, are, amenable, for, a common verdict being pronounced thereon.

2. In MAC petition No. 0100083 of 2011, wherefrom FAO No. 201 of 2015 has arisen, the learned MACT hence assessed, vis-a-vis, claimants compensation amount, borne in a sum of Rs. 25,00,000/-, and, thereon levied interest, at the rate of 6% per annum, from the date of petition, till realization, and, along therewith imposed costs of Rs. 4,000/-, and, in MAC Petition No. 0100082, wherefrom FAO No. 451 of 2015 arisen, the learned MACT assessed, vis-a-vis, claimants compensation amount borne in the sums of Rs. 11,40,000/-, and, thereon levied interest at the rate of 6% per annum, from the date of petition,till realization and along therewith imposed costs of Rs. 4,000/-, and, in both the afore MAC

Petitions, the, apposite idemnificatory liability(ies), stood fastened, upon the insurer, of, the offending vehicle.

3. The learned counsel appearing for the insurer, has not projected any resistance, vis-a-vis, the validity, of, the findings, returned by the learned MACT, upon the issue, appertaining to the ill-fated mishap, being a sequel of negligence, on the part of the driver of the offending vehicle, rather, the contest, in, both the afore FAOs, is centered upon, (a) with the Registration Certificate, appertaining to the offending vehicle concerned, and, as embodied, in the records of MAC petition No. 0100083 of 2011, as, Ext. R-1, and, in the records, of, MAC Petition No. 0100082,stands embodied, as, Ext. R-1, rather, making reflections, vis-a-vis, the offending vehicle being registered, as, a goods vehicle, (b) thereupon, unless, the deceased were evidently traveling therein, along with their goods, hence laden thereon, (c) thereupon, the, fastening of the apposite idemnificatory liability(s), upon, the insurer being grossly inapt. He further contends that, though, the investigation report, as, borne in Mark 'B' in MAC petition No. 0100083 of 2011, and, as borne in Mark 'B' of MAC Petition No. 0100082, respectively, not making disclosures, vis-a-vis, the offending vehicle, at the relevant time, hence carrying any goods, (d) thereupon an inference, is sparked, vis-a-vis, the deceased in both the afore appeals, being aboard, upon, the offending vehicle, as, gratuitous passengers, and, hence, the, fastening of, the, idemnificatory liability, upon, the insurer, being legally frail. However, in making the afore submissions, the learned counsel for the insurer, is grossly unmindful, vis-a-vis, the recitals, borne in Ext. PW-1/B, and, in Ext. RW-1/C, and, also, vis-a-vis, the recitals borne in Ext. PW-1/C, existing, on, file of MAC petition No. 0100083 of 2011, all exhibit(s) whereof, rather make graphic echoings, vis-a-vis, (a) garlic bags, (b) and, furniture existing, on the relevant spot. Besides with, RW-2 in his deposition, making also echoings, vis-a-vis, the offending vehicle, at the relevant, time being laden, with furniture, owned by deceased Chhaya Ram, and, also qua garlic bags owned, by deceased Roop Lal, also being laden thereon, (c) and, with the afore echoings, borne in the afore exhibits, and, also with the afore testification, rendered by RW-2, rather remaining uneroded, (d) thereupon, the ensuing conclusion, therefrom, is, qua, the afore deceased Chhaya Ram, and, deceased Roop Lal, at the relevant time, being aboard the offending vehicle, not in the capacity, of, gratuitous passengers, rather, theirs travelling, therein alongwith the afore goods, (e) and, thereupon their LRs, on their demise, had a valid right, by respectively constituting claim petitions, for hence therethrough, compensation being assessed, qua them, and, also, the, saddling of indemnificatory liability(ies) qua therewith, upon, the insurer of the offending vehicle, given, qua the offending vehicle, standing insured, with the insurance company concerned, being merit worthy.

4. **FAO NO. 451 of 2015.**

However, the learned tribunal, in not granting the requisite hikes or accretions towards future prospects, vis-a-vis, the per mensem income, of, the deceased, in 50% per centum rather has committed, a, gross legal fallacy, given the law laid down by the Hon'ble Apex Court, and, encapsulated in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.61, extracted hereinafter, hence, permitting, the, meteings, of, afore hikes:-

> "61. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. ”

thereupon, and, in consonance therewith the afore deceased Roop Lal, is entitled for meteing(s), of, 40% increase(s), in his apposite per mensem income, as, borne in a sum of Rs.5000/-, increases whereof, are, computed to stand borne, in a sum of Rs.7,000/-. Significantly, the number of dependents, of, the deceased, are, 4, hence, 1/4th deduction, is, to be visited, upon, a sum of Rs.7,000/-, hence, after making, the, aforesaid apt deduction, vis-a-vis, the afore sum, the per mensem dependency, hence comes to Rs. 5250/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs. 5250/- x 12=Rs.63,000/-. After applying thereto, the apposite multiplier of 16, thereupon, the total compensation amount, is assessed in a sum of Rs.63,000/- x 16=Rs.10,08,000/- (Rs. Ten lakhs, eight thousand only).

5. Furthermore, the quantification, of damages, by the learned Tribunal, vis-a-vis, the widow of the deceased, and, the other claimants (i) under the head, “loss of consortium”, “Loss of love and affection”, “loss of estate” and “funeral expenses” is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium vis-a-vis the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads, vis-a-vis, the widow of the deceased, as also, vis-a-vis, the other claimants. Accordingly, in addition to the aforesaid amount of Rs.10,08,000/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, only, vis-a-vis, the widow of the deceased, and, funeral expenses, sums of Rs.15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively, whereupon, the total compensation wheretowhich, the respondents/claimants, are, entitled

to, comes to Rs.10,08,000 + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.10,78,000/-(Rs. Ten Lakhs, seventy eight thousand only).

6. **FAO No. 201 of 2015**

However, the quantification, of damages, by the learned Tribunal, vis-a-vis, the widow of deceased, and, the claimants, in FAO No.201 of 2015, (i) under the head, "loss of consortium", "Loss of love and affection", "loss of estate" and "funeral expenses" is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium vis-a-vis the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the widow of the deceased, as also, vis-a-vis the other claimants. Accordingly, in addition to the compensation amount, as adjudged by the learned tribunal, under the head "loss dependency", and, borne in a sum of Rs.25,38,984/-, the claimants, are, also entitled, under, conventional heads, namely, loss to estate, loss of consortium, only, vis-a-vis, the widow of the deceased, and, funeral expenses, sums of Rs.15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively, whereupon the total compensation wheretowhich the respondents/claimants are entitled comes to Rs.25,38,984/- + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.26,08,984/- (Rs. Twenty six lakhs, eight thousand, nine hundred eight four only).

7. For the foregoing reasons, the impugned awards, are, in the aforesaid manner, hence modified. Accordingly, the claimants/respondents No.1 to 4, in FAO No. 451 of 2015, are, held entitled to a total compensation of Rs.10,78,000/-(Rs. Ten Lakhs, seventy eight thousand only) along with interest @ 6%, from, the date of petition till the date, of, deposit, of the compensation amount, and, in FAO No. 201 of 2015, the claimants are held entitled to a total compensation amount of Rs.26,08,984/- (Rs. Twenty six lakhs, eight thousand, nine hundred eight four only) along with interest, at the rate of 6% per annum, from the date of filing of the petition, till its realization.

8. The indemnificatory liability, vis-a-vis, the afore compensation amounts, in both the afore FAOs, shall be, vis-a-vis, insurer of the offending vehicle, i.e. appellant herein. The amount of interim compensation, if already awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation, be apportioned, in the manner as ordered by the learned tribunal. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep, and, benefit of her minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

Gagan Singh …Petitioner
Versus
Balwinder Singh ….Respondents

FAO No. 604 of 2018
Decided on : 11.7.2019

Employees Compensation Act, 1923 –Section 22 - Death of employee – Claim application by legal representatives – Dismissal by Commissioner– Appeal against- On facts, held, deceased was not doing or performing his duties at time of his death –Death seems to have taken place on account of consumption of liquor -Death thus is not shown to have occurred for reasons connected with his employment– Causal nexus between death and employment of deceased not established– Legal representatives have no cause to maintain claim application– Appeal dismissed. (Para 2)

For the appellant	:	Mr. Vivek Singh Thakur, Advocate.
For the respondent(s)	:	Mr. Shubham Sharma, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The dependents, of, deceased Vijay Kumar, stand aggrieved, by the award, rendered by the learned Commissioner, under Employees Compensation Act, Dharamshala, District Kangra, H.P., wherethrough, hence claim petition bearing No. 1/2012 rather stood dismissed.

2. After hearing the learned counsel, for, the parties, for sometime, the following issues arise, for, determination:

i) Whether deceased Vijay Singh died during the course of employment of respondent No. 1, as alleged? OPP

ii) Relief.

2. It is not denied by respondent No.1, that, he had engaged deceased Vijay Kumar, to perform the work of Welder, at Luxmi Steel Industry, Draman, however, the cause of demise, of, the afore deceased, finds reflection in his post mortem report, embodied in Ext. PW4/B, the relevant portion whereof, is, extracted hereinafter:

> *"An young adult male, medium built, measuring 5'6" vertex to heal, wearing yellow full sleeve shirt cream colour casual pant, and macroman brown coloured underwear. There is an "Om" tattoo on right upper arm silver coloured region in both sides. Rigor mortis present as both upper and lower limbs dry clotted blood present in both nostrils flowing down the check on right side. Mouth closed eyes open on right and closed on left. No ligature mark or sign of strangulation. Noted multiples bruises seen and i) Left dorsum of index finder 2) dorsum of right mid, ring and little finder, 3) right knee, 4) right dorsum of tibia 5) upper back side of chest, 6) medial aspect of left knee and ankle. A lacerated wound in left big toe and clotted blood on left foot."*

Palpably a disclosure is borne therein, that, presence of alcohol being noticed in his viscera. A perusal of the record also makes clear unfoldments, that the demise, of, the afore deceased Vijay Kumar, not occurring during, the course of his performing his duties as a Welder, rather his demise occurring, subsequent, to, the completion of his afore work. Further more, when, the afore referred postmortem report, embodied in Ext. PW4/B carries therein the afore enunciation(s), (a) thereupon it appears, that the demise of the deceased not holding, any,

> **nexus, and, connectivity, interse his performing, the, work of a Welder at Luxmi Steel Industry, owned by the** respondent, (b) rather his demise being sequelled by factors, other than, his purportedly, at the relevant time, performing the afore avocation, and, is also not inter-connected, with, his performing the work, of, a Welder, nor reiteratedly also it can be concluded that his demise, has occurred, during, the course of his performing employment, as, a Welder, under respondent No. 1.

3. Consequently, there is no merit in the appeal and the same is dismissed. The orders/award, impugned before this Court, rendered in WCP No. 1/2012, and, rendered on 30.12.2017, are affirmed and maintained. The pending application(s), if any, are also disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of H.P. ……Appellant.
Versus
Dr. Suresh Sankhayan ……Respondent.

LPA No. 224 of 2012
Reserved on: April 30, 2019.
Date of decision: July 29, 2019.

Central Civil Service (CCA) Rules, 1965–Rule 15 (2)– Disagreement of disciplinary authority with report of inquiry officer– Procedure thereafter- Held, disciplinary authority must record in writing its reasons qua such disagreement tentatively and serve the delinquent therewith before taking final decision– Delinquent is required to be given due opportunity of being heard by disciplinary authority before taking final decision in the matter– Report of inquiry officer exonerating the delinquent is required to be served upon him so that he has opportunity to persuade disciplinary authority to accept report submitted by inquiry officer- Forming of opinion by disciplinary authority that charges stand proved without affording opportunity of being heard to delinquent is improper– So also when such reasons are not based on evidence adduced before inquiring authority. (Paras 9 & 10)

Cases referred:

Punjab National Bank and others vs. Kunj Behari Misra, (1998) 7 SCC 84
Yoginath D. Bagde vs. State of Maharashtra and another, (1997) 7 SCC 739

For the appellant:	Mr. Vikas Rathore, Addl. A.G. with Mr. Narender Guleria, Addl. A.G with Mr. J.S. Guleria, Dy. A.G and Mr. Kunal Thakur, Dy. A.G.
For the respondent:	Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

This appeal is directed against the judgment dated 3.1.2012 passed by learned Single Judge in CWP No. 7144 of 2011 quashing thereby Annexure P-8 the order retiring the respondent-writ petitioner compulsorily from service, of course with his entitlement to full pension and gratuity as admissible and order Annexure P-9 holding him thereby entitled to the subsistence allowance equal to 75% of the total leave salary in addition to dearness allowance after adjustment of the subsistence allowance released earlier in his favour vide order dated 28.4.2009 and 16.9.2010.

2. The respondent-writ petitioner was working as Principal in Dr. Rajender Prasad Government Medical College (hereinafter referred to as 'RPGMC' in short), Kangra at Tanda in the year 2009. The incident of ragging had taken place during the night intervening 6th and 7th March, 2009. One student namely Aman Satya Kachru, a first year MBBS student was killed by senior students in this incident. The death of the young student has brought lot of criticism for the management of the college and also the State government. The matter was agitated by the public from all walks. The appellant-respondent/State ordered a judicial inquiry in the matter. The inquiry was conducted by Additional District Magistrate, Kangra district at Dharamshala. Besides the Medical council of India also got the matter inquired into. The Raghvan committee also conducted inquiry into the causes leading to death of Aman Kachru and submitted its report. The competent authority i.e. the appellant-respondent on going through the reports submitted by the Additional District Magistrate, Medical Council of India and Raghvan Committee and taking a serious view of the matter placed the respondent-writ petitioner under suspension and also decided to hold inquiry against him for imposition of major penalty. The appellant-respondent vide Annexure P-2 to the writ petition proposed to hold inquiry under Rule 14 of the CCS(CCA) Rules 1965 against the respondent-writ petitioner. The article of charges framed against him are annexure R-1 to Annexure-P-2 whereas the imputations of misconduct/misbehavior in support of article of charges, Annexure-II and list of documents relied upon Annexure-III. Shri Ajay Sharma, the then Director Ayurveda to the Government of Himachal Pradesh was appointed as Inquiry Officer vide order Annexure P-4 to the writ petition whereas Shri Rajinder Negi as Presenting Officer. The inquiry was conducted. The Presenting Officer has submitted the written arguments Annexure P-3. The Inquiry Officer vide inquiry report Annexure P-5 has exonerated the delinquent, respondent-writ petitioner from all the charges on the ground that the same were not proved. The inquiry report was placed before the Disciplinary Authority, the appellant-respondent. The said Authority has, however, differed with the inquiry report and recorded the reasons of its dis-agreement Annexure P-6 and thereby called upon the respondent-writ petitioner to show cause as to why major penalty under Rule 14 of CCS (CCA) Rules, 1965 is not imposed upon him. He was given 15 days time to make representation or submissions, if any, to the show cause notice. Consequently, the respondent-writ petitioner has filed the replies Annexures P7-A and P7-B to the writ petition in response to the show cause notice, Annexure P-6. The appellant-respondent, however, considering the reply/submissions made by the respondent-writ petitioner and finding the same not satisfactory has ordered to retire the respondent-writ petitioner compulsorily from service vide impugned order Annexure P-8. At the same time vide impugned order Annexure P-9 of the same day held him entitled to the subsistence allowance equal to 75% of the total leave salary on adjustment of the subsistence allowance already paid to him vide order dated 28.4.2009 and 16.9.2010.

3. The respondent-writ petitioner has challenged the impugned order Annexures P-8 and P9 in this Court on the grounds, inter alia, that imposition of major penalty of compulsory retirement from service against him is arbitrary, illegal and void,

abinitio being also not in violation of the procedure laid down under Rule 15 of CCS (CCA) Rules 1965. The report of the Inquiry Officer was stated to be well reasoned and as such, there was no occasion to the disciplinary authority to have disagreed therewith. The disciplinary proceedings being quasi judicial in nature, therefore, the requirement is that the disciplinary authority has to act in a just and fair manner. In the case in hand the opportunity of being heard allegedly was not given to the respondent-writ petitioner as the disciplinary authority has taken a final decision to retire him compulsorily from service at that very time when recorded the so called tentative reasons of its dis-agreement. Such an approach is stated to be not legally permissible. It is pointed out that the disciplinary authority is required to provide the tentative reasons of dis-agreement first and to decide finally qua such disagreement of taking into consideration the response of the delinquent officer thereon. The tentative reasons of dis-agreement recorded by the disciplinary authority are stated to be not based upon the evidence having come on record during the course of the inquiry conducted. Also that the impugned order annexure P-8 has been passed by the appellant-respondent in complete ignorance of the contentions raised by the writ petitioner in reply to the show cause notice he filed.

4. In response to the writ petition the stand of the respondent-appellant in a nut shell was that the Inquiry officer has not taken into consideration the inquiry report submitted by the Additional District Magistrate Kangra, by Raghavan Committee and also the Medical Council of India. The respondent-writ petitioner was allegedly negligent and careless throughout as he never taken the issue of ragging seriously. Such evidence having come on record was stated to be not appreciated by the Inquiry officer. This has led in recording its reasons of dis-agreement with Inquiry report by appellant-respondent. Since the reply to the notice, tentative reasons of dis-agreement Annexure P-6 filed by the respondent-writ petitioner was not found satisfactory, therefore, the disciplinary authority well within its competency has imposed the penalty of compulsory retirement upon the respondent-writ petitioner. It is also averred that the respondent-writ petitioner has straightway invoked the extra ordinary jurisdiction of this Court by filing the writ petition without exhausting the statutory remedy available to him under the provisions of CCS(CCA) Rules. The order Annexure P-8 and P-9 could have been challenged by filing the appeal before the appellate Authority under Rule 24 of the CCS (CCA) Rules. The writ petition as such, was sought to be dismissed.

5. Learned Single Judge on hearing the parties on both sides, taking into consideration the given facts and circumstances and also the law laid down by the Apex Court in ***Punjab National Bank and others*** versus ***Kunj Behari Misra, (1998) 7 SCC 84*** and ***Yoginath D. Bagde*** versus ***State of Maharashtra and another, (1997) 7 SCC 739*** has concluded that the disciplinary authority, the appellant-respondent, herein instead of recoding tentative reasons and supplying the same to the writ petitioner to enable him to make representation has straightway proposed the penalty to be imposed upon him. Such an approach has been held to be against the law laid down by the Apex Court. In view of the judgment again that of the Hon'ble Apex Court in SBI and others Versus Arvind K. Shukla, (2004) 13 SCC 797 it has been observed that the disciplinary authority taking a view different to that of the inquiry Officer is required to record its tentative reasons and made the same available to the delinquent and taking a final decision after affording the opportunity of being heard. The writ petition as such was allowed and the impugned order annexure P-8 and P-9 quashed and set aside. It has further been left open to the appellant-respondent to proceed in the matter in accordance with law.

6. The appellant-respondent aggrieved by the judgment passed by learned Single Judge has questioned the legality and validity thereof on the grounds, inter alia,

that the same is not only against the facts of the case but also the law applicable. Learned Single Judge allegedly has not appreciated the facts of the case in its right perspective. The factum of the penalty of compulsory retirement imposed upon the petitioner after holding regular departmental inquiry and after affording him due opportunity of being heard has not been appreciated. As per the settled proposition the disciplinary authority is not bound to accept the report submitted by the Inquiry officer and may disagree therewith by formulating its own opinion. The respondent-appellant, therefore, was well within its right to have recorded dis-agreement with the report submitted by the inquiry officer. The tentative reasons of dis-agreement as recorded were duly supplied to the respondent-writ petitioner after taking his response and considering the same. The order Annexure P-8 though has been passed imposing thereby the penalty of compulsory retirement upon the respondent-writ petitioner, however, while taking lenient view he has been held entitled to full pension and gratuity etc. Also that, he was due for retirement a day after the issuance of the impugned order annexure P-8 on 31st October 2010. On this ground also, the respondent-writ petitioner cannot be heard of any complaint against the impugned order Annexure P-8 to the writ petition.

7. We have heard Mr. Vikas Rathore, learned Additional Advocate General on behalf of the appellant-respondent and Mr. Sunil Mohan Goel, Advocate, representing the respondent-writ petitioner and also perused the record of the case.

8. The facts as discussed hereinabove are not in much controversy as admittedly in the month of March 2009 respondent-writ petitioner was officiating as Principal of RPGMC, Kangra at Tanda. One first year student Aman Satya Kachru was killed in an incident of ragging during the night intervening 6/7.3.2009. The inquiry into the incident of violation/ragging was conducted not only by the Additional District Magistrate, Kangra at Dharamshala but also the Medical Council of India got the matter inquired into. Besides, a committee namely Raghavan committee also inquired into the matter. All these reports anyhow or other implicates the administration of the college and held it responsible for the untoward incident of ragging taking away life of one of the students of the college. Obviously the respondent-writ petitioner being the Principal was at the helm of affairs so far as the administration and management of the college is concerned, hence, was prima facie held responsible for this incident. He, therefore, was placed under suspension. After holding inquiry initiated for imposition of major penalty upon him under Rule 15 of the CCS (CCA) Rules, the Inquiry officer, however, exonerated him of the charges framed.

9. There is again no dispute so as to the disciplinary authority may disagree with the report of the inquiry officer as provided under Rule 15(2) of the CCS(CCA) Rules. The only requirement, however, is that such authority must record in writing its reasons qua such disagreement tentatively and serve the delinquent therewith before taking a final decision. The delinquent officer is required to be given due opportunity of being heard before taking final decision in the matter. The short controversy which need adjudication in the present lis by us is, therefore, that the tentative reason of its disagreement Annexure P-6 to the writ petition recorded by the disciplinary authority is in accordance with law and that the respondent-writ petitioner has been provided with opportunity of being heard before imposition of the penalty of compulsory retirement from the service.

10. The answer to this poser in all fairness and in the ends of justice would in negative because tentative reasons of disagreement recorded by the disciplinary authority, respondent-appellant on the face of it are not based upon the material which was available before the Inquiry Officer and on appreciation whereof he has exonerated the respondent-writ petitioner from the charges framed against him. As a matter of fact, in a case where

disciplinary authority disagrees with the report submitted by the Inquiry Officer on any article of charge is required to record its own findings on such charge, record its tentative reasons for such disagreement and give an opportunity to the charged officer and make a representation, if any, against tentative reasons for such disagreement and thereafter record its findings. The report of the Inquiry officer exonerating the charged Officer is also required to be served upon him so that he had an opportunity to persuade the disciplinary authority to accept the inquiry report submitted by the inquiry officer. In the case in hand, the tentative reasons of disagreement, Annexure P-6 on the face of it are not speaking one. The disciplinary authority, no doubt, has recorded the reasons of disagreement, however, without affording the opportunity of being heard to the charged officer, formed the opinion that the charges framed against him stand proved. The reasons recorded therefor are either the non-consideration of the inquiry report submitted by the Additional District Magistrate, the Medical Council of India and Raghavan Committee. Also that, the respondent-writ petitioner has failed to controvert the allegations and inaction and lack of care and caution in dealing with the issue of ragging in the college. The reasons/findings (Annexure P-6) as recorded by the disciplinary authority, however, are not based upon the evidence considered by the inquiry officer. Even if the reasons so recorded are held to be sufficient, in that event also, the respondent-writ petitioner was not called upon to file his response and make submissions nor the opportunity of being heard in order to persuade the disciplinary authority to take similar view of the matter as was taken by the inquiry officer. In ***Kunj Behari Misra's*** case cited supra, the Apex Court has held that in the event of the disciplinary authority disagrees with the inquiry officer on any article of charge before recording its own findings on such charge, it must record the tentative reasons for disagreement and give to the charged officer an opportunity to represent and also to make submissions before such findings are recorded by it. It has further been held in this judgment that the disciplinary authority which has to take a final decision in the matter and to impose penalty must give an opportunity to the charged officer to file representation before the findings on the charges framed are recorded by the disciplinary authority. In the case in hand, as noticed supra, the disciplinary authority has recorded the reasons qua its disagreement with the inquiry officer, as is apparent from Annexure P-6, however, taken a final decision also that the charges stand established against the respondent-writ petition and also called upon him to show cause as to why penalty of compulsory retirement from Government service is not imposed upon him. Such an approach is without any legal sanctity as has been held by the Apex Court in ***Kunj Behari Misra's*** case, referred to hereinabove. Even in Yoginath D. Bagde, a case involving more or less similar facts as the disciplinary authority i.e. five senior most judges of the High Court including the chief justice, not only recorded its tentative reasons qua disagreement with the inquiry officer, however, the penalty was also proposed to be imposed upon him simultaneously without affording the opportunity of being heard. It is in this backdrop, the Apex Court has held as under:-

> 31. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tenative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he

is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution.

32. Applying the above principles to the facts of this case, it would be noticed that in the instant case the District Judge (Enquiry Officer) had recorded the findings that the charges were not proved. These findings were submitted to the Disciplinary Committee which disagreed with those findings and issued a notice to the appellant requiring him to show-cause why he should not be dismissed from service. It is true that along with the show-cause notice, the reasons on the basis of which the Disciplinary Committee had disagreed with the findings of the District Judge were communicated to the appellant but the Disciplinary Committee instead of forming a tentative opinion had come to a final conclusion that the charges against the appellant were established.....

34. Along with the show-cause notice, a copy of the findings recorded by the Enquiry Officer as also the reasons recorded by the Disciplinary Committee for disagreeing with those findings were communicated to the appellant but it was immaterial as he was required to show-cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision that the charges against the appellant were proved. It was not indicated to him that the Disciplinary Committee had come only to a "tentative" decision and that he could show cause against that too. It was for this reason that the reply submitted by the appellant failed to find favour with the Disciplinary Committee.

35. Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to findings on the two charges framed against him, the principles of natural justice, as laid down by a Three-Judge Bench of this Court in Punjab National Bank & Ors. vs. Kunj Behari Mishra, (1998) 7 SCC 84 = AIR 1998 SC 2713, referred to above, were violated.

11. Similar is the situation, in the case in hand, because the disciplinary authority which disagreed with the findings of inquiry officer had already taken a final decision at the stage of recording its tentative reasons qua disagreement with the report of the inquiry officer while observing that the charges against the charged officer were proved. No doubt, in show cause notice and the copy of findings recorded by the inquiry officer as well as the reasons, Annexure P-6 recorded by the disciplinary authority with respect to its

disagreement were communicated to the respondent-writ petitioner, but of no avail as it was no-where indicated to the respondent-writ petitioner that the disciplinary authority had come only to a tentative decision and that he will have the opportunity to show cause thereto. It is for this reason the reply filed by the respondent-writ petitioner to the tentative reasons, Annexure P-6 does not find favour with the disciplinary authority as a final decision was already taken that the charges against him stand proved. This is not legally permissible in view of the legal principles discussed hereinabove. Learned Single Judge, therefore, has not committed any irregularity or illegality while arriving at a conclusion that the order, Annexure P-8 with respect to imposition of penalty of compulsory retirement is not legally sustainable. Consequently, the impugned order, Annexure P-9, whereby the respondent-writ petitioner was allowed to draw the subsistence allowance to the extent of 75% of his leave salary has also been quashed and set aside. The contention to the contrary in the present appeal, to our mind, therefore, are not only without any basis but also legally unsustainable.

12. It is worth mentioning here that while quashing the impugned orders, Annexure P-8 and P-9, learned Single Judge has left it open to the appellant-respondent to proceed in the matter against the respondent-writ petitioner further in accordance with law. Therefore, the appellant-respondent otherwise also cannot be heard to have any complaint against the impugned judgment.

13. For all the reasons discussed hereinabove, this appeal fails and the same is accordingly dismissed, so also the pending application(s), if any.

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

Om Prakash (since deceased) through his LRs ...Appellants

Versus

Shri Sanjay Kumar and another ...Respondents

RSA No.89 of 2010
Reserved on : 19.7.2019
Decided on: 25.7.2019

Indian Succession Act, 1925 – Section 63 – **Indian Evidence Act, 1872**– Section 68 – Execution and proof of Will – Defendants challenging concurrent findings of lower courts holding Will propounded by them as not duly proved and decreeing suit of plaintiff to the effect that she and proforma defendants having succeed to estate of 'RR' – Held, (i) attesting witnesses 'ML' and 'A' duly deposing about testatrix in sound mental state (ii) putting thumb mark on Will in their presence and they also signing Will in her presence (iii) house of propounders in proximity to house of testatrix enabling them to serve her even though she was residing alone as reflected in pariwar register (iv) findings that thumb mark of testatrix was smudged on Will in absence of expert evidence of document writer, are perverse- Execution of Will in favour of defendants proved on record – RSA allowed – Decrees of lower courts set aside and suit dismissed. (Paras 7 & 8)

For the Appellant : Mr. K.D. Sood, Senior Advocate with
Mr. Sukrit Sood, Advocate.

For the respondent(s) : Mr. Suneet Goel, Advocate, for respondent No. 1.

Mr. Vivek Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The plaintiff instituted, a suit, for declaration against the defendants. The suit of the plaintiff, stood decreed, by the learned trial Court. In an appeal carried therefrom, by the defendants, before the learned First Appellate Court, the latter Court dismissed the appeal, whereupon, it concurred, with the verdict, recorded by the learned trial Court. In sequel thereto, the defendants/appellants herein, are, driven to institute, the, instant appeal herebefore.

2. Briefly stated the facts of the case are that plaintiff Kaushalya Devi filed suit for declaration, possession with consequential relief of injunction pleading that suit land compromising land measuring 2.44.03 Hectares, being shares of Khata No. 6, Khatauni Nos 14, 16, 17, 20 to 24 field Nos 1564, 1565, 330, 333, 334, 336, 247, 247, 248, 249, 251, 254, 267, 359, 481, 484, 487, 488, 245, 478, 1639, 246, 250, 274, 275, 332, 333, 337, 486, 483, 485, 1636,1638, 1640, 331, 482, 243,244, 252, 338, 489, 479 kita 41 area 4.88.07 Hectsland measuring 0.02.41 Hects. Being 40/180 shares of Khata Nos 22, Khatauni No. 78, 79 field No. 1999, 2028, 2030, 2027, 2029 kita 5 area measuring 0.10.83, hects and land measuring 0.04.26 hectares being 1/3 share of Khata No. 23 khatauni No. 80 field No. 1991 area 0.12.78 hectares totalland 2.50.79 hectares as entered in the Jamabandi for the year 1994-95 situated at Mohal Chaplah Tehsil Dehra District Kangra was in ownership and possession of one Ram Rakhi. Her husband had expired before enforecement of Hindu Succession Act, 1956 and she had inherited the suit land from her husband and thereby became absolute owner in possession ofl the same. The plaintiff and proforma defendant No. 3 Smt. Ajudhya Devi are the real sisters of Jagan Nath. Hence, after the death of Ram Rakhi, they are entitled to succeed to the suit land by virtue of heirs of Ram Rakhi, they are entitled to succeed to the suit land by virtue of heirs of Jagan Nath since Ram Rakhi died issueless. The defendants No. 1 and 2 Om Prakash and Suresh Kumar in collusion with scribe, witnesses and Patwari Halqua forged and fabricated one Will purported to have been executed by RamRakhi in their favour and consequently, got mutation No. 199 entered in their favour. The plaintiff has pleaded that both the defendants are strangers and are not related to the deceased They have threatened to interfere in possession of plaintiff. Hence, suit for declaration was filed with the prayer that plaintiff and proforma defendant No. 3 be declared owners in possession of suit property. Further, the prayer was made to restrain the defendants from interfering in possession of plaintiff over the suit property. The prayer was also made for possession in case, defendants would found in possession.

3. The defendant No 1 filed written statement wherein they took preliminary objections as to maintainability, locus standi, and estoppel, non-joinder of necessary parties and valuation of lthel suit. On merits, defendants stated that Ram Rakhi was their sister-in-law, and the defendants had been looking after Ram Rakhi who used to stay with the defendants. Consequently, Ram Rakhi during her life time had executed valid Will dated 3.11.1996 in favour of defendant Nos 1 and 2 to the extent of 2/3 share and to the extent of 1/3rd share in favour of plaintiffs in respect of her property. The plaintiff and proforma defendants are married and staying with their in-laws. Hence,on the basis of will a valid mutation qua the suit property it was in their possession. Son there was no question to interfere in the possession of plaintiff,hence prayed for dismissal of the suit. The defendant No. 3 filed separate written statement wherein she admitted the case of the plaintiff and categorically pleaded that late Ram Rakhi did not execute any Will in favour of defendants

No. 1 and 2. Defendant No. 3,hence prayed to pass a decree in her favour alongwith the plaintiff.

4. Replication has been filed, wherein the contentions made in the written statement, are, denied and those made in the plaint are re-asserted. On the pleadings of the parties, the following issues were framed on 16.10.1998.

1. Whether the plaintiff is entitled to the relief of declaration? OPP
2. Whether the plaintiff is entitled to the relief of injunction? OPP
3. Whether Ram Rakhi executed a valid will in favour of defendants No. 1 and 2, dagted 3.11.1996? If so, its effect? OPD
4. Whether the plaintiff is estopped by her act and conduct from filing the suit? OPD
5. Whether the suit is bad for non-joinder of necessary party? OPD
6. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the plaintiffs' suit. In an appeal, preferred therefrom by the defendants, before the learned First Appellate Court, the latter Court dismissed the apposite appeal, and, affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment, and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 26.10.2010, admitted the appeal instituted by the appellant(s), against, the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial question(s) of law:-

> (i) Whether the findings of the Court below are perverse,based on misreading of oral and documentary evidence as also pleadings of the parties, particularly, basic document of title i.e. Will Ext. DW1/A the execution whereof was duly proved by the witnesses Jaimal Singh PW-2 and the marginal witnesses Manohar Lal, DW-2 and Ashwani Kumar DW-4?
>
> 2. Whether the assumption of the Court below that the Will Ext. DW1/A was a forged and fabricated document is sustainable in law in the absence of particulars of fraud, etc. when the execution of the Will was duly proved by the scribe and the attesting witnesses in accordance with Section 63 of the Indian Succession Act, when the burden to prove the said fact lay on the persons setting up such a plea?

<u>Substantial questions of Law No. 1 and 2</u>

7. The defendants, who propounded Ext. DW1/A, executed by deceased testator, one Ram Rakhi, stand aggrieved, by the concurrent verdicts, recorded, by both, the learned Courts below, (i) wherethrough, Ext. DW1/A was pronounced, not to be, proven, to be, validly and duly executed, by the afore testator. Consequently, through, the instant Regular Second Appeal, constituted before this Court, they strive to beget reversal, of, the afore verdicts, as stand, concurrently pronounced, hence against them. Ext. DW1A, is, an unregistered testamentary disposition, executed by deceased testator Ram Rakhi, wherethrough she constituted the plaintiff, and, the defendants No. 1 and 2, as her legatees. The scribe of the Will, is one Jagmail Singh, who stepped into the witness box as DW-2. One Manohar Lal Sharma, and, one Ashwani, also respectively, stepped into the witness box, as

DW-3 and DW-4, hence in their capacity(ies), as, marginal witnesses thereto. Since, the testification, of, the scribe, is not the apt testimony, for therefrom making any firm conclusion, vis-à-vis, hence the statutory ingredients, cast under Section 63 of the Indian Succession Act, begetting apt satiation, provisions whereof stand extracted hereinafter:

> "63. Execution of unprivileged Wills –Every testator,not being a soldier employed in an expedition or engaged in actual warfare [or an airman so employed or engaged] or a mariner at sea, shall execute his Will according to gthe following rules:
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shallbe so placed that it shall appear that it was intended thereby to given effect to the writings as a Will
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, of or the signature of such other person, and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

(i) thereupon the testification, rendered by the scribe, who stepped into the witness box, as DW-2, Jagmail Singh, is, not of any probative worth, hence, for, the afore purpose. Contrarily, the testitication of the marginal witnesses to Ext. DW1/A, one Manohar Lal, and, of one Ashwani, who respectively stepped into the witness box, as DW-3, and as DW-4, enjoin makings, of, imperative allusion thereto, (ii) for therefrom, determining whether the statutory parameters, embodied, in Section 63 of the Indian Succession Act, rather therefrom begetting, their apt satiation. Their respective testitifications, contain echoings, qua the deceased testator, in contemporaniety, vis-à-vis, the execution of Ext. DW1/A, possessing enlivened cognitive faculty(s), (iii) and, also contain echoing(s), qua in their respective presence(s), the deceased testator, making her thumb impression thereon, and, thereafter, (iv) also both articulate qua each in the presence, of, the deceased testator, also making their respective signatures, hence thereon. The afore testification(s), rendered with the hence apt intrase corroboration(s), vis-à-vis, rather satiation, therethrough, being meted, vis-à-vis, the statutory ingredients, borne in Section 63 of the Indian Succession Act, remained unscathed, vis-à-vis, their apt vigor, (v) conspicuously, even during the course of the afore witnesses', being subjected, to the exacting ordeal, of, a rigorous cross-examination. Consequently, though, hence sanctity was enjoined to be meted vis-à-vis, Ext. DW1/A, rather the learned first appellate Court, introduced, certain suspicious circumstances, hence surrounding, the, execution of Ext. DW1/A, and, concluded, qua with theirs remaining un-explained, hence dispelled the vigor, of, the testification(s), rendered by the afore marginal witnesses, to Ext. DW1/A, and, who respectively stepped, into, the witnesses boxes, as, DW-3, and as DW-4. The suspicious circumstances, projected by the learned first appellate Court, is comprised in the factum, (vi) qua with the latter containing

recitals), vis-à-vis, the propounders, being related, to the deceased testator, and, the afore recital being not borne out from the pedigree table, (vii) and with the afore also not proving qua theirs, rendering services, to the deceased testator, rather with the abstract of Pariwar Register, appertaining to Ram Rakhi, unveiling qua hers residing alone, and, not with the defendants, (viii) thereupon, it concluded qua there being no occasion, for, the propounders, of, the Will, to serve Ram Rakhi, hence, the factum of Ram Rakhi, being coaxed, to, upon theirs' rendering services to her, hence constitute them, as her legatees, being falsified. Even though, the propounders, are not closely related to the deceased testator, rather when DWs, in his testification, made echoing(s), vis-à-vis, the house of the deceased testator, and, of, the propounders, being proximately located and, also his further deposing qua the propounders, during the lifetime, of, the deceased testator, rather taking care of her, (ix) thereupon when the afore testification has remained un-eroded of its vigor, (x) thereupon when the defendants, given theirs holding their abode(s), in, proximity to the abode of deceased testator, were hence enabled to serve her, and, when testified services rendered by them, vis-à-vis, the deceased testator, are, un-eroded of its/their vigor, (xi) thereupon the factum of Ext. DB, disclosing qua Ram Rakhi, residing alone, would not beget any conclusion, that, the recitals, qua the deceased testator, being hence, coaxed to bestow, the apt legacy upon them, becoming beclouded with any suspicion.

8. Be that as it may, the learned Courts below, had concluded that, with, the thumb impressions, purportedly, of the deceased testator, being super imposed or smudged, thereupon the testifications, of, DW-3, and, of DW-4, marginal witnesses thereto, being amenable for not meteing any credence thereto. However, the afore reason is a mere invention, and also is surmisal, (i) as during the course of cross-examination, of, the afore witnesses, no suggestion, in consonance therewith, stood meted, to the afore marginal witness, (ii) and, when the Court, has, without making any reference to the experts concerned, has, suo-motu, through its ipse-dixit, made the afore conclusion, (iii) whereas, only upon a reference, being made to the finger impression expert, and, with the latter rendering, an affirmative opinion thereon therefrom, rather the Court would be coaxed, to make the afore conclusion, (iv) thereupon in its suo moto making the afore conclusion, is, fallacious, moreso, when prima-facie, the thumb impression, of the deceased testator, does not appear, to be super-imposed or smudged, and, also is amenable, for, comparisons, with her, admitted thumb impressions, recoursing(s) whereof, stood un-endeavored rather by the plaintiff.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, as also, by the learned trial Court, being not, based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court, as well as the learned trial Court, have excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the appellants/defendants, and, against the respondent/plaintiff.

12. In view of the above discussion, the present Regular Second Appeal is allowed. In sequel, the judgments and decrees rendered by both the learned Courts below are set aside, and, the suit of the plaintiff is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Bahadur Singh (Deceased) through LRs .....Appellants

Versus

Sarup Singh (Deceased) through LRs. ....Respondents.

RSA No. 75 of 2004
Reserved on**:** 15.7.2019
Date of Decision:25.7.2019

Specific Relief Act, 1963–Section 38– Permanent prohibitory injunction– Grant of– Plaintiff seeking permanent prohibitory injunction against defendant for restraining him from constructing Gharat and taking water channel through his land– Case of plaintiff being that after death of defendant's father Gharat built over his land was in disuse and defendant now trying to reconstruct it– Trial court decreeing suit– First appellate court allowing defendant's appeal and dismissing suit– RSA– Held, revenue entries showing suit Khasra numbers as 'Banjar Kadim' and 'Nakabil jangle jhadi'– No description of Gharat or water channel recorded in revenue papers over this land– Revenue entries not rebutted– No proof of allegations that defendant is constructing Gharat or water channel through plaintiff's land, plaintiff is not entitled for permanent prohibitory injunction– RSA dismissed. (Paras 8 & 9)

For the appellants: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Mr. B. C. Negi, Sr. Advocate with Mr. Nitin Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant appeal, stands, directed by the aggrieved plaintiff, who has suffered reversal, of the verdict, decreeing his suit, hence, pronounced, by the learned trial Court, rather by the First Appellate Court, wherethrough, the plaintiffs' suit for rendition of, a, decree of injunction, for, hence restraining the defendant, from, raising construction of Gharat, over suit khasra No. 124, khata khatuani No. 9/20 min, measuring 4.13 bighas, and, also for restraining him, for, taking the water channel upon khasra No. 125, khata khatauni No. 5/12 min, measuring 0.14 bighas, situated in mauza Pirgari, Tehsil Nahan, District Sirmour, H.P., rather stands dismissed.

2. Briefly stated the facts of the case are that the plaintiff has filed a suit against the defendant for injunction alleging there he is co-owner in possession of land comprised in khasra No. 125, measuring 0.14 biswas, situated at village Pirgari, Tehsil Nahan, District Sirmour, H.P. along with khasra No. 124, measuring 4 bighas 13 biswas. A Gharat was constructed over khasra No. 270/126, which was owned and run by Prem Singh, father of defendant, who died about 16 years back. No patta was granted in favour of any person including the defendant and the Gharat is not functioning. The defendant cannot operate the Gharat without seeking prior permission of the Government of H.P. The plaintiff has also alleged that the defendant in connivance with the Revenue Officials is trying to raise the construction of Gharat over the land comprised in khasra No. 124 and alsotrying to carry the water through khasra No. 125 withouty any locus standi. The Gharat according to the plaintiff is in khasra No.270/126 and the defendant is at liberty to renovate the same. The plaintiff has further pleaded that the defendant has started the work on

16.9.2001 by carrying the water through khasra No. 125 and if the defendant is not restrained from raising the construction of Gharat or taking the water through khasra No. 125, the plaintiff shall be ruined. According to the plaintiff, the defendant has no right on khasra No.124 and thus, ye prayed for the relief.

3. The defendant contested the suit and filed written statement, taking certain preliminary objections that the present suit is not maintainable in the present form, that the suit is bad for non-joinder of necessary parties and the plaintiff has no cause of action to file the present suit. On merits, the defendant has denied that the plaintiff is co-owner over khasra No. 124, but according to him he is also co-owner over khasra No. 124/1 measuring 1 biswa. The defendant has admitted that there is a Gharat over khasra No.270/126, which is owned and possessed by the defendant since the time of his father who was running the same without any hindrance. He has denied that the Gharat was ceased to operate after the death of his father Sh. Prem Singh. There is no question of liquidating the Gharat. He is not taking any water through khasra No.125. According to the plaintiff there is khala of village Kathla from where the water is coming for the Gharat. He has denied the remaining contents of the plaint and prayed for the dismissal of the suit.

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

1. Whether the plaintiff is entitled to the relief of injunction, as prayed? OPP
2. Whether the suit in the present form is not maintainable? OPD.
3. Whether the suit is bad for non-joinder of necessary parties? OPD.
4. Whether no enforceable cause of action accrued to plaintiff to file the present suit?
5. Relief.

5. On an appraisal of evidence, adduced before learned trial Court, the learned trial Court, decreed the plaintiffs' suit. In an appeal, preferred therefrom, by, the defendant/ respondent herein, before the learned First Appellate Court, the latter Court allowed, the, appeal, and, set aside the findings recorded by the learned trial Court.

6. Obviously, through the instant Regular Second Appeal, cast, before this Court, by the plaintiff, he seeks reversal of the pronouncement, made, against him, by the learned first Appellate Court. Even though, upon, the instant appeal coming up for admission, on 7.5.2004, this Court, had, admitted the appeal, instituted by the plaintiff/appellant against the judgment and decree, rendered, by the learned first Appellate Court, however, the substantial questions of law are not borne in the grounds of appeal, rather, are appended therewith, hence substantial questions of law occurring at page No.7, of the paper book, are formulated for making an adjudication thereon:-

1. Whether the learned District Judge has misconstrued, misinterpreted and misapplied the pleadings of defendant in the form of written statement, oral and documentary evidence on record in reversing the judgment, decree dated 1.9.2003, passed by the learned Senior Sub Judge, Nahan?
2. Whether the defendant, even if he is a co-owner of land comprised in khasra Nos. 124, 125 along with the plaintiff, has a right to construct Gharat and carry water through channel on the suit land without the approval, consent of the plaintiff and in such situation whether the plaintiff is entitled to a decree of injunction as prayed?

Substantial questions of Law No.1 & 2:

7. The jamabandi, appertaining to the suit khasra Nos., as borne in Ext. PW-1/A, makes a candid graphic echoings qua khasra No. 125, carrying therein, the, classification, of, 'banjar kadim'. Also, a, reading of Ext. PW-1/B, the jamabandi, appertaining to khasra No. 125, and, pertaining to the year 1996-97, discloses, qua in, the, classification column thereof, it, carrying reflection, vis-a-vis, the afore khasra number, hence carrying, the, description, of, 'nakabil jangal jhadi'. Consequently, the afore reflections, cast, in the afore exhibits, per-se cannot carry forward the plaintiff's espousal qua, upon, the afore khasra number, hence, any Gharat existing, nor he can make any valid espousal, before this Court qua, for, his, hence making operational the afore gharat, his being rather, enabled to, supply water thereupto, hence from, a, channel existing on khasra No. 125. In aftermath, reiteratedly, the afore reflections, as, borne in Ext. PW-1/A, and, as borne in Ext. PW-1/B, and, wheretowhich, a presumption of truth, is, enjoyed, and, when no best documentary evidence, unfolding qua the afore reflections, as, borne therein, hence remaining unpreceded, rather by any valid order, for, hence belying their efficacy(ies), (i) thereupon, oral evidence, if any, adduced by the plaintiff, for, dislodging the afore presumption of truth, carried by the afore description(s) borne therein, is, inefficacious and, rather, the, afore reflections carry apt conclusivities. The further sequel thereof, is, that the plaintiff being estopped to claim rendition, of, the espoused decree. However, the learned trial court in gross derogation of the afore conclusivity, rather proceeded to obviously, hence, rendered, a, legally infirm, and, frail decree, of, injunction, against, the aggrieved defendant, respondent herein.

8. Be that as it may, the verdict recorded against the defendant/respondent, is, also ingrained rather deep perverse vice, of, the learned trial court below, proceeding to beyond, the, scope, and, domain, of, pleadings, cast, in the plaint, (i) wherein the plaintiff in apt paragraph thereof, had, contended qua the existence, a, Gharat earlier upon khasra No. 270/126, (ii) and, that though, during the life time of, the, predecessor-in-interest, of, the defendant, hence, it being in operation, yet, on his demise, the Gharat, existing upon the afore khasra number, rather, ceasing to operate, and, that any endevour of the defendant, to operate, the Gharat, without his seeking any permission, in respect thereto, from the Government, hence being impermissible, (iii) and, thereupon, the learned trial Judge had granted the espoused relief, purportedly, upon, the defendant attempting to bring into operation the Gharat, purportedly existing upon khasra No. 124, though evidently, it exists, upon, khasra No. 270/126. However, thereafter, and, in subsequent thereto paragraph, he had also made pleadings, vis-a-vis, the defendant, raising construction, of, a Gharat upon khasra No. 124, and, his also attempting to carry thereupto, a water channel, through his attempting to raise, a, water channel, upon, khasra No.125, for hence his ensuring the afore Gharat, being brought into operation. However, the afore stated Ext. PW-1/A, and, Ext. PW-1/B, upon, their evidently carrying rather reflections in repudiation, vis-a-vis, the afore pleadings, and, with the afore referred descriptions, borne therein, with echoings, qua, the suit khasra numbers beingreferred reflected, as, 'Banjar Kadim', and, 'nakabil jangal jhadi', and, with the afore descriptions, vis-a-vis, the afore suit khasra numbers hence acquiring conclusivity, (v) thereupon per-se the afore averments, cast in the plaint, were enjoined to be thereto conspicously when they remained unabled by apt documentary evidence Moreover, there onwards, during, the pendency of the suit, the plaintiff had, cast an application before the learned trial Court, constituted under the provisions of Order 6 Rule 17 CPC, for, hence therethrough his seeking leave, of the Court, to plead, qua the Gharat existing upon khasra No. 124, yet, the afore application also stood dismissed, (a) and, the order pronounced, on 28.8.2003, upon, the afore application, for want of it, being set aside, rather acquired conclusivity, (b) and, the requisite bindings effect there of, are,

hence, a, concomitant sequel, being engendered and qua thereupon also, the plaintiff being estopped, to, claim rendition, of, the espoused decree, vis-a-vis, the suit khasra numbers. However, even the afore trite factum probandum, appears to be slighted by the learned trial judge, and, thereupon the non meteing(s) , of, deference by him, vis-a-vis, the afore pre-eminent admission(s), of, the plaintiff, whereupon he stood rather barred to claim, the espoused relief, has, caused a grave casualty, to, justice. The afore rendition hence arises from, a, gross mis-appreciation, and, non appreciation, of the afore factum, and, hence begets the imperative sequel, qua thereupon, the impugned verdict being not amenable for interference by this Court.

9. The above discussion, unfolds, qua the conclusion, as arrived by the learned first appellate Court, being based, upon a proper and mature appreciation of evidence on record. Accordingly, the substantial questions, of law are answered in favour of the defendant/respondent, and, against the plaintiff/appellant herein.

10. In view of the above discussion, the instant appeal is dismissed, and, the judgment and decree impugned before this Court is affirmed and maintained. Consequently, the plaintiff's suit is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Shri Sarwan and others ...Appellants.
Versus
Smt. Savitri Devi and Others ....Respondents.

RSA No. 493 of 2004
Reserved on:18.7.2019
Decided on : 25.7.2019

Transfer of Property Act, 1882– Section 118– Oral exchange– Proof– Mutation of oral exchange not attested in presence of both parties– Mutation qua exchange was wrongly attested by revenue officer– Such mutation is not proof of oral exchange (Para 12)

For the Appellants: Mr. Rajneesh K Lall, Advocate vice Mr. Sanjeev Sood, Advocate.
For the Respondents: Mr. Ramakant Sharma, Sr. Advocate with Mr. Dinesh Bhatia, Advocate, for respondents No. 1(a) to 1 (f), 3,5 to 11.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The plaintiffs/respondents herein (for short the plaintiffs), suit for, rendition of a declaratory decree, as well as, a decree for possession, vis-a-vis, the suit khasra Number 1132/277, rather stood dismissed by the learned trial Court, however, on, an appeal cast therefrom, by the aggrieved plaintiffs before the learned first appellate Court, the latter

reversed the findings recorded by the learned trial Court, and, obviously decreed, the plaintiffs' hence the afore espoused relief.

2. The aggrieved therefrom, the defendants, hence rear the instant RSA, wherefrom, they strive to beget reversal, of, the impugned verdict.

3. The brief facts of the case are that the plaintiffs alongwith proforma defendants No. 9 to 18 were owners in possession of the suit land of Khasra No. 1132/277 measuring 10 marlas situated in village Bailag (for short "suit land"). However defendant No.1 and late Sh. Santa predecessor-in-interest of defendants No. 2 to 8 in collusion with the revenue staff got attested mutations of exchange with regard to the suit land in absence of the plaintiffs and proforma defendants and without any notice to them whereas plaintiffs and proforma defendants have never agreed to exchange the land with defendant No.1 and Sh. Santa. The whole process of attestation of mutation was collusive, fraudulent and illegal. Wrong mutation came to their notice in January 1996 when defendants No. 3 and 4 started raising forcible construction on the suit land. Subsequently the suit land during consolidation was merged with the land of khasra No. 244 and 245 of the defendants over a portion of the suit land, the defendants raised forcible construction after dispossessing the plaintiff in February 1996. Wrong mutations of the suit land in favour of the defendants would not affect their right title and interest.

4. Defendants No.1 to 8 in their written-statements claimed themselves to be owner in possession of the suit land and their possession was reaffirmed during consolidation. They also averred that they are owners of the suit land by way of construction of Abadies, which is in existence since time immemorial. In alternative, they claimed that they have acquired title by way of adverse possession of the suit land in case entires qua the suit land were held against the interest of the defendants. The objections qua cause of action estoppal, non-joinder of necessary parties and valuation were also raised.

5. Proforma defendants No. 9 to 18 have admitted the claim of the plaintiffs.

6. In replication, the plaintiffs reasserted their case.

7. From the pleadings of the parties, following issues were framed by the learned trial Court:-

1. **Whether the plaintiffs are entitled to the relief of declaration and possession as prayed for? OPP**
2. **Whether the mutation Nos. 347 and 348 dated 13.8.1997 are void and illegal, as alleged? OPP**
3. **Whether the plaintiffs have no cause of action? OPD**
4. **Whether the plaintiffs are estopped from filing the suit by their own act and conduct? OPD**
5. **Whether the defendants have become owners by way of adverse possession as alleged? OPD**
6. **Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPD**
7. **Whether the suit is not property valued for the purpose of Court fee and jurisdiction, as alleged? OP Parties.**
8. **Relief.**

8. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the suit, of, the plaintiffs. In an appeal, preferred therefrom, by the plaintiffs, before the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court.

9. Now the defendants, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded, in its impugned judgment and decree, by the learned first Appellate Court. When the appeal, came up, for admission, on 27.12.2004, this Court, admitted the appeal, on, the hereinafter extracted substantial questions of law:-

> **1. Whether the first Appellate Court erred in treating the suit of the plaintiff to be within the period of limitation?**
>
> **2. Whether the findings of the first Appellate Court are result of misreading of oral of documentary evidence particularly the admissions of the plaintiff in Exts. P3 & P4 and entry in Jamabandi Ex. P6?**

Substantial questions of law:-

10. The learned first appellate Court, had depended, upon mutations respectively borne in Ex. P-3, and, in Ex. P-4, wherethrough mutations of exchange, vis-a-vis, the suit khasra Numbers, hence stood attested, on anvil, of it hence making further dependence(s), upon, the testification rendered, by one Sarwan Singh, who appeared, in the witness box, as, PW-1, and, therein echoed qua the misal hakiyat appertaining, to the suit property, and, prepared in the year 1910-11, making, no disclosures, qua the predecessor in interest of defendants No. 2 to 8, Sarwan, and, defendant No.1, being recorded therein, to be owners of the contentious suit land, (i) and, therefrom the learned first appellate Court hence recorded a conclusion qua the defendants, not, holding any valid title, in the suit khasra numbers, and, thereupon the orders attesting mutation, of, exchange, and, respectively borne in Ex. P-3 and in P-4, were, concluding rather to be holding no legal sanctity.

11. The learned counsel appearing for the defendants/appellants herein, has contended, with much vigour before this Court (i) qua the dependence made by the learned first appellate Court, upon, the testification rendered by PW-1, being a gross misdependence, (ii) as since 2010-2011, upto, the date of attestation of mutations of exchange, respectively borne in Ex. P-3 and in P-4, no records being produced by PW-1, wherein reflections are borne, for succoring the factum qua the defendants, in contemporaneity vis-a-vis the attestation of mutations, of, exchange, as respectively borne, in Ex. P-3, and, in Ex. P-4 rather not holding valid, subsisting title, in the contentious suit khasra numbers. The afore contention addressed before this Court, is, grossly misfounded, as (a) with the plaintiffs, through, PW-1 adducing discharging evidence, vis-a-vis, the apposite contentious issue, emerging inter-se the contesting litigants (b) and with during the course of his rendering his testification, before the learned trial Court, his though, not producing, the, records hence appertaining to the interregnum, since 2020-2011 upto, the attestation of mutations of exchange, respectively borne in Ex. P-3, and, in Ex. P-4, rather also not carrying forward, the defendants' espousal, (c) that hence, in, the afore interregnum, there were, hence reflections in the revenue records, rather supportive of the defendants, qua theirs holding subsisting, and, valid tile, for, therethrough theirs validating, the mutations of exchange, (d) conspicuously with PW-1, in his cross-examination, rather voicing qua the afore records, remaining unrequisitioned by him.

12. The corollary thereof, is, when the plaintiffs, have through PW-1 hence adduced the apt discharging evidence, vis-a-vis, the contentious issue, (i) thereupon the onus shifted, upon, the defendants, to, during the stage of their adducing, their evidence, theirs hence, making vigorous strivings, for, therethroughs rather theirs belying the afore testification, of, PW-1 or for succoring their espousal, (i) strivings whereof, were comprised in theirs' eliciting from the records concerned, hence evidence, displaying qua their afore propagation, being meritworthy, as well as amenable for acceptance, and, also for belying, the testification rendered by PW-1, whereon hence dependence, was made, by the learned first appellate Court, hence, for reversing the verdict recorded, by the learned trial Judge, wherethrough, he non-suited the plaintiff. Consequently, since the afore endeavors remained unstrived, and, also when hence the onus, after, completion of the plaintiffs evidence, vis-a-vis, the afore factum, rather shifted upon the defendants, and, when it remained visibly undischarged, thereupon, the, inevitable sequel thereof, (i) is, that the testification rendered by PW-1, rather holding both tenacity, and, vigour and dehors, the participation, of both the contesting parties, in contemporaneity, vis-a-vis, the recording, of, the apt mutations respectively borne in Ex. P-3, and, in Ex.P-4, both being invalidly drawn, as thereat the defendants held no valid subsisting title, to, make any valid mutations, of, exchange, vis-a-vis, the suit khasra nos.

13. lastly, the learned counsel appearing, for the defendants, has made a vigorous submission, before this Court that the suit, is outside, the prescribed period of limitation, hence to be computed from 1987, whereat, the requisite mutations, were attested, (i) and, hence also when the afore factum, stood purportedly pleaded, in their written-statement furnished to the plaint, (ii) hence it was imperative for the learned trial Court, to, strike an issue, vis-a-vis, the suit being barred, by limitation, (iii) whereas, non-striking of the afore issue hence vitiating the trial, of, the suit. However the afore espousal is misfounded, as a reading, of the written-statement, instituted to the plaint, does not, make any unfoldings qua the afore fact being pleaded rather the defendants pleading qua theirs acquiring title, vis-a-vis, the suit land rather by adverse possession besides when DW-1, one Prakash Chand, while stepping into the witness box, has, in consonance with the averments, cast in the plaint, qua, the cause of action, erupting in February 1996, rather rendered echoings, (i) thereupon the inference, is, qua thereupon even dehors, the factum, vis-a-vis, the prime fact of the suit, being outside the period of limitation, rather purportedly computable from 1987, and, wherat the relevant mutations of exchange, hence stood attested, qua, rather thereat, the, apt period of limitation, hence not commencing, (ii) contrarily its' commencing, from the phase, of, the afore emerging, and, admitted cause of action, and, when the suit for declaration, and, for possession hence stands instituted, within the requisite period, of limitation, to be computed from 1996, thereupon the plaintiffs' suit, is within, the ambit, of, the apt prescribed period, of, limitation.

14. In view of the above, I find no merit in this appeal, and, the same is accordingly dismissed. The impugned judgment is maintained and affirmed. Substantial questions of law are answered accordingly. Records be sent back forthwith. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Dina Nath …Appellant.

Versus

Gian Chand and Others ….Respondents.

RSA No. 184 of 2018
Reserved on:19.7.2019
Decided on : 25.7.2019

Himachal Pradesh Tenancy and Land Reforms Act, 1972 - Section 2 (17) 'Tenant' – Proof – Dispute interse parties being whether defendant was non-occupancy tenant in suit land and had become its owner under the Act- Held, suit land measures just six marlas - Difficult to infer that he was raising crops over it – Five marlas of land recorded as Banjar kadim in revenue paper –No evidence of payment of rent in cash or kind - Defendant not proved to be non-occupancy tenant over suit land – Concurrent findings of lower courts and granting decree of declaration qua revenue entries standing in favour of defendant as wrong as well as injunction in favour of plaintiff upheld – RSA dismissed. (Para 12)

For the Appellant: Mr. Vikrant Thakur, Advocate.
For the Respondents: Ms. Soma Thakur, Advocate vice Mr. Tarun K Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The defendant/appellant herein (for short the defendant), upon, suffering adversarial verdict(s), vis-a-vis, the plaintiff's suit, for declaration, and, permanent injunction, vis-a-vis, the land comprised in Khata No. 108 min, Khatauni No. 130 , Khasra No. 1315/1157, measuring 6 marlas, situated in Tika Paplah, Mouza Mewa, Tehsil Bhoranj, District Hamirpur, H.P. (for short "suit khasra number), hence, through the instant RSA, he, strives to beget reversal(s) thereof.

2. Brief facts of the case are that respondents herein/ plaintiffs (for short "the plaintiffs), filed a suit for declaration and permanent injunction with respect to the suit khasra numbers. The entry regarding the tenancy as non-occupancy tenant in favour of the defendant in the column of possession is wrong, illegal and liable to the set aside. The entry incorporated in connivance with the revenue authorities, behind the back of the plaintiffs are mere paper entries.

3. The defendant contested the suit by taking preliminary objections qua locus-standi maintainability, limitation, non-joinder and mis-joinder of necessary parties. On merits, he avers that he is coming in possession over the suit land from the time of their ancestors. The father of the defendant had constructed his abdai over the suit khasra numbers about 50 years back, and, that construction now has collapsed. The defendant is trying to raise construction over the old foundation. The rent in respect of tenancy used to pay in cash. The defendant has already raised four pillars over the khasra numbers upto the height of 20 feet in the year 2008 and the foundations of two pillars have also been laid. The plaintiffs had not raised any objection at that time. The plaintiffs have no concern with the suit land and the revenue entires are valid. The plaintiffs were well aware of old possession of the defendant and the suit deserves to be dismissed.

4. The plaintiffs filed replication in which they have reasserted and reiterated the averments made in the plaint.

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

1. Whether the plaintiffs are owners in possession of the suit land as payed for? OPP
2. Whether the defendant is interfering with the suit land and raising construction over the same without any right title and interest? OPP
3. Whether the plaintiffs have no locus standi to file the present suit, as alleged? OPD
4. Whether the suit is not maintainable? OPD
5. Whether the suit is barred by limitation ? OPD
6. Whether the suit is bad for non-joinder of necessary parties, as alleged? OPD
7. whether defendant has become owner under the provisions of HP Tenancy and Land Reforms Act, if so, its effect? OPD
8. Whether the plaintiffs have not come to the Court with clean hands and have suppressed the material facts from the Court, if so, its effect? OPD.
9. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, decreed the plaintiffs' suit. In an appeal, preferred therefrom, by the plaintiffs, before the learned First Appellate Court, the latter Court dismissed the appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now defendant instituted the instant Regular Second Appeal before this Court, wherein, he assails the findings recorded by the learned Courts below.

8. In contemporaneity, vis-a-vis, the coming into force, of, the HP Tenancy and Land Reforms Act, 1972, (for short "the act'), with, statutory contemplations borne therein, hence, empowering qua evidently thereat rather recorded 'Gair Maurusi' tenant, to, stake, for, statutory conferment of proprietary rights upon him, (a) however, the afore, statutory facilitations bestowable upon the afore proven trite statutory ingredients, would be sparked, upon (b) the Jamabandi prepared in contemporaneity, vis-a-vis, the year 1972 rather whereat, the afore statute, came into force, and, it carrying therein, the afore statutory enablements, vis-a-vis, evidently thereat recorded 'Gair Maurusi', also, making hence visible graphic depictions, qua the litigant concerned, being reflected therein, as, a 'Gair Maurusi'. However, a perusal of, the, apposite jamabandi appertaining, to, the year 1976-1977, whereat the defendant or his predecessor-in-interest, were rather enjoined, to be reflected therein, to, carry the description, of, 'Gair Maurusi', does not, unfold, qua his or his predecessor-in-interest being recorded, as, a 'Gair Maurusi'. Consequently, the benefit of the afore statutory mandate, was not bestowable, upon, the aggrieved defendant.

9. Be that as it may through an order borne in Ex. DA and recorded, on 23.7.1987, hence by the Land Reforms Officer, the aggrieved defendant, was pronounced to be a 'Gair Maurusi' upon the suit khasra numbers, and, the quantum of rent determined therein, is borne in a sum of Rs.0-02 paisa per annum. The afore order has been aptly concluded, by the Courts below, to be legally frail, as, it is made, without, the respective presence(s) therebefore, of all the affected/aggrieved therefrom. Even if the Land Reforms Officer, preceding his making Ex.DA, has strived to ensure service, of, the aggrieved, and, affected landlords, through printing of a notice, in, a daily news paper nomenclatured, as

“Beerpratap”, (i) however the afore proceedings drawn by the Land Reforms Officer, hence preceding his ordering for service of the affected landlords, through publication, of, a notice in the afore news paper, (ii) hence, does not unfold, that he had prior thereto recoursed the apt initial mechanism, for, ensuring their service, through ordinary mode, and, rather with his failing to recourse, the afore prior thereto, mode of personal service, through ordinary mode, upon, the aggrieved/affected landlords, (iii) and whereafter he could legitimize his recoursing service through publication, of, a, notice in the afore news paper. However, reiteratedly, when the afore peremptorily enjoined initial mode of service, upon, the aggrieved landlords remains unrecoursed, thereupon it is enigmatic, qua his yet proceeding, to, ensure service of landlords through printing of , a, notice in the afore news paper.

10. Further more, the afore enigma also begets, a further inference qua hence the Land Reforms Officer concerned, rather colluding with the defendant, in, his proceeding, to, make the order borne in Ex. DA.

11. Even otherwise the validity of the afore order, is rid, vis-a-vis, its legal efficacy, if any, as, unless evidence existed, before the afore Land Reforms Officer, vis-a-vis the existence, of, a bilateral relation of landlord, and, tenant inter-se, the contesting litigants, and, sparked by the tenant evidently liquidating to the landlords, rent, vis-a-vis, the suit khasra numbers either in cash or in kind, (i) thereupon the afore order embodied in Ex. DA, wherethrough, the defendant, was declared to be, a, non-occupancy tenant, vis-a-vis, the suit khasra numbers, would be ingrained, with, a gross vice of invalidation. For determining whether the afore imperative bilateral relation, of, landlord and tenant inter-se the contesting litigants, hence existed, and, sparked by the tenant evidently liquidating to the landlords rent, vis-a-vis, the suit khasra numbers, in cash or in kind, an allusion, is required to be made, to the testification, borne in the cross-examination of the defendant, (i) wherein he has echoed, qua his father being tenant under Kanshi Ram, thereupon, he is to be inferred, to, be holding, 1/4th share in the suit khasra numbers, as, the afore kanshi Ram is depicted in the apposite jamabandi to be holding only 1/4th share in the suit khasra numbers (ii) and thereafter he is to be concluded to, upon, the demise of afore Kanshi Ram, holding tenancy only under one amongst his legal representative i.e Dharam Chand, as, in consonance therewith he has rendered echoings (iii) thereupon, his testimony makes apparent emergence(s) vis-a-vis (a) his not claiming to be, a, tenant, vis-a-vis, the entire suit khasra numbers rather qua his holding tenancy, only under, one amongst his legal representative i.e Dharam Chand, (iv) and, the afore admission occurring, in his cross-examination, nails an firm inference, qua, the defendant’s espousal, and, also the declaration embodied in Ex. DA, qua his being ‘Gair Maurusi’ upon, the suit land being obviously perse frail, and, suffering invalidation.

12. **Further there onwards with the defendant, making an echoing in his testification qua his landlord, one Kanshi Ram abandoning or waiving his claim of rent, from, him. Consequently, the afore echoing in his testifiation, erodes, the validity of the pleadings cast by him, in his written-statement, that, rent in cash kind was paid by him to his landlords, (a) and, thereupon the quantification of rent in Ex. DA, vis-a-vis, the suit khasra numbers also suffers omnibus falsification. Further sequel thereof, is, that with hence the imperative requirement, of, coming intoemergence(s), of, the afore bilateral relation, of, landlord and tenant, inter-se, the contesting litigants, sparked by the tenant, evidently liquidating to the landlords rent, vis-a-vis, the suit khasra numbers in cash or in kind, hence remaining un-satiated, (b) thereupon order borne in Ex. DA, suffers complete invalidation, and, moreso when, from, six marlas of land, five marlas, was, Banjar, and, the afore classification, appertaining to five marlas of land, rendering it unsuitable, for, cultivation, (c) thereupon with the afore portion**

of the suit land, being not cultivable, hence it is to be concluded qua the defendant, in the purported capacity, of, 'Gair Maurusi' not hence cultivating five marlas of land rather classified, as, Banjar kadim, (d) and thereonwards, it can also be concluded that he was not rearing crops therefrom, nor hence any part of, the, crops reared therefrom, was paid as rent in kind/ cash, to, the landlords. No question of law much less any substantial question of law, hence, arise, for, determination.

13. In view of the above, there is no merit in this appeal, and, the same is accordingly dismissed. Impugned verdicts and decrees are maintained and affirmed. Records be sent back.

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

Ashwani Kumar ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1325 of 2019
Decided on July 18, 2019

Code of Criminal Procedure, 1973 – Section 439– Regular Bail– Grant of in a case registered for offences under Indian Penal Code and Schedule Castes and Schedule Tribes (Preventions of Atrocities) Act, 1989 – Held, petitioner has joined investigation– Eye witnesses allegedly present at spot of incident in their statements to investigating officer, denying accused having manhandled victim and subsequently called her by caste names– On material collected during investigation, no impediment in admitting accused on regular bail– Petition allowed– Bail granted. (Paras 5, 6 & 12)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner	Mr. H.K.S. Thakur and Mr. Munish Datwalia, Advocates.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General. ASI Chet Ram, I/O, Police Station, Nankhari, District Shimla, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.439 CrPC, prayer has been made on behalf of the petitioner for grant of regular bail in case FIR No. 39, dated 11.7.2019 under Ss. 323 and 504 IPC and S.3(1)(x) of the Scheduled Castes and the Scheduled Tribes

(Prevention of Atrocities) Act, 1989, registered at Police Station, Nankhari, District Shimla, Himachal Pradesh.

2. Before adverting to the factual matrix of the case, it may be noticed that on 12.7.2019, bail petitioner surrendered before this Court and thereafter, this court, after taking him into custody, released him on bail in the FIR detailed above, subject to his furnishing of personal bonds in the sum of Rs.25,000/- subject to the satisfaction of learned Additional Registrar (Judicial). Vide aforesaid order, this court also directed the bail petitioner to join the investigation as and when required by the investigating agency.

3. Sequel to order dated 12.7.2019, ASI Chet Ram, has come present with the record. Mr. Sanjeev Sood, learned Additional Advocate General, has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

4. Mr. Sanjeev Sood, learned Additional Advocate General, on instructions of the Investigating Officer, fairly states that pursuant to order dated 12.7.2019, bail petitioner has joined the investigation and he is fully cooperating. Mr. Sood, learned Additional Advocate General further contends that as per investigation, nothing has emerged against the bail petitioner, as such, custodial interrogation of the bail petitioner is not required at this stage and he can be ordered to be enlarged on bail, subject to the condition that he would make himself available for investigation and trial, as and when required by investigating agency.

5. Close scrutiny of the record/status report reveals that on 11.7.2019, complainant, in her statement recorded under S.154 CrPC, alleged that the bail petitioner not only manhandled her but also called her by caste. On the basis of aforesaid statement made by the complainant, a formal FIR, as detailed herein above, came to be lodged against the bail petitioner. As has been noticed herein above, nothing has emerged against the bail petitioner during investigation as such, no fruitful purpose would be served in case, freedom of the bail petitioner, who has otherwise joined the investigation, is curtailed for an indefinite period during trial. As per investigation, independent witnesses present on the spot at the time of alleged incident have nowhere supported the prosecution case that the complainant was manhandled and subsequently called by her caste by the bail petitioner.

6. Otherwise also, guilt, if any, of the bail petitioner is yet to be determined by the learned Court below in the totality of evidence to be collected on record by the prosecution, as such, this court sees no impediment in accepting the prayer made in the instant petition for grant of bail.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person

in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

8. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to

> ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

9. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

10. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

11. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Order dated 12.7.2019 is made absolute, subject to bail petitioner furnishing fresh bail bonds in the sum of Rs.50,000/- (Rs. Fifty Thousand) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides the following conditions:

a. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

d. He shall not leave the territory of India without the prior permission of the Court.

e. He shall surrender passport, if any, held by him.

13. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Balbir Singh ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CrMMO No. 305 of 2019
Decided on: July 19, 2019

Code of Criminal Procedure, 1973– Section 482– Inherent powers– Exercise of- Quashing of FIR and consequent conviction and sentence– Held, power to quash criminal proceedings is not to be exercised in cases involving heinous and serious offences– Nor in cases involving offences committed by public servants while working in that capacity simply pursuant to a compromise between parties– But cases predominantly civil in nature or arising out of matrimonial relationship or family disputes may be quashed when parties have resolved their entire dispute– On facts, parties compromised matter between them and pursuant thereto dissolved their marriage with mutual consent– Wife admitting correctness of compromise before High Court– Wife also agreeing to withdraw all cases instituted by her against her husband– Petition allowed– FIR quashed– Conviction and sentence of petitioner for offence of cruelty set aside. (Paras 5, 8, 12 & 13)

Cases referred:
Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497
Gian Singh vs. State of Punjab and anr., (2012) 10 SCC 303
Narinder Singh and others vs. State of Punjab and another, (2014)6 SCC 466

For the petitioner:	Mr. Karan Singh Kanwar, Advocate.
For the respondents:	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for respondents No.1 to 3. Mr. Vinay Mehta, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, petitioner has prayed for quashing of FIR No. 408, dated 7.11.2008 under S.498-A IPC registered at the behest of respondent No.4-complainant (hereinafter, 'complainant') at Police Station Paonta Sahib, Sirmaur, Himachal Pradesh alongwith judgment/order of conviction dated 8.3.2016/15.3.2016 in Cr. Case No. 148/2 of 2009 passed by Additional Chief Judicial Magistrate, Court No.1, Paonta Sahib, District Sirmaur, Himachal Pradesh, on the basis of compromise arrived *inter se* petitioner and complainant on 9.1.2018.

2. On 10.6.2019, learned counsel for the petitioner, while inviting attention of this court to annexure P-4 (compromise deed), contended that since the petitioner and complainant, have resolved to settle their dispute amicably inter se them, this court, while exercising power under S.482 CrPC, may quash the FIR as well as consequential criminal proceedings pending before court below. This court, with a view to ascertain the factum with regard to compromise placed on record, deemed it fit to cause presence of the complainant, Smt. Ranjeet Kaur, in the court. Pursuant to order dated 10.6.2019, complainant has come present in court alongwith her counsel, Shri Vinay Mehta, who has filed Power of Attorney on behalf of respondent No.4/complainant.

3. Smt. Ranjeet Kaur, complainant states on oath that she of her own volition and without there being any external pressure has entered into compromise with the petitioner vide Annexure P-4, whereby both the parties have resolved to settle their dispute amicably inter se them, as such, she has no objection in case prayer made in the present petition for quashing of FIR as well as for setting aside judgment/order of conviction recorded by learned Additional Chief Judicial Magistrate, Court No.1, Paonta Sahib, is accepted. Her statement is taken on record. Apart from above, documents available on record clearly suggest that the complainant and petitioner filed a petition under S.13B of the Hindu Marriage Act, (Annexure P-5), in the court of learned District Judge, Sirmaur at Nahan, who, vide judgment and decree dated 10.3.2018 has dissolved their marriage by way of mutual consent

4. Mr. Kunal Thakur, learned Deputy Advocate General, having carefully perused the material placed on record, especially judgment and decree dated 10.3.2018, passed by learned District Judge, Sirmaur at Nahan states that since both the parties have resolved to settle their dispute amicably inter se them, there is no impediment in accepting the prayer made in the instant petition.

5. Careful perusal of the averments contained in petition as well as documents annexed therewith, clearly reveals that after recording of judgment of conviction by learned Additional Chief Judicial Magistrate, Paonta Sahib, petitioner as well as respondent No.4/complainant have obtained decree of divorce by way of mutual consent, as has been taken note herein above. Moreover, compromise placed on record as Annexure P-4, also reveals that the complainant has been paid permanent alimony by the petitioner. Terms and conditions contained in this agreement reveal that the complainant has bounden herself to withdraw all the criminal proceedings initiated against the petitioner at her behest.

6. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

7. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is

arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

8. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

9. In the case at hand, the dispute is more of a civil dispute, which is between husband and wife, who now have obtained decree of divorce and their marriage is no more subsisting.

10. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.

The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

11. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

> "13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:
>
> "...In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."
>
> 14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:
>
> > "... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."
> >
> > "...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system..."
>
> 15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:
>
> (i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision

does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. Since the matter stands compromised between complainant and accused, no fruitful purpose would be served in case proceedings initiated at the behest of complainant are allowed to continue. Moreover, the complainant has compromised the matter and she is no longer interested in carrying on with the criminal proceedings against the accused. Otherwise also, possibility of conviction in the case is bleak and remote, since complainant herself is not interested in carrying on with the criminal proceedings initiated at her behest.

13. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 408, dated 7.11.2008 under S.498-A IPC registered at Police Station Paonta Sahib, Sirmaur, Himachal Pradesh alongwith judgment/order of conviction passed dated 8.3.2016/15.3.2016 in Cr. Case No. 148/2 of 2009 by Additional Chief Judicial Magistrate, Court No.1, Paonta Sahib, District Sirmaur, Himachal Pradesh, are quashed and set aside. Petitioner is acquitted of the offences levelled against him in the aforesaid FIR.

14. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Manish Gaba and another ...Petitioners
Versus
State of Himachal Pradesh and others ...Respondents

CrMMO No. 388 of 2019
Decided on: July 19, 2019

Code of Criminal Procedure, 1973–Section 482– Inherent powers– Exercise of- Quashing of FIR– Circumstances– Held, cases having predominantly civil character especially arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when parties have resolved their entire dispute– On facts, parties compromised their dispute between them- Compromise admitted by wife before High Court as correct– Wife stating that she is happily residing in matrimonial house– Dispute is more of civil nature– No fruitful purpose would serve in case proceedings are allowed to continue- FIR ordered to be quashed alongwith trial pending before Judicial Magistrate. (Paras 2, 3, 7, 8, 11 & 12)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497
Gian Singh vs. State of Punjab and anr., (2012) 10 SCC 303
Narinder Singh and others vs. State of Punjab and another, (2014)6 SCC 466

For the petitioners: Mr. Parveen Chauhan, Advocate.
For the respondents: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General,

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, petitioners have prayed for quashing of FIR No. 0153 dated 22.6.2018, under Ss.498-A and 506 IPC registered at Police Station Sadar, Chamba, Himachal Pradesh against petitioner No. 1 at the instance of petitioner No.2, alongwith consequential proceedings i.e. Cr. Case No. 35 of 2019 pending before Judicial Magistrate 1st Class, Chamba, Himachal Pradesh on the basis of compromise arrived *inter se* petitioners No.1 and 2 on 26.6.2019.

2. On 12.7.2019, learned counsel for the petitioners, while inviting attention of this court to compromise (Annexure P-2), arrived *inter se* petitioners, contended that since both the petitioners, who are husband and wife, have resolved to settle their dispute amicably inter se them, this court, while exercising power under S.482 CrPC, may proceed to quash and set aside the FIR lodged at the behest of petitioner No. 2 against petitioner No.1 as well as consequential proceedings pending in the competent Court of law. This Court, solely with a view to ascertain the correctness and genuineness of the compromise placed on record, deemed it fit to cause presence of petitioner No.2 Ms. Aastha Gaba, at whose behest, FIR sought to be quashed, came to be registered at Police Station, Sadar, Chamba.

3. Pursuant to order dated 12.7.2019, petitioner No.2, Aastha Gaba has come present in the court alongwith her husband, petitioner No.1. She, states on oath before this court that she of her own volition and without there being any external pressure has entered into compromise, Annexure P-2, whereby she and her husband have resolved to settle their dispute amicably inter se them. She further states that after entering into aforesaid compromise alongwith her husband, Manish Gaba, she is residing happily in her matrimonial house at Panipat, Haryana and as such, she does not wish to prosecute further the FIR lodged at her behest against petitioner No.1 as well as criminal proceedings pending in the competent Court of law at Chamba. She has identified her signatures on the compromise. Her statement is taken on record.

4. Having heard aforesaid statement made by petitioner No.2, Aastha Gaba and compromise placed on record, Mr. Kunal Thakur, learned Deputy Advocate General fairly states that in view of amicable settlement arrived *inter se* petitioners, no fruitful purpose would be served in case FIR in question as well as criminal proceedings pending in the competent Court of law are allowed to stand/continue, in the given facts and circumstances of the case.

5. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

6. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be

distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> “29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.
>
> 29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.
>
> 29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.
>
> 29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would

> lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.
>
> 29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

7. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

8. In the case at hand, the dispute is more of a civil dispute, which is between husband and wife, who now are residing happily with each other.

9. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different

from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of

law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

10. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain

provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

11. Since the matter stands compromised between complainant and accused, no fruitful purpose would be served in case proceedings initiated at the behest of complainant are allowed to continue. Moreover, the complainant has compromised the matter and she is no longer interested in carrying on with the criminal proceedings against the accused. Otherwise also, possibility of conviction in the case is bleak and remote, since complainant herself is not interested in carrying on with the criminal proceedings initiated at her behest.

12. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 0153 dated 22.6.2018, under Ss.498-A and 506 IPC registered at Police Station Sadar, Chamba, Himachal Pradesh against petitioner No. 1 alongwith consequential proceedings i.e. Cr. Case No. 35 of 2019 pending before Judicial Magistrate 1st Class, Chamba, Himachal Pradesh, are quashed and set aside. Petitioner No.1 is acquitted of the offences levelled against him in the aforesaid FIR.

13. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

****

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

Gopal Singh ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CrMMO No. 418 of 2019

Decided on: July 22, 2019

Code of Criminal Procedure, 1973–Section 482– Inherent jurisdiction– Exercise of- Quashing of FIR registered for rash and negligent driving pursuant to a compromise– Held, matter stands settled between parties i.e. petitioner driver of offending vehicle and injured– No fruitful purpose would be served by allowing proceedings to continue– Injured not interested in carrying on with criminal proceedings - Possibility of conviction is bleak and remote– Petition allowed– FIR ordered to be quashed alongwith trial pending before Judicial Magistrate. (Paras 10 & 11)

Cases referred:
Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497
Gian Singh vs. State of Punjab and anr., (2012) 10 SCC 303
Narinder Singh and others vs. State of Punjab and another, (2014)6 SCC 466

For the petitioner: Mr. Ashwani Kaundal, Advocate.
For the respondents: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for respondent No.1.
Mr. Rahul Thakur, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, prayer has been made on behalf of the petitioner for quashing of FIR No. 2, dated 9.1.2016 under Sections 279, 337 and 338 of the Indian Penal Code registered against the petitioner at Police Station Darlaghat, Solan, Himachal Pradesh as well as consequential proceedings pending in the Court of learned Judicial Magistrate 1st Class, Arki, District Solan, Himachal Pradesh being Case No. 32 of 2016, titled State vs. Gopal Singh, on the basis of amicable settlement arrived *inter se* petitioner and respondents No.2 and 3, i.e. complainant and the injured, respectively.

2. Mr. Rahul Thakur, Advocate has filed memo of appearance on behalf of respondents No.2 and 3, who have also come present in the court for getting their statements recorded.

3. Precisely, the facts as emerge from the record are that on 9.1.2016, vehicle bearing Registration No. HP-11-8137, in which respondents No.2 and 3 were traveling, was hit by another vehicle bearing registration No. HP-63-6815, being driven by the petitioner, as a consequence of which, respondent No.3 sustained injuries. On the basis of complaint made by respondent No. 2, who was also one of the occupants in the ill-fated vehicle, FIR detailed herein above came to be lodged against the petitioner. Police, after completion of investigation, presented *Challan* against the petitioner-accused in the competent Court of law for having committed offence punishable under Ss.279, 337 and 338 IPC.

4. Averments contained in the petition as well as documents annexed therewith, especially annexure P-2, compromise, clearly reveal that during the pendency of the trial before the learned Court below, petitioner has entered into a compromise with respondents No.2 and 3, whereby they have resolved to settle their dispute amicably inter se them. Both respondents No.2 and 3 have agreed in the compromise, as taken note herein above, that in view of amicable settlement *inter se* them, they would withdraw the case filed at their behest against the petitioner. Respondents No.2 and 3, who are present in court, stated on oath before this court that they, of their own volition and without there being any external pressure, have compromised the matter with the petitioner, whereby they have resolved to settle their dispute amicably inter se them, as such, they shall have no objection in case, FIR in question alongwith consequential proceedings is ordered to be quashed and set aside. Respondent No.2-complainant Shri Amar Nath specifically stated that since

respondent No.3/injured has compromised the matter with petitioner, he shall not have objection, in case FIR detailed herein above, lodged at his behest, is quashed and set aside. Respondents No. 2 and 3 have identified their signatures on the compromise. Their statements are taken on record.

5. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

6. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

7. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

8. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

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But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

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"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design

with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

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"... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."

"...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system..."

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

10. Since the matter stands compromised between the petitioner and respondents No.2 and 3 (complainant and injured, respectively), no fruitful purpose would be served in case proceedings initiated at the behest of complainant are allowed to continue. Moreover, the complainant and injured have compromised the matter and they are no longer interested in carrying on with the criminal proceedings against the accused. Otherwise also, possibility of conviction in the case is bleak and remote, since complainant and injured are not interested in carrying on with the criminal proceedings initiated against the petitioner.

11. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 2, dated 9.1.2016 under Sections 279, 337 and 338 of the Indian Penal Code registered at Police Station Darlaghat, Solan, Himachal Pradesh as well as consequential proceedings pending in the court of learned Judicial Magistrate 1st Class, Arki, District Solan, Himachal Pradesh being Case No. 32 of 2016, titled State vs. Gopal Singh, are quashed and set aside. Petitioner is acquitted of the charges levelled against him in the aforesaid FIR.

12. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Gurmeet Singh … Petitioner

Versus

State of Himachal Pradesh … Respondent

CrMP(M) No. 1241 of 2019
Decided on July 22, 2019

Code of Criminal Procedure, 1973-Section 439– **Narcotic Drugs and Psychotropic Substances, Act, 1985 (Act)**– Section 21 & 37–Recovery of 2880 tablets of 'Lomotil' from a car driven by accused– Regular bail– Grant of– Accused contending that recovered tablets do not fall in category of 'manufactured drug', and at any rate, said contraband is not in 'commercial quantity'– Held, as per report of SFSL, Diphenoxylate Hydrochloride has been found to be 2.49 mg per tablet– Prohibited drug in recovered tablets comes to 7.172 gms, which is above small quantity but less than commercial quantity– No opinion is given by SFSL regarding remaining contents of tablets– Question whether 'Lomotil tablet' falls in category of 'manufactured drug' left open for determination by trial court during trial– Investigation is complete– Charge sheet also filed in court– Rigors of Section 37 of Act are not attracted in this case– Petitioner cannot be kept in custody for indefinite period– Petition allowed– Conditional bail granted. (Paras 3,4, 7, 12 & 19)

Cases referred:

Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation (2012)1 SCC 49
Siddharam Satlingappa Mhetre vs. State of Maharashtra and others, (2011) 1 SCC 694
Sundeep Kumar Bafna vs. State of Maharashtra, (2014)16 SCC 623

For the petitioner : Mr. O.C. Sharma, Advocate.

For the respondent : Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.
SI Mohar Singh Chauhan, I/O, Police Station, Baddi, Solan, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner, Gurmeet Singh, who is behind the bars since 29.4.2019, has approached this Court in the instant proceedings filed under S.439 CrPC, for grant of regular bail in FIR No. 112, dated 29.4.2019, under S.21 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter, 'Act') registered at Police Station, Baddi, Solan, Himachal Pradesh.

2. Sequel to order dated 18.7.2019, SI Mohar Singh Chauhan, has come present with the record. Mr. Sudhir Bhatnagar, learned Additional Advocate General has

also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Close scrutiny of record reveals that on 29.4.2019, police intercepted Car bearing registration No. HP-12-3834 at Morepan Road, Baddi. On checking, Police allegedly recovered green coloured bag containing 2880 tablets of "Lomotil". Since bail petitioner failed to produce any permit to keep the aforesaid prohibited drug, FIR, as has been taken note herein above, came to be lodged against the bail petitioner on 29.4.2019 and, since then the bail petitioner is behind the bars. After completion of investigation, police presented the *Challan* in the competent Court of law and at this stage, nothing is required to be recovered from the bail petitioner.

4. Mr. O.C. Sharma, Advocate appearing for the bail petitioner, while inviting attention of this Court to the report submitted by SFSL, Junga, strenuously argued that the drug namely "Lomotil" does not fall under the definition of "manufactured drug" as defined under Section 2 (xi) of the Act *ibid*. Mr. Sharma also invited attention of this Court to the Notifications No. S.O. 826(E), dated 14.11.1985, S.O. 49 (E), dated 29.1.1993 and S.O. 1431 (E), dated 21.6.2011 to demonstrate that the preparations of Diphenoxylate calculated as base and a quantity of Atropine Sulphate equivalent to at least one percent of the dose of Diphenoxylate does not fall under the definition of "manufactured drug", as notified vide aforesaid notifications. Mr. Sharma further contended that though in the report referred to herein above, total weight of the tablets has been shown to be 182.304 grams but as per report of SFSL, prohibited drug namely Diphenoxylate Hydrochloride has been found to be 2.49 mg per tablet and as such, prohibited drug, if any, alleged to have been recovered from the conscious possession of the bail petitioner, cannot be said to be of 'commercial' quantity. He contended that though recovery, if any, of the prohibited drug from the conscious possession of the bail petitioner is yet to be proved by the prosecution by leading cogent and convincing evidence, but, even if it is presumed that such dug came to be recovered from the conscious possession of the bail petitioner, he deserves to be enlarged on bail, keeping in view the quantity, which is an "intermediate" quantity. Mr. Sharma, also invited attention of this Court to judgment dated 17.7.2017, passed by this court in CrMP(M) No. 792 of 2017, to contend that this court, having taken note of entry at Sr. No. 58 in the Notifications referred to herein above, has concluded that the tablet namely "Lomotil", having Diphenoxylate Hydrochloride as 2.50 mg and 0.025 mg Atropine Sulphate, does not fall under the definition of 'manufactured narcotic drug', as such, it does not come within the purview of the Narcotic Drugs & Psychotropic Substances Act.

5. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while opposing aforesaid prayer having been made on the part of the bail petitioner for grant of bail, vehemently argued that the contraband/narcotic substance recovered from the bail petitioner is of 'commercial' quantity, as such, no leniency can be shown while considering petitioner's prayer for grant of bail. He further contended that as per settled law, entire material contained in the recovered contraband is to be taken into consideration while determining quantity of the narcotic substance.

6. While refuting submission made by Mr. O.C. Sharma, Advocate, with regard to conclusion drawn by SFSL, Mr. Bhatnagar, learned Additional Advocate General made a serious attempt to persuade this court to agree with his contention that the SFSL has concluded in its report that on quantitative analysis, Diphenoxylate Hydrochloride was found to be 2.49 mg per table in the "Lomotil", i.e. prohibited drug, as such, by no stretch of imagination, it can be contended that contraband/prohibited substance as recovered from the bail petitioner is of an 'intermediate' quantity, as claimed by the bail petitioner.

7. Having heard learned counsel for the parties and perused the material available on record, especially report of SFSL, it clearly emerges that the prohibited substance i.e. Diphenoxylate Hydrochloride has been found to be 2.49 mg per tablet meaning thereby quantity of the prohibited drug, after taking into consideration 2880 tablets, allegedly recovered from the bail petitioner, comes out to be 7.172 grams i.e. above 'small' quantity and less than the 'commercial' quantity. SFSL, while concluding that 2.49 mg of Diphenoxylate Hydrochloride has been found in each tablet, has admittedly nowhere rendered opinion, if any, with regard to remaining contents/mixture contained in the tablet namely "Lomotil". Hence, inference can be drawn that 7.172 grams of Diphenoxylate Hydrochloride is present in the recovered tablets.

8. At this stage, it may be apt to take note of Entry at Sr. No. 58 contained in the Notifications, referred to herein above, which reads as under:

> " Elthy1 1-(3- Cyano-3, 3-diphenylpropy)-4 – phenylpiperidine-4-carboxylic acid ethyl ester(the international non-proprietary name of which is Diphenoxylate) and its salts and preparations, admixture, extracts or other substances containing any of these drugs except preparations of Diphenoxylate calculated as base, and a quantity of Atropine Sulphate equivalent to at least one percent of the dose of Diphenoxylate."

9. Careful perusal of aforesaid entry at Sr. No.58 in the notification, as referred hereinabove, clearly suggests that Diphenoxylate and its salts and preparations, admixtures, extracts or other substances containing any of these drugs are manufactured narcotic drugs, but save and except preparations of Diphenoxylate calculated as base, and a quantity of Atropine Sulphate equivalent to at least one percent of the dose of Diphenoxylate. Learned counsel for the petitioner, while referring to the report submitted by SFSL, contended that the drug namely Diphenoxylate Hydrochloride has been found to be 2.49 mg per tablet and similarly 0.025 mg of Atropine Sulphate i.e. 1% of dose of Diphenoxylate Hydrochloride has been also found in each tablet, meaning thereby tablet namely "'Lomotil"' having 2.49 mg of Diphenoxylate hydrochloride with 0.025 mg of Atropine Sulphate does not fall under the definition of "manufactured narcotic drug" and as such, does not come under the purview of the Narcotic Drugs & Psychotropic Substances Act.

10. At this stage, it would be profitable to reproduce Section 2(xi) of the Act, herein:-

> ""Manufactured drugs" mean:-
>
> (a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;
>
> (b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette (declared to be a manufactured drug)"

11. Careful perusal of aforesaid provision of law suggests that all the coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrates and any other narcotic substance or preparation which central government may notify in the official Gazette would be termed as "manufactured drugs", but it further suggests that it will not include any narcotic substance or preparation which the Central Government may, having regard to the available information or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be "manufactured drugs."

Aforesaid provision of law, clearly suggests that narcotic substance or preparations declared by Central Government by issuing notification in the Official Gazette shall only be deemed to be "manufactured drugs" save and except of coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate, as prescribed under Section 2(xi) of the Act. Aforesaid provisions of law i.e. section 2(xi((b), certainly suggests that the narcotic substance or preparations not included in the notification, if any, issued by the Central Government declaring certain narcotic substances or preparations to be "manufactured drugs" shall not be considered as "manufactured drugs" in terms of Section 2(xi) of the Act. In the instant case, entry made at Sr. No.58 of Notification, as referred above, certainly suggests that Diphenoxylate Hydrochloride and its slats and preparations and admixtures, extracts or other substances containing any of these drugs are to be treated as manufactured narcotic drugs save and except preparations of Diphenoxylate calculated as base, and a quantity of Atropine Sulphate equivalent to at least one percent of the dose of Diphenoxylate.

12. In the case at hand, 2.49 mg of Diphenoxylate Hydrochloride has been found in one tablet whereas, Atropine Sulphate has been found to be 0.025 mg per tablet i.e. 1% of the dose of Diphenoxylate Hydrochloride. Though this Court, having carefully perused Entry at Sr. No. 58 of the Notification, is in agreement with Mr. O.C. Sharma, Advocate appearing for the bail petitioner that the tablet namely "Lomotil" does not fall under the definition of 'manufactured drug', as defined under S.2(xi) of the Act *ibid*, but said aspect of the matter is to be considered and examined by learned trial Court during the course of trial. However, having taken note of the fact that investigation in the case is complete and Challan stands filed before the competent Court of law, this Court sees no reason to curtail the freedom of the bail petitioner for an indefinite period during trial, especially, when guilt, if any, of the bail petitioner is yet to be ascertained/determined by the learned trial Court, in the totality of evidence collected by the prosecution. Bail petitioner has already suffered for more than two and a half years and nothing has been placed on record to compel this Court to infer that the bail petitioner has been indulging in illegal trade of narcotics in the past, as such, considering the fact that the bail petitioner is a first offender and the quantity involved is not "commercial", this court sees no reason to curtail the freedom of the bail petitioner for an indefinite period during trial. Moreover, rigours of Section 37 of the Act *ibid*, are not attracted in the present case, keeping in view the quantity of contraband allegedly recovered from the bail petitioner.

13. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases,

> "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

14. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.
>
> 112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:
>
> (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
>
> (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
>
> (iii) The possibility of the applicant to flee from justice;
>
> (iv) The possibility of the accused's likelihood to repeat similar or the other offences.
>
> (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
>
> (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.
>
> (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court

should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

15. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or

elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

16. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused

pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

17. Needless to say object of the bail is to secure the presence of the accused in the trial and proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take its trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

18. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

19. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to his furnishing personal bonds in the sum of Rs.5,00,000/-(Rupees Five Lakh) with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial court, with following conditions:

a. attend the trial Court on each and every date of hearing and if prevented by any He shall make himself available for the purpose of interrogation, if so required and regularly reason to do so, seek exemption from appearance by filing appropriate application;

b. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

d. He shall not leave the territory of India without the prior permission of the Court.

e. He shall deposit passport, if any, held by him, with the Investigating Officer.

20. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

21. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Shri Sunil Chauhan ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1289 of 2019
Decided on July 22, 2019

Code of Criminal Procedure, 1973– Section 439 – **Protection of Children from Sexual Offences Act, 2012** – Section 4 – Regular bail – Grant of in a case registered for offences of kidnapping and penetrative sexual assault– On facts, held, victim and complainant- her father, turning hostile during trial of case– Victim telling that she had made statement before Magistrate under Section 164 of code regarding sexual assault by accused under pressure from her parents– Even prosecution case does not suggest that accused forcibly abducted her or compelled her to join his company– Victim joined his company voluntarily– Petitioner in jail for three years and nine months and cannot be kept to incarcerate for indefinite period– Petition allowed– Bail granted subject to conditions. (Paras 5 to 8 and 14)

Cases referred:
Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner Mr. Rajesh Kumar Parmar, Advocate.
For the respondent Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.
ASI Parshottam Singh, I/O, Police Station, Nalagarh, District Solan, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner, Sunil Chauhan, who is behind the bars since 7.11.2015, has approached this Court in the instant proceedings filed under S.439 CrPC, for grant of regular bail, in FIR No. 218, dated 6.11.2015 under Ss. 363, 366A and 376 IPC and S.4 of

Protection of Children from Sexual Offences Act, registered at Police Station, Nalagarh, District Solan, Himachal Pradesh.

2. Sequel to order dated 8.7.2019, ASI parshottam Singh has come present with the record. Mr. Sudhir Bhatnagar, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. On 6.11.2015, complainant Deep Singh got his statement recorded at Police Station Nalagarh alleging therein that his minor daughter (name withheld) aged 14 years, had gone to School on 5.11.2015, but till date, she has not returned. Complainant further alleged that as per information received by him, bail petitioner allured his daughter on the pretext of marriage and thereafter has eloped with her. On the basis of aforesaid statement made by the complainant, a formal FIR, as detailed hereinabove came to be lodged against the bail petitioner. During investigation, police apprehended the bail petitioner with the victim-prosecutrix on 7.11.2015 from a place called Hadaboi, Tehsil Sunder Nagar, Mandi, Himachal Pradesh and since then the bail petitioner is behind the bars.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly acknowledging the factum with regard to completion of investigation and filing of *Challan*, contended that keeping in view the gravity of the offence alleged to have been committed by the bail petitioner, he does not deserve any leniency. Learned Additional Advocate General further contended that though there is nothing to infer that the victim-prosecutrix consented to join the company of the bail petitioner but even otherwise consent, if any, of the victim-prosecutrix is immaterial taking into consideration her age, as such, bail petition may be dismissed. Mr. Bhatnagar, learned Additional Advocate General further contended that the prosecution witnesses are being examined and at this stage, in the event of bail petitioner being enlarged on bail, he may tamper with evidence and dissuade the witnesses from deposing against him.

5. Mr. Rajesh Kumar Parmar, learned counsel for the bail petitioner, while inviting attention of this court to the depositions/statements of the victim-prosecutrix as well as her father/complainant made before the trial court, strenuously argued that no case, much less case under S.376 IPC and S.4 of the Protection of Children from Sexual Offences Act is made out against the bail petitioner, as such, he deserves to be enlarged on bail. Mr. Parmar, further contended that it has specifically come in the statement of victim-prosecutrix that she had levelled false allegations against the bail petitioner under the influence of her parents in her initial statements under Ss. 161 and 164 CrPC, given to the Police and the Magistrate concerned, respectively. Mr. Parmar contended that the bail petitioner is behind the bars for around three years and nine months now, without there being any fault on his part, as such, prayer made in the instant application may be accepted. He contended that since statements of victim-prosecutrix and the complainant stand already recorded, there is no force in the argument of learned Additional Advocate General that in the event of petitioner's being enlarged on bail, he may influence the witnesses.

6. Having heard learned counsel for the parties and perused the material available on record, this court though finds that in the initial statements given to the Police and the Magistrate concerned under Ss.161 and 164 CrPC, respectively, victim-prosecutrix alleged that the bail petitioner asked her to run away from her house and thereafter sexually assaulted her, but, careful perusal of the statements made by victim-prosecutrix as well as complainant before learned trial Court during trial, clearly suggests that the victim-prosecutrix nowhere supported the case of the prosecution rather, both have been declared

hostile. Cross-examination conducted upon these witnesses by learned Public Prosecutor nowhere proves the case of the prosecution, because, it has specifically come in the cross-examination of the victim-prosecutrix that she had made false allegations against bail petitioner under the influence of her parents, while getting her statement recorded under S.164. Learned Additional Advocate General was unable to dispute the factum with regard to aforesaid statement made by victim-prosecutrix during trial, rather, he has himself made available copies of the statements given by the victim-prosecutrix as well as complainant, during trial.

7. Leaving everything aside, this court having perused initial statements given by victim-prosecutrix to the Police and the Magistrate concerned, is in agreement with Mr. Parmar, learned counsel for the bail petitioner that there is nothing to suggest that the bail petitioner forcibly abducted the victim-prosecutrix or compelled her to join his company, rather, victim-prosecutrix, of her own volition, knowing fully well the consequences of her being in the company of the bail petitioner, joined his company and thereafter stayed with him.

8. Though, guilt if any, of the bail petitioner is yet to be determined by the learned trial Court in the totality of the evidence to be led on record by the prosecution, but having noticed aforesaid glaring aspects of the matter, especially statements given by victim-prosecutrix and her father, who is the complainant, this court sees no reason to let the bail petitioner incarcerate in jail for an indefinite period during trial. Since statements of victim-prosecutrix and complainant stand recorded, there is no force in the argument of learned Additional Advocate General that in the event of petitioner being enlarged on bail, he may tamper with the prosecution evidence or may influence prosecution witnesses, because, admittedly, only official witnesses remain to be examined.

9. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
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> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

10. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty,

> save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

11. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

12. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

13. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

14. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rs. Two Lakh) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

a. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

d. He shall not leave the territory of India without the prior permission of the Court.

e. He shall surrender passport, if any, held by him.

15. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

16. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

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

Cr. Appeal No. 308 of 2009
Decided on: July 24, 2019

Punjab Excise Act, 1914 (as application to state of HP)- Section 61 (1) (a) – Recovery of 168 bottle IMFL without licence – Proof -Trial court acquitting accused of charges of keeping 168 bottles of IMFL without licence in his house -Appeal by State on ground of wrong appreciation of evidence by trial court – On facts, held, independent witnesses 'PD', a Ward Panch and 'SK' relating to search and seizure not supporting prosecution case during trial–

Seal on case property when produced during trial found tampered with – House of accused situated in Bazar - Witnesses from Bazar having 200-300 shops not associated in investigation – Case of prosecution is doubtful – No reason to interfere with judgment of acquittal appeal dismissed. (Paras 2, 7 to 10 & 14)

Cases referred:
State of HP vs. Jagjit Singh, Latest HLJ 2008 (HP) 919
Surender Singh. vs. State of H.P., Latest HLJ 2013 (2) 865

For the appellant: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.
For the respondent: Mr. Ashwani Kaundal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Being aggrieved and dissatisfied with judgment dated 29.12.2008 passed by learned Judicial Magistrate 1st Class, Barsar, District Hamirpur, Himachal Pradesh in Excise Case No. 6-III-2008, whereby respondent-accused (hereinafter, 'accused') came to be acquitted of the offences punishable under S. 61(1)(a) of Punjab Excise Act (as applicable to the State of Himachal Pradesh) (hereinafter, 'Act'), appellant-State has approached this Court in the instant proceedings, praying therein for conviction of the accused after setting aside judgment of acquittal recorded by learned Court below.

2. In nutshell, case of the prosecution, as emerges from the record is that on 8.6.2007, Police party, after having received secret information that the accused, who runs a *Biri* and Cigarette shop at Bani, illegally sells liquor, formed raiding party by associating independent witnesses namely Prakasho Devi, Ward Member (PW-2) and Sanjay Kumar, Shopkeeper (PW-3) and conducted search of the house of accused. During search, police allegedly recovered 4 cartons of "Big Boss" whisky, 8 cartons of "Everyday" whisky and 2 cartons of "Red Rose" whisky, total 168 bottles from the house of accused, who failed to produce any permit /license for the same. Police extracted two bottles from two cartons of "Big Boss" whisky, three bottles from three cartons of "Everyday" whisky and two bottles from two cartons of "Red Rose" whisky for chemical analysis and sealed the samples as well as remaining bulk with seal impression, "K" and took the same into possession. Seal impression "K" was taken on piece of cloth, Ext. PX. Site plan was prepared and samples were sent for chemical analysis. Statements of the witnesses including independent witnesses Prakasho Devi and Sanjay Kumar were recorded. Police presented *Challan* in the competent Court of law against the accused for the commission of offence punishable under S.61(1)(a) of the Act, to which accused pleaded not guilty and claimed trial.

3. Prosecution, with a view to prove its case, examined as many as six witnesses, whereas, accused in his statement recorded under S.313 CrPC, denied the case of the prosecution in toto and claimed himself to be innocent. However, accused did not lead any evidence despite opportunity having been afforded for the purpose.

4. Learned trial Court, on the basis of evidence collected on record by the prosecution, vide judgment dated 29.12.2008, held accused not guilty of having committed offences punishable under S.61(1)(a) of the Act and acquitted him. In the aforesaid background, appellant-State has approached this Court, praying therein for setting aside judgment of acquittal and convicting the accused.

5. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Court below in the impugned judgment of acquittal, this court is not persuaded to agree with Mr. Kunal Thakur, learned Deputy Advocate General that impugned judgment of acquittal is not based upon proper appreciation of the evidence, rather, this court finds from the record that none of the prosecution witnesses supported the case of prosecution and as such, impugned judgment of acquittal rightly came to be recorded in favour of the accused. Though, in the case at hand, prosecution examined as many as six witnesses but statements of independent witnesses i.e. Prakasho Devi and Sanjay Kumar, allegedly associated by investigating agency, during raid, are material for determining the guilt, if any, of the accused. Both these independent witnesses, while deposing before the learned Court below as PW-2 and PW-3, respectively nowhere supported prosecution case and were declared hostile.

6. PW-2 Prakasho Devi deposed that she does not remember the date of alleged incident as she is illiterate. She stated that she does not know anything about the case. She further stated that she was asked to put her signatures and as such, she put the same. Though this witness was declared hostile, however, cross-examination conducted on this witness nowhere suggests that the prosecution was able to extract anything advantageous to its case. This witness categorically denied the averments with regard to search of the house of the accused and recovery of liquor in her presence. She denied the portion 'A' to 'A' of the statement recorded by the Police.

7. PW-3 Sanjay Kumar stated that he does not remember the date but about one year back, Police obtained his signatures encircled with 'A' in Ext. PW-1/A. This witness was also declared hostile but even in his cross-examination the prosecution was unable to extract anything advantageous to its case. He also denied the suggestion put to him that the Police conducted search of house of accused in his presence and in the presence of Prakasho Devi and allegedly recovered liquor from the house of the accused. In his cross-examination, this witness denied that he is related to the accused. He further admitted that there are 200-300 shops in the Bazaar and 400-500 persons used to remain present therein. He further admitted that the Police obtained his signatures on a blank paper.

8. IO of the case, Inspector Jagdish Kumar, appeared as PW-4 and gave a narration of the investigation. He admitted in his cross-examination that the seal of the bags of the case property had been tampered with. He also admitted that there are 100-150 shops at Bani Bazaar. He stated that he formed raiding party at Mehre Bazaar

9. Careful perusal of the statements having been made by aforesaid material prosecution witnesses certainly creates doubt and suspicion with regard to genuineness and correctness of the story put forth by the prosecution. In the case at hand, so called independent witnesses associated by the investigating agency at the time of alleged raid, have seriously disputed the factum with regard to search and recovery of liquor from the house of accused. PW-3 Sanjay Kumar and PW-4 Inspector Jagdish have categorically admitted that there are 200-300 shops at Bani Bazaar but it is not understood that why the investigating agency failed to associate independent witnesses from the Bani Bazaar or the locality concerned, especially when they were available in abundance.

10. Interestingly, in the cross-examination conducted upon the independent witnesses i.e. PW-2 and PW-3, no suggestion ever came to be put to them that they were falsely deposing in favour of accused with a view to save him, as such, version put forth by these witnesses cannot be brushed aside easily. NO doubt, mere non-association of independent witnesses may not be a ground to doubt story of the prosecution, but in the case at hand, so called independent witnesses i.e. PW-2 and PW-3, associated by

investigating agency have also not supported prosecution, which fact certainly compels this Court to agree with learned counsel for the accused that the possibility of false implication of the accused in the case cannot be ruled out. Had the investigating agency associated witnesses from the locality or the Bazaar, version put forth by PW-2 and PW-3, could have been further verified/ascertained.

11. Leaving everything aside, it is an admitted case of the prosecution that only seven bottles out of total 168 bottles allegedly recovered from the house of accused, were drawn as sample and sent for examination, as such, content is only proved qua seven bottles in all, meaning thereby, recovery, of seven bottles only is proved against the accused, whereas all the 168 bottles allegedly recovered from the house of the accused, were required to be sent for chemical examination, but in the instant case, only seven bottles were sent for chemical examination as such the whole of the recovery is vitiated.

12. In this regard reliance is placed upon the judgment passed by our own High Court in "**Surender Singh**. V. **State of H.P**.", Latest HLJ 2013 (2) 865, which reads as under:-

> "26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes actually contained liquor. The samples cannot be said to be representative in character.
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> 27. In similar circumstances, this Court in Mahajan versus State of Himachal Pradesh, 2003 Cr.L.J. 1346; State of H.P. versus Ramesh Chand, Latest HLJ 2007 (2) 1017; Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shim. LC 208; and State of Himachal Pradesh versus Kuldeep Singh & others, 2010(2) Him.L.R. 825, acquitted the accused, as prosecution could not prove, beyond reasonable doubt, as to what was actually there in the remaining boxes.
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> 28. As per version of PW-1, outside the boxes 'Sirmour No.1' was printed which version stands denied by PW-7. In the instant case, there is nothing on record to show that the remaining boxes were in fact containing liquor. Quantity of the remaining bottles of the boxes from which samples were drawn has also not been proved to be liquor. These aspects have not been considered by the Courts below. The cumulative effect is that the prosecution has failed to prove the charge against the accused, beyond reasonable doubt and as such judgments of the Courts below are not sustainable in law."

13. Reliance is also placed on the judgment passed by this Court **State of HP** v. **Jagjit Singh,** Latest HLJ 2008 (HP) 919, wherein this Court has observed in paras 6 and 7 as under:-

> "6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render

the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.

7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."

14. In view of the aforesaid discussion and law laid down by the Hon'ble Apex Court as well as this Court, there are major flaws in the investigation of the prosecution and prosecution story does not appear to be believable.

15. Consequently, in view of detailed discussion made herein above, this Court sees no reason to differ with the judgment of acquittal recorded by the learned Court below, which otherwise appears to be based upon correct appreciation of evidence adduced on record.

16. Accordingly, the present appeal is dismissed. Judgment passed by the learned trial Court is upheld. Bail bonds, if any, furnished by the accused are discharged.

17. Case property, if not destroyed, be destroyed forthwith.

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

Sudheer Kumar …Petitioner

Versus

State of Himachal Pradesh …Respondent

Cr. MP (M) No. 1159 of 2019

Decided on July 24, 2019

Code of Criminal Procedure, 1973 -Section 439 –**Protection of Children from Sexual Offences Act, 2012**– Section 4– Kidnapping and penetrative sexual assault -Regular bail- Grant of– On facts, held, victim not supporting allegations during trial which she initially made while recording her statement under Sections 161 & 164 of code– Remaining witnesses required to be examined during trial are public servants- No possibility of accused influencing those witnesses– Liberty of accused cannot be curtailed for indefinite period during trial– Petition allowed– Accused ordered to be released on conditional bail. (Paras 4,6, 8 &14)

Cases referred:

Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218

Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496

Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner	Mr. Tara Singh Chauhan, Advocate.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General. ASI Amar Nath, I/O, Police Station, Sadar, Chamba, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

By way of present petition filed under S.439 CrPC, prayer has been made on behalf of the petitioner for grant of regular bail in case FIR No. 50, dated 9.2.2019, under Ss. 363, 366A and 376 IPC and S.4 of the Protection of Children from Sexual Offences Act, registered at Police Station, Sadar, District Chamba, Himachal Pradesh.

2. Sequel to order dated 12.7.2019, ASI Amar Nath has come present with the record. Mr. Kunal Thakur, learned Deputy Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Before adverting to the factual matrix of the case, it may be noticed that on 12.7.2019, this court had directed learned Deputy Advocate General to verify whether the victim-prosecutrix has resiled from her earlier statement, during her deposition made in the trial court. Mr. Kunal Thakur, learned Deputy Advocate General, on the instructions of the Investigating Officer, fairly stated that the victim-prosecutrix has resiled from her statements earlier given to the Police and the Magistrate under Ss. 161 and 164, respectively and she has nowhere supported the case of the prosecution.

4. Record reveals that on 9.2.2019, Complainant, Smt. Manuhar, who happened to be the mother of the victim-prosecutrix (name withheld), lodged a complaint at Police Station, Sadar, Chamba, alleging therein that on the intervening night of 13th and 14th January, 2019, her minor daughter left the house without informing anybody. On 15.1.2019, though victim-prosecutrix returned to the house but did not disclose any untoward incident, if any, happened to her. But, on 14.2.2019, it transpired that the victim-prosecutrix was pregnant, who subsequently on the askance of the complainant, disclosed that on the intervening night of 13th and 14th January, 2019, bail petitioner took her to a place called Sidhkund and thereafter subjected her to forcible sexual intercourse. On the basis of aforesaid complaint, a formal FIR, as detailed herein above, came to be lodged against the bail petitioner on 9.2.2019 and on 11.2.2019, Police arrested the bail petitioner, who is behind the bars since then.

5. Record reveals that the victim-prosecutrix in her statement given under S.164 CrPC to the Magistrate, alleged that she was subjected to forcible sexual intercourse by bail petitioner, who threatened her not to disclose this fact to anybody. On the last date of hearing, Mr. Tara Singh Chauhan, learned counsel for the bail petitioner, while placing on record statement of victim-prosecutrix made during trial, vehemently argued that no case much less, case under S.376 IPC and S.4 of the Protection of Children from Sexual Offences Act is made against the bail petitioner, as such, he deserves to be enlarged on bail.

6. This Court having carefully gone through the statement made by victim-prosecutrix on oath on 3.7.2019, directed learned Deputy Advocate General to ascertain the factum with respect to correctness and genuineness of the copy of statement placed on record by learned counsel for the petitioner. As has been taken note herein above, learned Deputy Advocate General, on instructions of Investigating Officer, has fairly acknowledged factum with regard to statement of victim-prosecutrix recorded on 3.7.2019, where she has resiled from her earlier statement given to the Police as well as Magistrate under Ss. 161 and 164 CrPC, respectively.

7. Though guilt, if any, of the bail petitioner is yet to be determined in the totality of the evidence collected on record by the prosecution, but having carefully perused statement of victim-prosecutrix recorded on 3.7.2019, this Court sees no reason to curtail the freedom of the bail petitioner for an indefinite period during trial.

8. No doubt, twenty one prosecution witnesses remain to be examined but since statement of victim-prosecutrix stands recorded, there appears to be no force in the argument of learned Deputy Advocate General that in the event of bail petitioner being enlarged on bail, he may tamper with prosecution evidence, because most of the remaining prosecution witnesses are official witnesses.

9. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the

investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

10. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

11. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his

trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

12. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

13. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

14. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leaves the territory of India without the prior permission of the Court.

(e) He hall surrender passport, if any, held by him.

15. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

16. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

State of Himachal Pradesh …Appellant

Versus

Maan Singh …Respondent

Cr. Appeal No. 365 of 2009

Decided on: July 26, 2019

Punjab Excise Act 1914 (as application to State of HP) - Section 61(1)(a) – Recovery of thirty cartons of IMFL from floor mill of accused - Accused not holding any licence to possess liquor – Appeal against acquittal of trial court -State contending wrong appreciation of evidence on part of trial court -On facts, held, 'PK' and 'GK' independent witnesses not supporting case during trial relating to recovery of cartons of liquor from premises of accused - Panch witnesses not from that locality where search was made - Disputed mill was open and not locked at relevant time - Investigating officer and other police witnesses not knowing about ownership of building – Case of prosecution doubtful – Acquittal of accused based on correct appreciation of evidence – Appeal dismissed. (Paras 6 to 8, 13 & 20)

Cases referred:

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

State of HP vs. Jagjit Singh, Latest HLJ 2008 (HP) 919

Surender Singh vs. State of H.P., Latest HLJ 2013 (2) 865

For the appellant: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

For the respondent: Mr. Vinod Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Being aggrieved and dissatisfied with judgment dated 15.10.2008 passed by learned Judicial Magistrate 1st Class, Court No.1, Amb, District Una, Himachal Pradesh in Police *Challan* No. 13-III-2006, whereby respondent-accused (hereinafter, 'accused') came to be acquitted of the offences punishable under S. 61(1)(a) of Punjab Excise Act (as applicable to the State of Himachal Pradesh) (hereinafter, 'Act'), appellant-State has approached this Court in the instant proceedings, praying therein for conviction of the accused after setting aside judgment of acquittal recorded by learned Court below.

2. In nutshell, case of the prosecution, as emerges from the record is that on 3.1.2006, police party, which was on patrolling duty, after having received secret information that the accused deals in illegal sale of liquor in his Flour Mill at Khuwarian, conducted raid. During search, Police allegedly recovered 30 cartons of "Bagpiper" whisky. Police took one bottle each from six cartons and prepared sample nips and sealed them with seal impression, "N". Since accused failed to produce valid permit, if any, to possess liquor in excess of the permissible limit, Police, after completion of codal formalities, registered FIR No. 4, dated 3.1.2006 under S.61(1)(a) of the Act *ibid* at Police Station Amb, District Una, Himachal Pradesh against the accused.

3. Prosecution, with a view to prove its case, examined as many as five witnesses, whereas, accused in his statement recorded under S.313 CrPC, denied the case of the prosecution in toto and claimed himself to be innocent. However, accused did not lead any evidence despite opportunity having been afforded for the purpose.

4. Learned trial Court, on the basis of evidence collected on record by the prosecution, vide judgment dated 15.10.2008, held accused not guilty of having committed offences punishable under S.61(1)(a) of the Act and acquitted him. In the aforesaid background, appellant-State has approached this Court, praying therein for setting aside judgment of acquittal and convicting the accused.

5. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Court below in the impugned judgment of acquittal, this court finds no illegality or infirmity in the judgment of acquittal passed by learned Court below and as such is not persuaded to agree with Mr. Sanjeev Sood, learned Additional Advocate General that the impugned judgment of acquittal is not based upon proper appreciation of the evidence, rather, this court finds from the statements made by independent witnesses associated by investigating agency, while effecting search, if any, in the premises of the accused that the prosecution failed to prove beyond reasonable doubt that on the date of alleged incident, 30 cartons of "Bagpiper" whisky were recovered from the premises of the accused. None of the prosecution witnesses supported the case of the prosecution and as such, they were declared hostile but even cross-examination conducted on these witnesses nowhere compels this court to agree with the contention of Mr. Sanjeev Sood, learned Additional Advocate General that the court below erred while discarding version put forth by these witnesses because, prosecution during cross-examination of these witnesses was unable to extract anything advantageous to its case,

rather version put forth by these witnesses in their cross-examination creates serious doubt with regard to correctness and genuineness of the story put forth by prosecution.

6. Independent witness Parvinder Kumar (PW-1) denied that he had participated in the police investigation. He also denied that search of Flour Mill of the accused was ever conducted, which allegedly led to recovery of liquor. He disowned portions “A” to “A” and “B” to “B” of his statement Mark P, recorded by the police. He further denied that memo Ext. PW-1/A was prepared in his presence, however, he stated that his signatures on the memo were obtained by the Police in the Police Station.

7. Similarly, PW-2 Gopal Krishan also did not support prosecution case. He denied that on 3.1.2006 police conducted search of Flour Mill of accused in his presence, which led to recovery of liquor. He also disowned the portions “A” to “A” and “B” to “B” of his statement mark G, allegedly recorded by the police. Though this witness admitted his signatures on the memo, Ext. PW-1/A, but voluntarily stated that signatures were put in the Police Station.

8. PW-3 ASI Davinder Kumar though in his examination-in-chief supported the prosecution story and stated that on 3.1.2006, he alongwith HC Karanjit No. 63, LHC Pawan Kumar No. 189 was at Repoh, when at around 6.30 pm, a secret information was received that accused deals in illegal sale liquor at his Flour Mill, but in his cross-examination, he feigned ignorance with regard to owner of Flour Mill, from where liquor allegedly came to be recovered. In his cross-examination, this witness though admitted that search of flour mill of accused was conducted, which led to recovery of liquor but in cross-examination but stated that shop from where liquor was recovered, was open and not locked. He did not enquire about ownership of the shop from revenue authorities or the Pradhan. He also admitted that he did not associate the Pradhan or *Lambardar* during investigation. He admitted that PW-2 Gopal Krishan met them near the shop of accused.

9. HC Pawan Kumar PW-4, deposed that on 13.2.2006, MHC Police Station Amb had handed over him 6 nips for depositing at CTL Kandaghat vide RC No. 21/06, which he deposited on 14.2.2006 at CTL Kandaghat. He stated that the sample nips were not tampered.

10. ASI Karanjit (PW-5) deposed that on 3.1.2006, he alongwith ASI Davinder and LHC Pawan Kumar had gone to Repoh in a private vehicle being driven by Parvinder Kumar. He stated that having received secret information that accused deals in illegal sale of liquor at his Flour Mill, they associated independent witness Gopal Krishan and thereafter searched the Flour Mill of the accused. They recovered 30 cartons of “Bagpiper” liquor. However, in his cross-examination, he feigned ignorance that who was owner of shop, from where liquor was allegedly recovered. He denied that he is deposing falsely in favour of the Police being police official.

11. Careful perusal of record reveals that alleged recovery of liquor from the premises of Flour Mill of accused came to be effected in the presence of independent witnesses namely Parvinder Kumar and Gopal Krishan, who miserably failed to support the case of prosecution, rather, cross-examination conducted on these witnesses creates serious doubt with regard to story put for by the prosecution.

12. Interestingly, both these witnesses have specifically denied their presence on the spot and they have stated that their signatures were obtained on the memo in the Police Station, meaning thereby story of search being put forth by the police is itself highly doubtful, especially when no cogent and convincing evidence except so called independent witnesses, ever came to be led on record by the prosecution.

13. As per prosecution story, Parvinder Kumar was driver of the private vehicle, in which police party went to Repoh. It is not in dispute that neither Parvinder Kumar nor Gopal Krishan (PW-1 and PW-2 respectively) are residents of locality where search was conducted. S. 100(4) CrPC clearly casts duty upon police to call two or more independent witnesses, especially inhabitants of the locality where place to be searched is situate, or from another locality, in case they are not available or not willing to be associated.

14. In the case at hand, no attempt ever came to be made by police to associate two or more respectable persons of area. Otherwise also, if statements of prosecution witnesses are read in their entirety, there appear to be lot of contradictions and inconsistencies in their statements with regard to location, area and number of rooms in the premises in question. Allegedly, in the site plan, Ext. PW-3/F, shop of accused has been shown to be consisting of two rooms whereas PW-5 in his statement deposed that shop consists of three rooms. Similarly, shop has been show to be tin-roofed in the site plan, whereas, PW-5 deposed it to be of RCC roof. Leaving it aside, there is nothing on record to suggest that accused is/was real owner of Flour Mill. Omission on the part of the investigating agency to prove the name of owner of the Flour Mill is fatal to the case of prosecution, especially in view of the stand taken by the accused that he does not own any Flour Mill.

15. Leaving everything aside, it is an admitted case of the prosecution that only six bottles out of total 30 cartons allegedly recovered from the Flour Mill of accused, were drawn as sample and sent for examination, as such, content is only proved qua those bottles in all, meaning thereby, recovery, of six bottles only is proved against the accused, whereas all the 30 cartons of liquor allegedly recovered from the house of the accused, were required to be sent for chemical examination, but in the instant case, whole bulk was not sent for chemical examination as such the whole of the recovery is vitiated.

16. In this regard reliance is placed upon the judgment passed by our own High Court in "**Surender Singh**. V. **State of H.P**.", Latest HLJ 2013 (2) 865, which reads as under:-

> "26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes actually contained liquor. The samples cannot be said to be representative in character.
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> 27. In similar circumstances, this Court in Mahajan versus State of Himachal Pradesh, 2003 Cr.L.J. 1346; State of H.P. versus Ramesh Chand, Latest HLJ 2007 (2) 1017; Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shim. LC 208; and State of Himachal Pradesh versus Kuldeep Singh & others, 2010(2) Him.L.R. 825, acquitted the accused, as prosecution could not prove, beyond reasonable doubt, as to what was actually there in the remaining boxes.

> 28. As per version of PW-1, outside the boxes 'Sirmour No.1' was printed which version stands denied by PW-7. In the instant case, there is nothing on record to show that the remaining boxes were in fact containing liquor. Quantity of the remaining bottles of the boxes from which samples were drawn has also not been proved to be liquor. These aspects have not been considered by the Courts below. The cumulative effect is that the prosecution has failed to prove the charge against the accused, beyond reasonable doubt and as such judgments of the Courts below are not sustainable in law."

17. Reliance is also placed on the judgment passed by this Court **State of HP** v. **Jagjit Singh,** Latest HLJ 2008 (HP) 919, wherein this Court has observed in paras 6 and 7 as under:-

> "6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.
>
> 7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."

18. By now it is well settled that in a criminal trial evidence of eye-witnessrequires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
>
> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such

> evidence becomes eligible to be put into the scales for a cumulative evaluation."

In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

19. In view of the aforesaid discussion and law laid down by the Hon'ble Apex Court as well as this Court, there are major flaws in the investigation of the prosecution and prosecution story does not appear to be believable.

20. Consequently, in view of detailed discussion made herein above, this Court sees no reason to differ with the judgment of acquittal recorded by the learned Court below, which otherwise appears to be based upon correct appreciation of evidence adduced on record.

21. Accordingly, the present appeal is dismissed. Judgment passed by the learned trial Court is upheld. Bail bonds, if any, furnished by the accused are discharged.

22. Case property, if not destroyed, be destroyed forthwith.

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

Bunti Lal ....Petitioner
Versus
State of Himachal Pradesh ....Respondent

Cr. Revision No. 55 of 2009
Decided on: July 30, 2019

Indian Penal Code, 1860- Sections 279 and 337– **Motor Vehicles Act, 1988**- Section 187- Rash and negligent driving on public highway- Proof- Prosecution alleging that accused by his rash driving of truck hit a scooter and caused injuries to victim– Trial court convicting accused– Additional Sessions Judge affirming conviction in appeal – Revision against – Held, mere rashness or negligence on part of accused is not sufficient to prove charge – It is criminal rashness or negligence on part of accused which constitutes offence – Speed alone is not criteria for inferring criminal rashness – Victim not receiving injuries so not filing report with police – FIR registered at instance of brother of victim, a press reporter– Investigating officer also admitting of case having been registered on instructions of Additional S.P.– No independent witness examined– No evidence of damage to scooter of victim on account of collision as its mechanical examination was not got done – Case of prosecution doubtful– Revision allowed – Conviction and sentence set aside – Accused acquitted. (Paras 5, 9, 18 & 20)

Cases referred:

Akshay Kumar vs. State of HP, Latest HP LJ 2009 HP 72

C. Magesh and others vs. State of Karnataka, (2010) 5 SCC 645
Gurcharan Singh vs. State of Himachal Pradesh, 1990 (2) ACJ 598
State of Punjab vs. Saurabh Bakshi, 2015 (5) SCC 182

For the petitioner: Dr. Lalit K. Sharma, Advocate.
For the respondent: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

Instant criminal revision petition under S.397 read with S.401 CrPC, lays challenge to judgment dated 5.3.2009 passed by learned Additional Sessions Judge, Solan, Himachal Pradesh in Criminal Appeal No. 24-S/10 of 2008 affirming the judgment dated 26.6.2008 passed by learned Judicial Magistrate 1st Class, Kasauli, Solan, Himachal Pradesh in Case No. 128/2 of 2007, whereby learned trial Court held petitioner-accused (hereinafter, 'accused') guilty of having committed offences punishable under Ss.279 and 337 IPC and S.187 of the Motor Vehicles Act and accordingly convicted and sentenced him in the following manner:

Section	**Sentence**	**Fine**	**In default of payment of fine**
279 IPC	Six months simple imprisonment	Rs.1000	One month imprisonment
337 IPC	Six months	Rs.500	One month imprisonment
187 of the Motor Vehicles Act	Two months	Rs.500	Ten days

2. Precisely, the facts as emerge from the record are that on 9.10.2006, PW-1 Arvind Kashyap informed Police Station, Kasauli that his younger brother, Arun Kashyap (PW-2), who was riding a scooter bearing registration No. HP14A-2396, has been hit by a Truck bearing registration No. HP-64-0996 being driven in high speed by the accused. He further alleged that after accident, accused fled away from the spot with the truck. On the basis of the aforesaid statement/complaint made by complainant, PW-1, Arvind Kashyap, a formal FIR Ext. PW-10/A dated 9.10.2006 came to be lodged against the accused under Ss.279 and 337 IPC and S.187 of the Motor Vehicles Act. After completion of investigation, Police presented *Challan* in the competent Court of law, who being satisfied that a prima facie case exists against the accused, put notice of accusation to the accused for the commission of the offences punishable under aforesaid provisions of law, to which accused pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case examined as many as ten witnesses, whereas accused in his statement recorded under S.313 CrPC, though admitted the factum with regard to accident but claimed that the accident occurred on account of rash and negligent driving of the rider of the Scooter. He did not lead any evidence in his defence. Learned trial Court, on the basis of evidence collected on record by the prosecution, held the accused guilty of having committed offence punishable under Ss.279 and 337 IPC and S.187 of the Motor Vehicles Act, and accordingly convicted and sentenced him as per description given herein above. Being aggrieved and dissatisfied with the judgment of conviction recorded by learned trial Court, accused preferred an appeal before learned

Additional Sessions Judge, Solan, who vide judgment dated 5.3.2009, dismissed the appeal, as a consequence of which judgment of conviction and sentence passed by learned trial Court came to be upheld. In the aforesaid background, accused has approached this Court in the instant proceedings, seeking his acquittal after setting aside judgment of conviction and sentence passed by learned trial Court and affirmed by learned first appellate Court.

4. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Courts below, while holding the accused guilty of having committed offences punishable under aforesaid provisions of law, this court is persuaded to agree with Dr. Lalit K. Sharma, learned counsel for the accused that since there was no positive evidence, if any, led on record by prosecution to the effect that the offending vehicle was being driven rashly and negligently by the accused at the time of alleged accident, learned Courts below ought not have held him guilty.

5. It is well settled by now that rashness and negligence cannot be presumed, rather, onus is always upon the prosecution to prove the same beyond reasonable doubt. Apart from above, mere rashness and negligence are not sufficient for holding accused guilty of having committed offences punishable under Ss.279 and 337 IPC, rather it is criminal rashness and negligence on the part of the accused, which constitutes commission of such offence, as have been defined in the aforesaid provisions of law. In a catena of judgments, this Court as well as Hon'ble Apex Court have held that speed is not the sole criteria to hold that vehicle in question was being driven rashly and negligently, rather, specific evidence is required to be led on record by prosecution in this regard. In the case at hand, record clearly reveals that the complaint with regard to alleged incident came to be lodged at the behest of PW-1, Arvind Kashyap, who was not present on the spot. His own statement, which ultimately culminated into FIR, Ext. PW-10/A, clearly reveals that he having received telephonic information from his brother, Arun Kashyap, who allegedly suffered injuries as well as damage to his Scooter, lodged complaint stating therein that the incident in question occurred on account of rash and negligent driving of the accused. Keeping in view the fact that PW-1 was not an eye witness to the alleged accident, learned Court below ought not have placed much reliance upon the version put forth by this witness, because, admittedly, he had no occasion to see the accident with his own eye. There is another aspect of the matter that since no serious injury ever came to be suffered by PW-2, Arun Kashyap in the accident, it is not understood, what prevented him from lodging FIR. Though, Dr. Lalit K. Sharma, learned counsel for the accused made an attempt to persuade this Hon'ble Court, to agree with his contention that the factum with regard to accident is in dispute but, as has been taken note herein above, accused, in his statement under S.313 CrPC, has admitted the factum with regard to his accident as such, plea raised by Dr. Lalit K. Sharma deserves outright rejection. Moreover, PW-6, Tej Pal, who was Conductor in the Truck being driven by the accused, has also admitted that after alleged accident, they had fled away from the scene, but this witness has denied the factum with regard to damage/injury, if any, suffered by victim (PW-2) Arun Kashyap. Though, this witness was declared hostile but even the cross-examination conducted upon this witness nowhere proves the case of the prosecution that at the time of alleged incident, vehicle in question was being driven in a rash and negligent manner.

6. Aforesaid witness, in his cross-examination, has stated that the accident occurred on a spot, where road is narrow and in the alleged accident, no injury was caused to PW-2, Arun Kashyap. Even the Investigating Officer (PW-10), in his cross-examination has stated that there is a curve where alleged accident took place.

7. PW-2 Arun Kashyap, victim, has also admitted that there was a curve on the site of alleged accident.

8. PW-3 Ram Singh, Mechanical Examiner, while proving Mechanical Report, Ext. PW-3/A, dated 10.10.2006, has categorically stated that no signs of accident were detected on the offending vehicle, which admittedly came to be apprehended immediately after alleged accident by the Polie.

9. PW-2, Arun Kashyap stated that at the time of alleged accident, 10-12 people had gathered at the spot but none of such persons, ever came to be associated as independent witnesses and no explanation, whatsoever, has been rendered by IO, PW-10 that why he failed to associate independent witnesses, especially when they were available in abundance. None filing of the complaint by victim himself, especially when he did not receive any injury, compels this court to agree with Dr. Lalit K. Sharma that no actual damage was caused to the Scooter being driven by Arun Kashyap, PW-2, but subsequently on the complaint of Arvind Kashyap, PW-1, who is stated to be a Press Reporter, case came to be registered against the accused. Aforesaid conclusion as has been drawn by this Court is further fortified/substantiated with the statement of PW-10, IO, who in his cross-examination has categorically admitted that they had received instructions from the office of Additional Superintendent of Police, Solan, for registering the case.

10. Leaving everything aside, there is nothing in the statements of material prosecution witnesses that at the time of alleged incident, offending vehicle was being driven in a rash and negligent manner as such, both the learned Courts below merely taking into account version put forth by prosecution witnesses that the vehicle was being driven in high speed, wrongly proceeded to hold accused guilty of having committed offences in question.

11. True it is that aforesaid witness stated that the offending vehicle was in high speed but that is not sufficient to conclude rash and negligent driving, if any, on the part of accused. High speed itself is not a criteria to conclude rashness and negligence, rather it is/was incumbent upon the prosecution to prove that offending vehicle was being driven in such rash and negligent manner so as to endanger human life or likely to cause hurt or injury to any other person.

12. Needless to say, for the purpose of criminal law, a high degree of evidence is required before felony is established. Merely because accident took place, it can not be presumed that there was negligence on the part of driver. Act of driving must be grossly rash and negligent to such an extent that reasonable inference can be drawn about the same likely to endanger human life or cause hurt or injury to another person.

13. By now, it is well settled that specific evidence is required to be adduced on record by prosecution to prove rash and negligent driving, if any, on the part of the accused. Mere allegations are not sufficient to hold accused guilty of having committed offence punishable under Section 279 IPC.

14. At this stage, reliance is placed on judgment rendered by our own High Court in case titled **Akshay Kumar v. State of HP**, Latest HP LJ 2009 HP 72, relevant para of which reads as under:-

> "8. In fact, an injury shall be deemed to be negligently caused whomsoever it is willfully caused, but results from want of reasonable caution, in the undertaking and doing of any act either without such skill, knowledge or ability as is suitable to consequences of such act, or when it results from the not exercising reasonable manner of using them or from the doing of any act without using reasonable caution for the prevention of mischief, of from the omitting to do any act which is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without an

intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Rash and negligent act may be described as criminal rashness negligence. It must be more than mere carelessness or error of judgment."

The courts below did not appreciate the above facts that there was debris on the side of the road on the curve due to the slip, while negotiating the curve, as stated above, some witnesses have admitted that the danga gave way to the bus which caused the accident and the rash and negligent driving by the petitioner is also denied, therefore, it find that the findings of quilt arrived at against the petitioner by both the courts below were not based upon legal and proper appreciation of evidence. In the circumstances aforesaid, the petitioner cannot be said to have criminal rashness or negligence, thus he is entitled for the benefit of doubt as two views were deducible from the evidence on record."

15. Reliance is placed upon judgment of this Court in **Gurcharan Singh versus State of Himachal Pradesh** reported in 1990 (2) ACJ 598, relevant paragraphs of which are reproduced here-in-below:-

"14. Adverting to the facts of this case, it is in evidence that the truck in question was loaded with fertilizer weighing 90 quintals. Obviously, it cannot be said that the speed of the vehicle was very fast. Secondly, it is a State Highway and not a National Highway. Therefore, the speed on this account as well cannot be considered to be high.

"15. Coming to the statements of witnesses on this aspect, it has been stated that the truck was moving in high speed but it has not been said as to what that speed actually was. To say that a vehicle was moving in a high speed is neither a proper and legal evidence on high speed nor in any way indicates thereby the rashness on the part of the driver. The prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved in a case under Section 304-A of the Indian Penal Code. Further, there are no skid marks which eliminate the evidence of high speed of the vehicle. In addition to this, it has been stated by the witnesses that the vehicle stopped at a distance of 50 feet from the place of accident. This appears to be exaggerated. However, it is not a long distance looking to the two points; viz, the first impact of the accident and the last tyres of the vehicle and the total length of the body of the truck in question. If seen from these angles, the distance stated by the witnesses cannot be considered to be very long and thus an indication of high speed. The version of the petitioner that he blew the horn near about the place of curve which frightened the child, cannot be considered to be without substance. This can otherwise be reasonably inferred that the petitioner would have blown the horn on seeing the child on the road as it is in evidence that the child had come on the pucca portion of the road while there is no evidence as to whether the witnesses, more particularly, Ghanshyam, PW7, Chander Kanta, PW8, mother, and a few other witnesses were there at that particular time. Rather the depositions of these witnesses indicate that they were coming from some village lane which was joining the main road in question. Children of this age, usually crafty by temperament, move faster than the parents and are in advance of them while walking. This appears to have

> happened in the present case. Minute examination of the circumstances of this case and the evidence brought on the record, discloses that the deceased had reached the pucca portion of the road much before the arrival of his parents and the witnesses. That is why in their deposition they have said that the child had been run over by the truck. On the other hand, the petitioner has stated that horn by him and started crossing the road which could not be seen by him and the result was the accident and the death of the child. In case some pedestrians suddenly cross a road, the driver of the vehicle cannot save the pedestrian, however slow he may be driving the vehicle. In such a situation he cannot be held negligent; rather it appears that the parents of the child were negligent in not taking proper care of the child and allowed him to come alone to the road while they were somewhere behind and they could have rushed to pull back the child before the approaching vehicle came in contact with him as it is in their depositions that the truck driver was at a distance coming at a high speed and in case the child wanted to cross the road, it could do so within the time it reached at the place of the accident. How the accident has actually taken place, has not been clearly and comprehensively stated by any of the witnesses. They appear to have been prejudiced by the act of the driver. Their versions are, therefore, coloured by the ultimate act of the petitioner and the fact that the child had been finished."

16. This Court is also fully conscious of judgment of Hon'ble Apex Court in ***State of Punjab*** *versus* ***Saurabh Bakshi 2015 (5) SCC 182,*** wherein it has been held that no leniency should be shown to reckless drivers. The Hon'ble Apex Court has observed as follows:-

> "25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

17. There cannot be any disagreement with the concern expressed by the Hon'ble Apex Court in the aforesaid judgment with regard to carelessness /recklessness of the drivers, especially under the influence of alcohol. But in the instant case, as has been discussed above, prosecution was not able to prove beyond reasonable doubt that ill fated vehicle was being driven by accused rashly and negligently, rather, version put forth by prosecution appears to be untrustworthy in view of material contradictions in the statements of the prosecution witnesses, and as such, this Court sees no application of aforesaid law laid down by the Apex Court in the instant case.

18. Though, in the case at hand, PW-2 Arun Kashyap and PW-1 Arvind Kashyap claimed that in the alleged accident, rider of the Scooter, PW-2 suffered injuries, but record reveals that he nowhere came to be medially examined as such, injuries if any, suffered by PW-2 Arun Kashyap never came to be proved in accordance with law. Nowhere any positive evidence, if any, ever came to be led with regard to damage if any caused to Scooter being driven by PW-2 Arun Kashyap, rather, to the contrary, as has been taken note, Mechanical

Examiner, while proving report, Ext. PW-3/A, has categorically stated that no signs of accident were noticed on the offending vehicle. Record further reveals that the Scooter in question which allegedly was damaged, on account of being hit by the offending vehicle, never came to be impounded by the Police. PW-1, Arvind Kashyap has admitted in his cross-examination that after alleged accident, scooter was taken to Solan.

19. By now it is well settled that in a criminal trial evidence of eyewitness requires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
>
> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

20. Consequently, in view of detailed discussion made herein above, revision petition is accepted. judgment dated 5.3.2009 passed by learned Additional Sessions Judge, Solan, Himachal Pradesh in Criminal Appeal No. 24-S/10 of 2008 affirming the judgment dated 26.6.2008 passed by learned Judicial Magistrate 1st Class, Kasauli, Solan, Himachal Pradesh in Case No. 128/2 of 2007 is quashed and set aside. Accused is acquitted of the offences alleged against him. Bail bonds, if any, furnished by him are cancelled.

All pending applications, if any, are disposed of.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J.AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Reserve Bank of India and others …Appellants
Versus
Shadi Lal Sharma …Respondent

LPA No. 28 of 2019
Reserved on: 25.07.2019
Decided on: 30.07.2019

Constitution of India, 1950– Articles14 & 226 – **Reserve Bank of India Pension Regulations ,1990** - Regulation 28 as amendment vide notification dated 28.8.2017 and made applicable from 6.10.2017 i.e, from date of publication in official gazette enabling employees to fix basic pension at 50% of last pay drawn – Effect on retirees who retired before 6.10.2017 – Held, any legislation including subordinate legislation unless otherwise specifically provided for can take only prospective and not retrospective effect – Writ of petitioner was filed on misconception that prospective operation of statutory regulation will amount to artificial cut off date – Petitioner having retired on 31.7.2013 not entitled to compute his basic pension at 50% of last pay drawn vide Regulation which had come into force from 6.10.2017 – By amending Regulation what was changed was just method of computation of pension – LPA allowed – Order of Hon'ble Single Judge set aside – Petition dismissed. (Paras 9 to 13 & 21)

Cases referred:
All Manipur Pensioners Association vs. The State of Manipur and others, Civil Appeal No.10857 of 2016 dated 11.07.2016
D.S. Nakara and others vs. Union of India, AIR 1983 SC 130
Government of Andhra Pradesh and others vs. N. Subbarayudu and others, (2008) 14 SCC 702
State of Punjab and others vs. Amar Nath Goyal and others, (2005) 6 SCC 754

For the appellant: Mr. Neeraj K. Sharma and Mr. Jyotirmay Bhatt, Advocates.
For the respondent: Respondent in person.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

The Reserve Bank of India has come up with the above Letters Patent Appeal questioning the correctness of the order of the learned Single Judge allowing the writ petition filed by the respondent herein.

2. Heard Mr. Neeraj K. Sharma, learned counsel for the appellant and the respondent appearing in person.

3. The brief facts leading to the above Appeal are as follows:

(i) The respondent herein retired from the Reserve Bank of India as Assistant General Manager on 31.03.2013 after putting in more than 32 years of service. According to the respondent, the total emoluments as on the date of his retirement, taken into account for the purpose of basic pension, as per Administrative Circular No. 4 dated 09.09.2010 was ₹ 56,750/-.

(ii) The pension of the respondent was accordingly fixed before commutation at ₹ 28,375/-, which was 50% of the total emoluments.

(iii) Admittedly, basic pension was fixed on the basis of the average emoluments received during the last ten months preceding the date of his retirement and the respondent also received commutation.

(iv) It appears that the pay and allowances of the employees of the Bank were revised under an Administration Circular No. 7 dated 11.04.2016, with retrospective effect from 01.11.2012. Since the respondent reached superannuation on 31.01.2013, he was granted the benefit of the revised pay and allowances with effect from 01.11.2012 up to the date of his retirement.

(v) After the revision of pay and allowances with retrospective effect, the Management issued advisories for recalculating the pension and commuted value of pension of those employees who retired on or after 01.11.2012.

(vi) It appears that the revised last drawn pay of the respondent was taken as ₹ 1,05,600/-, but the average pay for the purpose of re-fixation of basic pension was taken as ₹ 95,301/-.

(vii) As per Regulation 28 of the Reserve Bank of India Pension Regulations, 1990, (hereinafter referred to the Regulations), the rate of basic pension has to be 50% of the average emoluments. The expression "average emoluments" is defined in Regulation 2 (2) to mean the average of pay drawn by an employee during the last ten months of his service.

(viii) The Reserve Bank of India Pension Regulations, 1990 were amended by a Notification bearing No. Co.HRMD No.6563/21.01/2017-18 dated 28.08.2017. By this Notification, the following words were directed to be inserted, after the words "average emoluments" appearing Regulation 28:

> *"or the last pay drawn whichever is more beneficial to the employee."*

(ix) The impact of the Notification dated 28.08.2017 was that the rate of basic pension should be 50% of "either the average emoluments or the last pay drawn whichever is more beneficial to the employee".

(x) Since the respondent retired on superannuation on 31.01.2013 and since the revision of pay and allowances was granted with retrospective effect from 01.11.2012, the respondent naturally got the benefit of revised pay for a period of three months, namely November and December 2012 and January 2013.

(xi) If the rate of basic pension as per Regulation 28, as amended by the Notification dated 28.08.2017 was to be fixed, the same could have been fixed either at 50% of the average emoluments or at 50% of the last pay drawn. The calculation of the rate of basic pension on the basis of the last pay drawn, rather than on the basis of average emoluments, was to be more beneficial to the respondent, as he had the benefit of revision of pay only for a period of three months before retirement and that too, by virtue of the revision of pay and allowances being offered with retrospective effect.

(xii) It is pertinent to note that the Notification dated 28-08-2017 amending the 1990 Regulations were published in the Gazette of India on 06.10.2017. It is also relevant to note that Regulation 1(2) of RBI Pension (Amendment) Regulations, 2017 clearly stipulated that the amended Regulations shall come into force on the date of their publication in the Official Gazette.

(xiii) Therefore, an Administration Circular No. 1 dated 26.10.2017 was issued making it clear that the amended Regulation 28 will take effect from 06.10.2017 and that it will be applicable only to employees retiring from the Bank's service on or after 06.10.2017.

(xiv) However, it appears that immediately after the implementation of the revision of pay and allowances, the respondent was granted a higher pension on the basis of the last pay drawn rather than on the basis of the average emoluments. This resulted in an excess payment of ₹ 1,14,111/-.

(xv) After realizing the mistake, the excess payment was recovered from the pension of the respondent. Aggrieved by the recovery of the excess amount and also aggrieved by the non-application of the benefit of the amended Regulations of the year 2017 to persons who retired before 6-10-2017, the respondent herein came up with a writ petition in CWP No. 2618 of 2016.

(xvi) The said writ petition was allowed by a learned Judge of this Court on the ground (A) that the fixation of the cut-off date of 06.10.2017 for extending the benefit of the amended Regulations was artificial; and (B) that as per the law laid down by the Supreme Court in **D.S. Nakara and others vs. Union of India (AIR 1983 SC 130)**, the fixation of such a cut-off date was arbitrary.

(xvii) The learned Judge also directed the Reserve Bank of India to refund the amount recovered from the respondent and further directed the Bank to re-fix the basic pension based upon the last pay drawn.

(xviii) Aggrieved by the said judgment of the learned Single Judge, the Reserve Bank of India has come up with the above Letters Patent Appeal.

4. Before we proceed further, it may be necessary to have a look at the reliefs sought by the respondent in his writ petition. The reliefs sought by the respondent in his writ petition CWP No. 2618 of 2016 are as follows:

> *"(i) That the impugned Circular dated 07.06.2016, Annexure P3 may kindly be quashed and set aside, by issuing writ of certiorari.*
>
> *(ii) That sub para (2) of para 1 of impugned notification dated 28.08.2017 which fixes the date of operation of the amendment as 06.10.2017 may kindly be quashed and setaside as petitioned in paragraph No.23 of this petition.*
>
> *(iii) That the respondents may kindly be directed to refix the basic pension of the petitioner on the basis of 'last pay drawn' effective from 01.02.2013 and also pay commuted value of pension on that basis (last pay drawn).*
>
> *(iv) That the respondent Bank may kindly be directed to refund Rs.1,14,111/(Rupees One Lac Fourteen Thousand One Hundred Eleven) recovered from the petitioner illegally without giving any notice."*

5. The reliefs granted by the learned Judge by his judgment dated 14.12.2018 are to be found in paragraph 23 of the impugned judgment. It reads as follows:

> *"23. Accordingly, the impugned circular dated 7.6.2016 (Annexure P3) is quashed and setaside and resultantly, the impugned notification dated 28.8.2017 which fixes the date of operation of the amendment as 06.10.2017 is also quashed and setaside and the respondents are directed to refix the basic pension of the petitioner on the basis of 'last pay drawn' effective from 01.02.2013 and also pay commuted value of pension on that basis i.e. last pay drawn. The respondent Bank is also directed to refund Rs.1,14,111/- to*

the petitioner which was recovered from the petitioner illegally without giving him any notice."

6. But as we have pointed out in the paragraph providing the narration of the historical background, Regulation 28 of the RBI Pension Regulations, 1990 as it originally stood, provided only for the calculation of basic pension at the rate of 50% of the average emoluments. The expression "average emoluments" was defined in Regulation 2 (2) to mean the average of pay drawn by an employee during the last ten months of his service.

7. It was only by the RBI Pension (Amendment) Regulations, 2017, issued by way of Notification dated 28.08.2017 and published in the Gazette of India on 06.10.2017 that Regulation 28 was modified so as to enable an employee to seek the fixation of basic pension at the rate of 50% of the last drawn pay. These amendment Regulations were issued by the Central Board of the RBI, in exercise of the power conferred by Clause (j) of sub-Section (2) of Section 58 of the RBI Act, 1934. These amendment Regulations were issued with the previous sanction of the Central Government, as required by the Statute. Regulation 1 (2) of the 2017 Amendment Regulations made it clear that they shall come into force only on the date of their publication in the Official Gazette. Admittedly, the amendment Regulations were published in the Official Gazette on 06.10.2017.

8. Therefore, when a Regulation is issued in exercise of the power conferred by a Statute and that too with the previous sanction of the Central Government, the challenge to such a Regulation could be only on established parameters. Regulation 1(2) of the Notification dated 28.08.2017 did not actually fix any cut-off date. All that it said was that the Regulations will come into force on the date of publication of the Notification in the Official Gazette. Therefore, we do not know how a Regulation which merely says that it shall come into force with effect from the date of its publication in the Official Gazette, can be challenged on the ground that it fixes an artificial cut-off date. In fact Section 58(1) of the RBI Act, 1934 reads as follows:

> *"58. **Power of the Central Board to make regulations**.- (1) The Central Board may, with the previous sanction of the Central Government, by notification in the Official Gazette, make regulations consistent with this Act to provide for all matters for which provision is necessary or convenient for the purpose of giving effect to the provisions of this Act."*

9. Therefore, the Central Board is empowered to make Regulations subject to two conditions, namely (i) previous sanction of the Central Government; and (ii) notification in the Official Gazette. Any Regulation made without complying with any one of these conditions will be invalid and ultra vires the Act. Therefore, even if Regulation 1(2) of the RBI Pension (Amendment) Regulations, 2017 had been silent about the date of coming into force of the Regulations, the Regulations could have taken only prospective effect from the date of publication. Any legislation, including subordinate legislation, unless otherwise specifically provided for, can take only prospective effect and not retrospective effect. The whole writ petition was filed by the respondent on the misconception that the prospective coming into operation of a statutory regulation will tantamount to prescription of an artificial cut-off date.

10. Interestingly, the first part of the relief prayed for by the respondent was to quash a Circular dated 07.06.2016. This circular merely stipulated that the pay and allowances of employees who were in service as on 01.11.2012 has been revised w.e.f. 01.11.2012 and that, therefore, the pension sanctioned to employees who retired on or after 01.11.2012 should be re-computed. On the date on which the said Circular dated

07.06.2016 was issued, the Amendment Regulations 2017 had not even been notified. Therefore, the Circular dated 07.6.2016 merely reflected the statutory position prevailing on the date of retirement of the respondent, namely, that for the purpose of calculation of average emoluments, in respect of employees who have retired after 01.11.2012, the pay for the months falling before November 2012 may be taken as pre-revised pay. But subsequently Regulation 28 stood amended w.e.f. 06.10.2017 by the Notification dated 28.08.2017. In any case under the amended Regulations also, the definition of the expression "average emoluments" did not undergo any change. Therefore, we do not know why and how the Circular dated 07.06.2016 should be challenged, especially when an amendment had been issued to the Regulations.

11. The main thrust of the argument of the respondent is that in **D.S. Nakara and others vs. Union of India (AIR 1983 SC 130)**, the Supreme Court has frowned upon the fixation of an artificial cut-off date, creating two categories of retired pensioners without any rational basis. The principles laid down in **D.S. Nakara** were also followed in a recent decision of the Supreme Court in **All Manipur Pensioners Association vs. The State of Manipur and others** in Civil Appeal No.10857 of 2016 dated 11.07.2016. Therefore, the main ground on which the respondent challenged Regulation 1(2) of the Amendment Regulations 2017 was the principle laid down in **D.S. Nakara**.

12. But we do not think that the principle laid down in **D.S. Nakara** has any application to cases of this nature. What happened in **D.S. Nakara** was, that by a Memorandum dated 25.05.1979, the Government of India liberalized the formula for computation of pension in respect of employees governed by the Central Civil Services (Pension) Rules, 1972. It was made applicable to the employees retiring on or after 31.03.1979. Therefore, it was in the context of a non-statutory scheme framed by the Government that the Supreme Court observed that an artificial classification cannot be made between retired pensioners only on the basis of the date of retirement.

13. But in the case on hand the impugned Regulation 1(2) of the 2017 Regulations does not seek to divide the retired pensioners on the basis of any artificial date, namely, those who retired before 06.10.2017 and those who retired thereafter. By the Amendment Regulations 2017, what was changed was just the method of computation of pension. Instead of computing the basic pension on the basis of average emoluments, a switchover was permitted by the amended Regulations, to be made on the basis of the last pay drawn. This benefit was conferred for the first time under the amended Regulations. As pointed out elsewhere, the statutory scheme of Section 58(1) of the RBI Act, 1934 prescribes two conditions. Upon the satisfactory compliance of those two conditions, the new formula for calculation of pension came into force. This has nothing to do with the prescription of a cut-off date or the classification of retired pensioners into two artificial categories.

14. It must be remembered that the respondent retired on reaching superannuation on 31.01.2013. The revision of pay and allowances was implemented with retrospective effect from 01.11.2012. Therefore, the respondent could reap the benefit of revised pay and allowances only for a period of three months, namely, November and December 2012 and January 2013.

15. The respondent did not challenge and could not have challenged the fixation of the date 01.11.2012 for the grant of revised pay and allowances. The same logic would apply even to the amended Regulations.

16. As a matter of fact if the amended regulations had been directed to come into force with retrospective effect from some earlier date (anterior to the date of notification or

publication), the choice of such a date would have been frowned upon. A regulation, which, by its natural course, would normally come into force automatically with effect from the date of publication of notification, cannot be challenged on the ground that the date of publication was illegal.

17. What is in issue in the case is the date of publication of the notification in the Official Gazette and not the fixation of any cut-off date. It is this distinction that will make the case not to fall within the mischief addressed by the Supreme Court in **D.S. Nakara**. As a consequence, the ratio laid down by the Supreme Court in **All Manipur Pensioners Association** is also not applicable to the case on hand. As could be seen from paragraph 2 of the decision of the Supreme Court in **All Manipur Pensioners Association,** the Government of Manipur issued an Office Memorandum dated 21.04.1999 increasing the quantum of pension as well as the pay of the employees, taking into account the rise in the cost of living. But it was stipulated that the benefit will be applicable only to those who retired on or after 01.01.1996. This resulted in a higher percentage of pension to those who retired on or after 01.01.1996 and lower percentage of pension to those who retired on or before 01.01.1996. This is why the Supreme Court applied the twin tests for the applicability of Article 14 and invoked the mantra of **D.S. Nakara** to grant relief. **All Manipur Pensioners Association** case, like **D.S. Nakara,** also arose out of a non-statutory scheme for revision of pension with retrospective effect. Once a non-statutory scheme is propounded with retrospective effect from a particular date, the choice of that date would naturally become questionable. But in the case on hand, a statutory prescription has been made applicable with prospective effect from the date of publication of the Notification in Official Gazette, as required by Section 58 of the RBI Act, 1934. Hence, the magic wand of **D.S. Nakara** cannot produce the result sought by the respondent.

18. As observed by the Supreme Court in **State of Punjab and others versus Amar Nath Goyal and others {(2005) 6 SCC 754},** the refrain of **D.S. Nakara** has been played too often to retain its initial charm, which has been worn thin by subsequent dicta. In paragraph 29 of its decision in **Amar Nath Goyal,** the Supreme Court pointed out that subsequent judgments have considerably watered down the rigid view taken in **D.S. Nakara,** as for example in **Tamil Nadu Electricity Board versus R. Veerasamy.**

19. Again in **Government of Andhra Pradesh and others versus N. Subbarayudu and others {(2008) 14 SCC 702},** the Supreme Court, relying upon **Amar Nath Goyal** indicated that the rigid view in **D.S. Nakara** had already been watered down.

20. A legislation that comes into effect prospectively from the date of its publication in the Official Gazette can never be attacked as one creating a classification between those who retired before the coming into force of the legislation and those who retired thereafter. By its very nature, all legislations including subordinate legislations, can come into force only prospectively, unless retrospectivity is clearly spelt out in the Section dealing with the coming into force of the legislation.

21. Therefore, the entire foundation of the case of the respondent on the basis of **D.S. Nakara** was completely shaky and hollow. The learned Judge has omitted to take note of this aspect and hence the appeal deserves to be allowed. Accordingly, the appeal is allowed and the impugned order of the learned Judge is set aside. The writ petition filed by the respondent shall stand dismissed. However, there will be no order as to costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Praveena Devi.
Versus
State of H.P. & ors.

CWP No. 438 of 2017 & connected matters.
Reserved on: 03.05.2019.
Decided on: 02.08.2019.

Limitation Act, 1963- Section 5 – Condonation of delay– Whether delay caused in filing appeal before Appellate Authorities against selection/appointment of Anganwari helper can be condoned? – Held, Appellate Authority (Deputy Commissioner) is a person designate and it exercises quasi-judicial functions – As such, Section 5 of Limitation Act has no applicability in proceedings before Appellate Authority and it cannot condone delay occurred in filing appeal. (Paras 10 to 13 & 19)

Cases referred:
Khadi Gram Udhog Trust vs. Shri Ram Chandrji Virajman Mandir, AIR 1978 SC 287
L.S. Synthetics Ltd. vs. Fairgrowth Financial Services Ltd. And another, AIR 2005 SC 1209
Mohamad Kavi Mohamad Amin vs. Fatmabai Ibrahim, (1997) 6 SCC 71
Sakuru vs. Tanaji, AIR 1985 SC 1279
Uttam Namdeo Mahale vs. Vithal Deo and Others, (1997) 6 SCC 73

For the petitioner(s)/ appellant(s) M/s Sanjeev Bhushan and Mr.Sanjeev Kuthiala, Senior Advocates with Ms. Abhilasha Kaundal, Ms.Garima Kuthiala, M/s G.R. Palsra, Vishal Panwar, Karan Singh Kanwar, Digvijay Singh, K.B. Khajuria, Ashok K. Tyagi, J.L. Bhardwaj,Ambika Kotwal, Adarsh K. Vashisht, Surinder Saklani, Jai Dev Thakur,Dinesh Kumar, H.S. Rangra, Prem P. Chauhan, R.S. Chandel, Sudhir Negi, V.S. Rathore, Neel Kamal Sood, Sanjay Jaswal, Tara Singh Chauhan, and Mr. Mukul Sood, Advocates for the respective petitioner(s) in all the writ petitions and for the respective appellant(s) in all the appeals.

For the respondents Mr. Vikas Rathore, Addl. AG with Mr. J.S. Guleria, Dy. AG.
M/s Vivek Sharma, Ajeet Sharma, Lalit Sharma, Karan Singh Kanwar, Yogesh Kumar Chandel, Sushat Vir Singh Thakur, Advocate, for the private respondents.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

In this bunch of writ petitions and Letters Patent Appeals a common question that the Appellate Authority under the Schemes framed by respondent-State from time to time for making selection against the posts of Anganwari workers/helpers in the State is competent to condone the delay, if occurred in filing the appeal by the person aggrieved.

2. On 6.9.2017 after hearing this matter further, following orders came to be passed:

> "Heard further. In view of the arguments addressed perhaps one Scheme was framed by the respondent-State in the year 2007 providing therein the provision of limitation for filing an appeal against the selection of Anganwari workers/helpers as 15 days and another in the year 2009 Annexure P-5 in writit record in which though there is no provision of limitation for filing an appeal, however, limitation as per clause-12 thereof is qua decision of the appeal by the competent authority within 15 days. Learned Counsel have also informed that subsequently a memorandum was issued by the respondent-State and thereby again made the provision of 15 days for filing an appeal against the selection of Anganwari workers/helpers. Learned Additional Advocate General to assist the Court qua this aspect of the matter by producing all Schemes or corrigendum/ memorandum, if any, issued by the State government governing the method of recruitment and other service conditions of the Anganwari worker and helper on the next date. List on ***12.10.2017."***

3. Subsequently, this matter when again listed in the Court on 22.11.2017, learned Additional Advocate General has produced all Schemes along with corrigendum issued by the respondent-State from time to time i.e. during the year 2005 to 2016 providing procedure for making selection and appointment as Anganwari workers/helpers. On that day, following orders came to be passed in these matters:

> "Learned Additional Advocate General has produced all Schemes and Corrigendum/Memorandum governing the method of recruitment and other service conditions of the Anganwari workers and Helpers in the State right from the year 2005 till 2016. In all the Schemes framed as on today the period prescribed for filing an appeal by an aggrieved person against selection as Anganwari Worker/Helper is 15 days from the date of declaration of result thereof. It is in this backdrop and in the light of the judgment of this Court in *CWP No. 1096 of 2010* dated 17.5.2010 titled *Raksha Devi* versus *State of H.P. & others* and its connected matters, learned Counsel to assist this Court on the next date. List on ***13.12.2017."***

4. On going through the different Schemes, it transpired that in few of them there is provisions to file the appeal by a person aggrieved within fifteen days from the date of appointment and in few of them within fifteen days from the date of declaration of the result and in few of such Schemes though no period is prescribed for filing an appeal, however, the period prescribed is for disposal of the appeal by the Appellate authority within fifteen days from the date of its institution. Being so, this Court has passed following orders on 9.8.2018:

> "Heard further. The guidelines to govern the selection process and other procedure to be followed in the matter of appointment of an Anganwari Worker/Helper framed from time to time prescribe different criteria for example in the matter of period for filing of appeal by a person aggrieved from the selection made initially in the guidelines framed during the year 2006-07, it was 15 days from the date of publication of result, in the year 2009, no time was prescribed for filing an appeal and it is only the appeal, if filed, had to be decided by the appellate authority within 15 days' from the date of its institution whereas as per the guidelines framed in the year 2010,

the time for filing the appeal has been prescribed 15 days from the date of issuance of appointment letter. In the guidelines issued on 18.3.2016, again there is no time prescribed for filing the appeal and it is only 15 days prescribed thereunder for disposal of the same from the date of its institution. Whether any other and further guidelines issued after 18.3.2016 or not, learned Deputy Advocate General to seek instructions.

As a matter of fact, the writ petitions pertain to the years 2009, 2011, 2012, 2014, 2015, 2016 and 2017. The question of limitation raised therein has to be decided in terms of the guidelines inforce at the relevant time. Learned Deputy Advocate General to seek instructions in this behalf also and assist the Court accordingly on the next date. We would like to go through the record pertaining to issuance of these guidelines from time to time to ascertain as to without there being any mechanize (mechanism) provided under the guidelines, how the Policy makers have satisfied themselves that the aggrieved person will come to know at his own about the declaration of result/issuance of appointment letter to the selected candidate and that there will be no hardship to him by way of prescribing 15 days as the period of limitation from the date of declaration of result/issuance of appointment order.

The 1st respondent i.e. Principal Secretary (Social Justice and Empowerment) to the Government of Himachal Pradesh shall also remain present in person to assist the Court on the next date. List on 29th August, 2018."

5. It is thus seen that in the Scheme framed during the year 2006-2007 the prescribed time for filing the appeal is 15 days from the date of publication of the result. In the Scheme framed during the year 2009 no time was prescribed for filing an appeal and the Appellate Authority had to decide the appeal within 15 days from the date of its institution. As per the guidelines framed in the year 2010 the time for filing the appeal has been again prescribed 15 days, however, from the date of issuance of the appointment letter. In the guidelines issued specifically on 18.3.2016 again there is no provisions qua prescribing the time for filing appeal and it is the Appellate Authority required to decide the appeal within 15 days from the date of its institution.

6. On the next date i.e. 29.8.2018, the Additional Chief Secretary, Social Justice and Empowerment to the Government of Himachal Pradesh attended this Court in person, as directed. On hearing learned Deputy Advocate General on that day and keeping in view there is no uniformity in the Schemes framed from time to time particularly qua the time prescribed for filing appeal by the person aggrieved against the selection/appointment made against the post of Anganwari helper/worker and also that no mechanism find mention indicating as to how the person aggrieved would come to know about the appointment/declaration of result and consequently the date from which the limitation will start running. It was observed that there should be uniformity/clarity qua these aspects in the guidelines to be framed in future. The order passed on 29.8.2018 reads as follow:

"Consequent upon the order passed on the previous date, Mrs. Nisha Singh, Additional Chief Secretary, Social Justice and Empowerment to the Government of Himachal Pradesh is present in person. On instructions from her, Mr. R.P. Singh, learned Deputy Advocate General submits that process to modify/re-frame the guidelines meant for making selection of the candidates as Anganwari worker/Anganwari Helper is in progress. As we have noticed in the order passed on the previous date, at different times,

> different guidelines came to be framed and sometime in complete departure to the guidelines in vogue at the time of re-framing or modifying the same. We feel that there should have been uniformity in the guidelines, particularly concerning with prescribing the limitation for filing an appeal by the aggrieved person against the appointment of a candidate as Anganwari worker/helper. In the guidelines some mechanism needs to be indicated with all certainty so that the person aggrieved should know that the limitation for filing the appeal against selection/appointment of Anganwari worker/helper will start running from the appointed day.
>
> As we have noticed in the order passed on the previous date, the points in issue in these writ petitions are governed by the guidelines in vogue at the time of selection/appointment and the selection process initiated. Let the petitioners to segregate the cases covered under a particular policy and prepare the list(s) accordingly and also to place the same on record within two weeks. List these matters for further hearing now on 26.09.2018."

7. Consequent upon the order dated 26.09.2018 passed in these matters, Mr. Karan Singh Kanwar, Advocate has prepared and filed the list indicating therein the order of scheme(s) under which the selection/appointment made by the Selection Committee to facilitate this Court as to in how many writ petitions/LPAs the question of limitation alone is involved and also to find out that 15 days time for filing appeal therein is from the date of declaration of result or appointment of the selected candidate. The list so filed is on the record of this writ petition. As per the list the following writ petitions have to be delinked being not involving the question of limitation as the ground of challenge:-

Writ petition number.	Title	Ground on which filed.
CWP No.160/2014	Sangeeta Devi V. State of H.P.	Income dispute
CWP No. 3371/2014	Anjana Kumar V. State of H.P.	Feeder area.
CWP No. 3604/2014	Pushp Lata V. State of H.P.	Different issue.
CWP No. 644/2016	Anita Devi V. State of H.P.	Income dispute.
CWP No. 9725/2014	Pushp Lata V. State of H.P.	Different issue.

The above writ petitions are, therefore, ordered to be de-linked.

8. It is in this backdrop, the matter was heard on the question as to whether Appellate Authority under the Scheme has the power to condone the delay in filing the appeal or not and reserved for pronouncement of order only qua this limited extent.

9. As noticed supra, the period prescribed for filing an appeal against the declaration of result/appointment, as the case may be is 15 days from the date of publication thereof/appointment of selected candidate. The result as per provisions under the scheme(s) is required to be declared within a week of the last date of meeting of the Selection Committee. Therefore, a candidate appeared before the Selection Committee on a particular day can reasonably be believed to have the knowledge of the date of declaration of result. Therefore, he is expected to be vigilant and the moment result declared and if aggrieved thereby prefers an appeal to the Appellate Authority prescribed under the scheme without wastage of further time. So far as the date of appointment is concerned, once the candidate has the knowledge of declaration of result, he is supposed to have the knowledge of the appointment of the person selected also being a local resident. Perhaps, it is for this reason and rightly so the time for filing the appeal will start running from the date of declaration of result/appointment, as the case may be. The person aggrieved, therefore,

cannot be heard of any complaint that he was not aware of the date of declaration of result/appointment of the selected candidate. In the scheme also, there is no requirement of filing the copy of result/appointment letter of the selected candidate. Therefore, in our considered opinion, the appeal in such like cases should preferred within 15 days from the date of declaration of result/appointment of the selected candidate.

10. The Appellate Authority(s) as per the Scheme initially was the Deputy Commissioner of the concerned district. There was provisions of second appeal also before the Divisional Commissioner. Now it is only the Deputy Commissioner alone the Appellate Authority under the Scheme. The Appellate Authority(s) under the Scheme as such is *Persona designeta* of course quasi judicial authority. It is well settled that Section 5 of the Limitation Act is applicable only to the proceedings pending in the Court of law. We can draw support in this regard from the judgment of the apex Court in ***Sakuru*** versus ***Tanaji, AIR 1985 Supreme Court 1279.*** Relevant extract whereof reads as follow:

> "...........On a plain reading of the section it is absolutely clear that its effect is only to render applicable to the proceedings before the Collector, the provisions of the Limitation Act relating to computation of the period of limitation. The provisions relating to computation of the period of limitation are contained in Ss. 12 to 24 included in Part III of the Limitation Act, 1963. section 5 is not a provision dealing with computation of the period of limitation. It is only after the process of computation is completed and it is found that an appeal or application has been filed after the expiry of the prescribed period that the question of extension of the period under S. 5 can arise. We are, therefore, in complete agreement with the view expressed by the Division Bench of the High Court in Venkaiah's case that S. 93 of the Act did not have the effect of rendering the provision of Sec. 5 of the Limitation Act, 1963 applicable to the proceedings before the Collector."

11. The Apex Court while placing reliance on the judgment in *Sakuru's* case supra had held in ***L.S. Synthetics Ltd.*** Versus ***Fairgrowth Financial Services Ltd. And another,AIR 2005 Supreme Court 1209*** as under:

> "The Limitation Act, 1963 is applicable only in relation to certain applications and not all applications despite the fact that the words "other proceedings" were added in the long title of the Act in 1963. The provisions of the said Act are not applicable to the proceedings before bodies other than Courts, such as quasi-judicial tribunal or even an executive authority The Act primarily applies to the civil proceedings or some special criminal proceedings. Even in a Tribunal, where the Code of Civil Procedure or Code of Criminal Procedure is applicable; the Limitation Act, 1963 per se may not be applied to the proceedings before it. Even in relation to certain civil proceedings, the Limitation Act may not have any application."

12. The Division Bench of this Court vide judgment dated 17.5.2010 passed in CWP No. 1096 of 2010, titled *Raksha Devi* versus *State of H.P. and other*s and its connected matters has also held as under:

> "Another Legal contention is as to whether the Appellate authority has power to condone delay in filing appeal. The guidelines provide a period of 15 days for filing an appeal. Being a statutory authority, in terms of policy guidelines the Appellate Authority does not have the power under Section 5 of the Limitation Act. No power is conferred also in the guidelines for the

condonation of delay. Therefore, he cannot enlarge the time by condoning the delay in filing the appeal. In other word, if an appeal is not filed within the prescribed time it has only to be dismissed, since the Appellate Authority has no power to condone the delay."

13. The case law discussed supra, therefore, lead to the only conclusion firstly that Section 5 of the Limitation Act has no application in the proceedings pending before statutory authorities like the Appellate Authority under the Scheme framed for making selection/appointment against the post of Anganwari workers/helpers and also in the proceedings pending before quasi judicial authorities/tribunal etc. and secondly, the Appellate Authority is not vested with any power to condone the delay if occurred in filing the appeal under the Scheme. It has applicability only to the proceedings pending in the Courts

14. The provisions contained under Section 5 of the Limitation Act is, however, applicable to a proceeding pending before statutory authorities/quasi judicial authorities also in case the statute so provides. We may refer here the judgment of the Apex Court in ***Khadi Gram Udhog Trust*** versus ***Shri Ram Chandrji Virajman Mandir, AIR 1978 Supreme Court 287*** . While interpreting Section 21(2)(a) of the U.P. Urban Building (Regulations of letting, rent and eviction) Act XIII, 1972 has held that though the land-lord may institute the suit for eviction of the tenant from the building on the ground of arrears that the latter is in arrears of rent for not less than 4 months and has failed to pay the same to the former within one month from the date of service upon him of a notice of demand, however, in case rent is deposited/paid by the tenant unconditionally at the very first hearing of the suit, he will stand relieved from his liability for eviction on the ground of he being in arrears of rent for a period not less than four months as provided under Section 24 of the Act. Therefore, the Limitation Act is applicable even before quasi judicial authorities/Tribunals also in case there is provisions qua its applicability in the statute.

15. However, the Apex Court in ***Mohamad Kavi Mohamad Amin*** versus ***Fatmabai Ibrahim, (1997) 6 Supreme Court Cases 71*** has held that where there is no time limit prescribed for exercising of power under the statute the same should be exercised within a reasonable period.

16. A Division Bench of this Court has also held so in CWP No. 645 of 2011 decided vide judgment dated 29.7.2011. This judgment reads as follow:

> "Since the Court was not prima facie convinced by the scope of the Scheme, we directed the Government itself to file an additional affidavit as to whether there was a period of limitation as far as appeals pertaining to appointments under 2009 Scheme are concerned In the affidavit dated 18th July, 2011 filed by the Principal Secretary, Social Justice and Empowerment, it is made clear that only time limit for disposal of the appeal alone is contemplated in the Scheme and that there is no time as such prescribed in the Scheme. Thus it is clear that under the 2009 guidelines for appointment of Anganwari worker there is no period of limitation for filing appeal. If no time limit is prescribed for filing an appeal, it is now well settled law that it should be construed to be filed within a reasonable period. It is seen that the petitioner has filed the appeal within three months which is a reasonable period by any standard."

17. The Apex Court in ***Uttam Namdeo Mahale*** versus ***Vithal Deo and Others, (1997) 6 Supreme Court Cases 73*** has again held that the period of limitation prescribed

under the Limitation Act stands excluded by necessary implication where special statute governing the matter prescribes no limitation period.

18. Learned arguing counsel on behalf of the petitioner(s) has placed reliance on the judgment rendered by a division Bench of this Court on May 11, 2017 in LPA No. 176 of 2016, titled *Jaiwanti* versus *Smt. Heera Mani and others* to persuad us to take a view of the matter that the period prescribed for filing the appeal should start running from the date when the copy of the result/appointment letter is received by the person aggrieved thereby. As a matter of fact, the Division Bench in this judgment has not gone into the question whether provisions of Limitation Act are applicable in the proceedings having arisen out of the Scheme framed by the State for appointment of Anganwari workers/helpers and rather left it open to be decided in some other appropriate proceedings. The ratio of this judgment that the Appellate Authority (Divisional Commissioner) should at the first instance ascertain whether the appeal was within the period as stipulated by counting the period of limitation from the date of supply of order and not from the date of passing of such order by the Deputy Commissioner and that in case arrives at a conclusion that the appeal was within the limitation from the date of receipt of the certified copy of order to decide the same on merits in accordance with law being not relevant at this stage is left open to be considered at the time of hearing of individual writ petitions/LPA.

19. The upshots of the discussion hereinabove, therefore would be as follow:

(i) The provisions contained under Section 5 of the Limitation Act are applicable only to the proceedings pending in the Courts alone and not before the quasi judicial authorities like the Appellate Authority under the Scheme.

(ii) The Appellate Authority under the Scheme where there is provisions of 15 days for filing the appeal from the date of issuance of the result or the date of appointment, as the case may be, is not competent to condone the delay and the person aggrieved should prefer appeal within 15 days from the date of declaration of the result/appointment of the selected candidate. The Appellate Authority in order to verify the factual position is competent to requisition the record pertaining to the selection so made.

(iii) Since in the Scheme framed by the respondent-State, there is no provision for condonation of delay, therefore, the person aggrieved is not entitled to invoke Section 5 of the Limitation Act and rather to file the appeal well within the time prescribed under the Scheme.

(iv) In few of the schemes where no period of limitation is prescribed for filing an appeal, the aggrieved person must file the appeal within reasonable time to be determined on taking into consideration the facts of each case.

(v) In an appeal preferred against the order of the first Appellate Authority i.e. the Deputy Commissioner to the Divisional Commissioner irrespective of there is no requirement under the scheme to file certified copy of order nor any procedure prescribed for filing the same, the question that certified copy of impugned order is required to be filed along with the memorandum of appeal or it is sufficient to mention the date of such order is left open to be considered in due course, if arises in any of the writ petitions/LPA which have to be heard separately.

20. All the writ petitions/letters patent appeal have to be now taken up for hearing separately and decided in the light of the above legal principles settled in this

judgment and on going through the facts of each case. List for the purpose on ***3rd September, 2019.***

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

Padam Prakash Sharma .....Petitioner.
Versus
Powergrid Corporation of India and others .....Respondents.

CWP No.4736 of 2013.
Date of decision: 31.07.2019.

Payment of Gratuity Act 1976 – Section 7(3) and (3-A) – Delayed payment of gratuity – Liability to interest thereon and exceptions thereto - Circumstances – Held, employer is bound to pay interest on delayed payment of gratuity – The only exception to this rule is that delay in payment must be on account of fault of employee and controlling authority should have approved such withholding of gratuity on basis of alleged fault of employee- Petitioner was facing departmental proceedings for major penalty at time of superannuation - Withholding of gratuity was approved by competent authority – Gratuity was withheld for default of petitioner himself – He is not entitled for interest on delayed payment of gratuity. (Paras 6 to 11)

For the Petitioner : Mr. O.P. Sharma, Senior Advocate with Mr. Gurmeet Bhardwaj, Advocate.
For the Respondents: Mr. Bimal Gupta, Senior Advocate with Mr. Vineet Vashistha, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

Aggrieved by the non-grant of interest on the delayed amount of gratuity, the petitioner has filed the instant petition claiming therein the following reliefs:

> *"I. That the respondents be directed to pay the interest on gratuity of Rs.Ten Lacs w.e.f. 01.02.2010 to 16.04.2013. The rate of interest may kindly be ordered to be paid @ 12% per annum.*
>
> *II. That the writ in the nature of certiorari may kindly be issued and order dated 18-1-2010 that is Annexure A-1 and in reply that is Annexure R-5 and in the amended writ petition Annexure P-3 be set aside and quashed and a writ in the nature of mandamus may kindly be issued that the petitioner is entitled for the interest as prayed for."*

2. The respondents filed their reply wherein they have not denied that interest has to be paid on the delayed amount of gratuity, but have sought to justify their action on the ground that while the petitioner was in service with the respondent-Corporation, a departmental inquiry had been initiated against him and the same continued even after his superannuation and eventually culminated into an order of penalty of censure against the petitioner which was imposed vide order dated 18.03.2013 and it is only thereafter the

gratuity of Rs.10 lacs was released to the petitioner on 16.04.2013 without any further delay.

3. Now, the moot question is whether the action of the respondents in withholding the gratuity of the petitioner is justified.

4. Section 7 of the Payment of Gratuity Act, 1972 (for short 'the Act') reads as under:

> *"7. Determination of the amount of gratuity.-*
>
> *(1) A person who is eligible for payment of gratuity under this Act or any person authorized, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.*
>
> *(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.*
>
> *(3) The employee shall arrange to pay the amount of gratuity, within thirty days from the date it becomes payable to the person to whom the gratuity is payable.*
>
> *(3-A) If the amount of gratuity payable under sub-Section (3) is not paid by the employer within the period specified in sub- Section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:*
>
> *Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.*
>
> *(4) (a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.*
>
> *(b) Where there is a dispute with regard to any matter specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.*
>
> *(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.*
>
> *(d) The controlling authority shall pay the amount deposited including the excess amount, if any, deposited by the employer, to the person entitled thereto.*
>
> *(d) As soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the deposit-*

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the nominee or, as the case may be, the guardian of such nominee or heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(5) For the purpose of conducting an inquiry under sub-section (4), the controlling authority shall have the same powers as are vested in a court, while trying a suit, under the Code of Civil Procedure, 1908, (5 of 1908) in respect of the following matters, namely :-

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commission for the examination of witnesses.

(6) Any inquiry under this section shall be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount.

(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority."

5. A perusal of sub-section (2) of Section 7 reveals that it is the onerous responsibility of the employer to determine the amount of gratuity payable to a retiring employee. Sub-section (3) of Section 7 enjoins a further responsibility on the employer, to disburse the amount of gratuity payable to an employee, within 30 days from the date it becomes payable. Sub-section (3-A) of Section 7 of the Act states that in case the gratuity is not released to an employee within 30 days from the date the same becomes payable under sub-section (3) of Section 7, the employee would be entitled to "……simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term loans, as the Government may, by notification specify".

6. There is, however, one exception to the payment of interest envisaged under sub-section(3) of Section 7 of the Act. The aforesaid exception is provided for in the proviso under sub-section (3-A) of Section 7. A perusal whereof reveals that no interest would be payable "……. if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed

payment on this ground". The exception contemplated in the proviso incorporates two ingredients. Where the two ingredients contemplated in the proviso under sub-section(3-A) are fulfilled, the employee concerned can be denied interest despite delayed payment of gratuity.The first ingredient is that the payment of gratuity to the employee was delayed because of some fault of the employee himself. The second ingredient is that the controlling authority should have approved such withholding of gratuity(of the employee concerned) on the basis of the alleged fault of the employee himself.

7. Insofar as the present controversy is concerned, it would be noticed that the petitioner superannuated on 31.01.2010. However, prior to the same, the respondents had sought vigilance clearance for release of his retiral benefits like EL Encashment, HPL Encashment, Provident Fund and Gratuity. However, the same was denied on the ground that major penalty charge sheet has already been issued to the petitioner on 05.10.2009 in a case pertaining to award of a contract in respect of diversion of 800/220 KV TLs near Shahpurkandi dam area.

8. In addition thereto, a decision not to pay the gratuity unless the proceedings against the petitioner were finalized was taken as per Clause 36 C of the CDA Rules which read as under:

> *"In this connection, it is mentioned that as per CDA Rules, clause 36 C: **<u>Effect of Vigilance cases on acceptance of Resignation/Superannuation</u>**, it is envisaged that "An employee against whom disciplinary action/proceeding is pending at the time of resignation/retirement etc., will not be paid gratuity unless the action/proceedings against him have been finalized. On finalization of the disciplinary proceedings, the release of payment of amount of gratuity will depend on the final outcome of the disciplinary proceedings and keeping in view the orders of the disciplinary authority (Copy enclosed as Annexure-II).*

9. It was under these circumstances that three proposal were sent for approval of the competent authority which are as under:

> *"1- Release of Shri P.P. Sharma, Employee No. 16341, Chief Manager(F), w.e.f. 31.01.2010 (AN) on his superannuation.*
>
> *2- Release of all the benefits as mentioned at NP-1 except Gratuity, subject to settlement of all the outstanding dues, if any on his superannuation.*
>
> *3- Withholding the amount of Gratuity in respect of Shri P.P. Sharma till the final outcome of the disciplinary proceedings."*

10. It is not in dispute that all the aforesaid proposals were approved by the competent authority and, therefore, the requirement of sub-section (3-A) of Section 7 of the Act, stood complied with and after imposition of minor penalty of censure, the gratuity was ordered to be released in favour of the petitioner.

11. As the gratuity payable to the petitioner on attaining the age of superannuation was withheld because of the fault of petitioner himself for which he was charge- sheeted and ultimately a minor penalty of censure was imposed, his claim for interest on the gratuity amount is totally misconceived.

12. Consequently, there is no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

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

Cr. Appeal No. 626 of 2008
Date of Decision 2nd August, 2019

Indian Penal Code, 1860 - Section 279 – Rash driving on public highway – Proof – Appeal against acquittal recorded by trial court -Prosecution assailing acquittal on ground of wrong appreciation of evidence by trial court - Held, (i) driver of offending bus was driving his vehicle in his lane i.e towards his left (ii) complainant had emerged from residential colony situated towards right side of accused (iii) complainant was entering in main highway from right side and had to come towards lane in which accused was driving his bus, as direction of their journey was towards same side (iv) accused had applied brakes still struck against front of car of complainant (vi) complainant had not entered left lane at all – Probability of complainant himself not vigilant while crossing road at 90 degree cannot be ruled out – No evidence of rash driving on part of accused - Acquittal upheld – Appeal dismissed (Paras 8 to 10)

Code of Criminal Procedure, 1973–Section 313– Recording of statement of accused– Manner of- Held, it is obligatory upon court to put all incriminatory evidence and circumstances to accused to enable him to render an explanation, and if required to lead such evidence in defence to rebut such incriminatory circumstance. (Pars 12)

For the Appellant: Mr.R.P.Singh, Deputy Advocate General.
For the Respondent: Mr. Amit Singh Chandel, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(oral)

This appeal has been preferred by the State against the acquittal of respondent under Section 279 IPC and Section 181 of Motor Vehicles Act vide judgment dated 22.7.2008 passed in RBT No. 240-II of 2004, titled State of H.P. vs. Kamlesh Kumar in case FIR No. 77 of 2002, dated 2.8.2002, registered in P.S. Sujanpur, District Hamirpur H.P.

2. I have heard learned Deputy Advocate General for the State as well as Mr. Amit Singh Chandel, Advocate, for the respondent and have also gone through the record.

3. As per prosecution case, on the basis of challan presented in the Court, Notice of Accusation was put to accused under Sections 279 IPC and 181 of Motor Vehicle Act for causing damage to car No. HP-22-4679 driven by PW1 A.Prabhakar Rao by driving bus No.HP-22-8789 on public highway on 2.8.2002 at 7 PM, in rash and negligent manner endangering human life and causing injury to complainant in front of Sainik School Family Quarters Colony, Sunjanpur, District Hamirpur H.P.

4. The case of prosecution is that the respondent was driving his bus en-routed from Hamirpur to Sujanpur in rash and negligent manner on the day of accident and at that time, PW1 A.Prabhakar Rao was coming out of his residential Colony for going to Sainik School, Sujanpur and respondent, without caring for entry of the said car on the main road had hit and damaged it.

5 After the accident, the police was informed telephonically by PW1 A.Prabhakar Rao which led to recording of Report No.28, dated 2.8.2002 (Ext.PW10/A) in Daily Diary of Police Station Sujanpur, whereupon PW5 ASI Parkash Chand along with HHC Randeep Singh had rushed to the spot and had recorded statement of complainant Ext.PW1/A. The said statement was sent to Police Station, Sujanpur through HHC Randeep Singh (not examined) for registration of FIR, whereupon FIR Ext.PW8/A was registered at 8.45 PM. During investigation, spot map Ext.PW5/A was prepared, photographs of spot and vehicles were taken and the bus along with documents was taken in possession vide memos Ext.PW2/A and Ext.PW2/B. Statements of witnesses under Section 161 Cr.P.C. were recorded and car along with documents was also taken in possession vide memo Ext.PW1/B. Vehicles involved in the accident were mechanically examined by PW4 Ranjeet Singh and reports Ext.PW4/A and Ext.PW4/B issued by him were also obtained by Investigating Officer. According to prosecution, accused could not produce the driving licence and therefore, case was also made out under Section 181 of Motor Vehicles Act. After completion of investigation, challan was presented in Court by PW8 SI/SHO Bakshi Ram.

6. As referred supra, on finding prima facie complicity of commission of offence, on the basis of challan presented by police, Notice of Accusation was put to accused/respondent and on pleading not guilty, he was subjected to trial, wherein the prosecution has examined as many as 11 witnesses to prove its case, whereas after recording statement under Section 313 Cr.P.C., respondent has not chosen to lead any evidence in defence.

7 The facts that accident has taken place, respondent was driving the bus involved in the accident, the said bus had hit and damaged the car being driven by PW1 A. Prabhakar Rao coming out from the colony and lodging of FIR in consequence thereto are not in dispute. Now only point, on the basis of relevant evidence, to be determined in the present case is that whether the prosecution has proved the guilt of respondent/accused beyond reasonable doubt for driving the bus in rash and negligent manner, without driving licence, causing damage to the car of complainant PW1 A. Prabhakar Rao. For this purpose, main relevant witnesses will be the spot witnesses namely PW1 A Prabhakar Rao and PW2 Raman Dhiman. Besides them, deposition of Investigating Officer ASI Parkash Chand and documentary evidence like site map Ext.PW5/A and photographs Ext.PW3/A to Ext.PW3/D would also be relevant for the said purpose. Rest evidence, whether oral or documentary, is not required to be discussed in view of admitted facts, as noticed supra.

8 PW1 A.Prabhakar Rao, PW2 Raman Dhiman and PW5 ASI Parkash Chand Investigating Officer in their examination-in-chief have stated that accident had taken place on account of rash and negligent driving of driver of bus and PW5 ASI Parkash Chand has also deposed that bus driver could not produce the valid driving licence to drive the bus. It has also come on record in evidence that bus driver had applied the brake and there were marks on the road indicating the said fact. In the site map Ext.PW5/A also proved on record by PW5, Investigating Officer, it is recorded that there were marks indicating application of brake on the road from a distance of 65 feet from spot of accident. The said marks are also visible in photographs Ext.PW3/A, Ext.PW3/C and Ext.PW3/D. PW1 A Prabhakar Rao, in his examination-in-chief has stated that driver of bus had applied brake from a distance of 60-70 feet, but it did not work and there were skid marks establishing the said fact. PW2

Raman Dhiman, in his cross examination, has admitted that bus driver had applied the brake and there were marks of application of brake on the spot. All this evidence on record indicates that bus driver, immediately after noticing the car, had applied the brake at a distance of 60 feet or more.

9 PW1 in his statement Ext.PW1/A has stated that bus driver could not control his bus, but in his deposition in Court, he is silent about it, whereas PW2 has stated so in his deposition in the Court. It is evident from spot map Ext.PW5/A as well as photographs Ext.PW3/A, Ext.PW3/B, Ext.PW3/C and Ext.PW3/D that bus is on its correct side i.e. left side of road. It is not a case where bus had become uncontrolled on account of high speed or otherwise, or had left its lane and hit the car after going out of the track. It is apparent from photographs as well as spot map that bus remained on its own side and after noticing the car coming at rectangular direction in front of him, driver had applied the brakes immediately and it also emerges from the oral evidence on record as also evident from the spot map Ext.PW5/A that residential colony was on right side of bus and car had entered on the road from that side for coming in the lane in which bus was coming as destination of bus and car was the same i.e. Sujanpur. Meaning thereby that car driver was trying to enter the lane ahead of the bus and in this attempt car driver made an entry on road at 90 degree and made T with vehicles by coming in front of bus in perpendicular direction. It is also evident from mechanical reports Ext.PW4/A and Ext.PW4/B and also from photographs referred supra that right side of bus had hit the left side of car. Car was coming from right side at a 90 degree angle. Bus driver had applied the brake at a distance of 60 feet after noticing the car. It indicates that there was a clear vision upto 60 feet and bus driver had noticed the car coming at an angle of 90 degree on the road and had applied the brakes and for that reason only after covering a distance of 60 feet, only the front portion of car was hit which proves that when there was distance of 60 feet between the vehicles involved in accident, the car had yet to come in the lane of the bus. In that situation, bus driver applied the brake but car driver continued to move ahead and as a result thereof, edge of front portion of car came in front of bus, meaning thereby that driver of bus noticed the car which was yet to come in the lane of bus and applied brakes but car driver did not do so, whereas, it was also incumbent upon the car driver to see the traffic on the road on both sides and thereafter try to enter the lane in which the bus was also coming on State Highway en-routed from Hamirpur to Sujanpur. It appears that car driver either did not notice the bus or did not care for the coming bus or presumed that bus will stop for giving the way to car and keep on moving the car to enter the lane in which the bus was also coming to go in the same direction and for that reason, only front edge of left side of car was hit by bus. It is not a case where the car was in front of bus and bus driver caused delay in applying the brakes and had collided with car. Therefore, plea taken by PW1 and PW2 that bus driver could not control the bus is not substantiated by the facts and evidence on record. Rather, it has also come on record that bus driver to the best of his ability had tried to avoid the accident by applying the brakes promptly. So far as the speed of bus is concerned, there is no positive evidence with respect to exact speed of bus.

10. It has come in evidence of mechanic, the bus driver might not have applied the emergency brake but might have applied the brake in a moderate manner to avoid any injury to passengers. It may be an error on his part in deciding the action to be taken after noticing the car coming in front of him at a 90 degree angle, but such error cannot be termed as gross negligence as required to fasten the criminal liability upon the driver for rash and negligent driving so as to convict him.

11. Therefore, there is no cogent, reliable and convincing evidence on record to establish beyond reasonable doubt that the accident had occurred on account of rash and negligent driving of bus driver only.

12. So far as another point in issue with regard to possession of driving licence by bus driver/respondent at the time of driving the bus is concerned, there is no evidence against him except assertion by Investigating Officer ASI Parkash Chand in his examination in chief, wherein he has stated that at that time, driver of bus could not produce the driving licence. The said assertion has been disputed by respondent in cross examination by putting a suggestion though denied by the witnesses that during investigation, driver had shown his driving licence. Further, the trial Court has not considered this evidence to be reliable upon against the respondent as the said evidence and circumstance was never put to respondent at the time of recording his statement under Section 313 Cr.P.C. It is obligatory upon the Court to put all incriminatory evidence and circumstances to the accused, which have come against him and to be considered to convict him by the Court so as to enable accused to render an explanation, if any, to such evidence, and to rebut the same, if necessary, by leading evidence in defence. When evidence on this issue was not considered by the trial Court, as an incriminating evidence or circumstances, there was no occasion for him to respond thereto and to lead evidence to prove his version wherein he had disputed the fact by putting the question to Investigating Officer that he had produced the licence during investigation.

13. In view of above discussion, I find that prosecution has failed to prove its case beyond reasonable doubt by leading cogent, reliable,convincing and trustworthy evidence against the accused. Moreover the respondent/accused is having the advantage of being acquitted by the trial Court and presumption of innocence in his favour is fortified from his acquittal and degree of proof to rebut the said presumption is not found in evidence on record. The trial Court has appreciated the evidence placed on record completely and correctly without committing any irregularity, illegality or perversity. Therefore, acquittal of respondent has not resulted to travesty of justice and has not caused miscarriage of justice. Hence, no ground for interference is made out.

14. Accordingly appeal is dismissed. Bail bonds stand discharged. Record of the trial Court be sent back forthwith. Pending application(s), if any, also stands disposed of.

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

Jeet Singh alias Jaggu ……Appellant.
Versus
State of Himachal Pradesh ……Respondent.

Cr. Appeal No. 233 of 2009
Reserved on: 11.07.2019
Decided on: 06.08.2019

Indian Penal Code, 1860- Sections 307 & 452– Attempt to murder and house trespass – Proof – Prosecution story being that accused 'JS' and 'RK' made trespass in house of complainant during night and then 'JS' made an assault with darat at behest of 'RK' on her– Trial court acquitting 'RK' but convicting 'JS'– Appeal against by accused– Held, evidence on record is marred with contradictions and discrepancies i.e., complainant stating about darat

with which assault was made was complete and unbroken, whereas darat produced during trial was with broken handle (i) in statement given to police, complainant not telling that 'JS' was having darat with him and 'RK' having gas lighter in his hand (iii) statements of other witnesses at variance with statements given to investigating officer during investigation– (iv) complainant not telling witnesses which of accused had inflicted injuries with darat (v)witness 'M' deposing that 'RK' was having darat with him– There was land dispute between parties– Motive to commit crime on part of 'JS' unclear– Trial court convicted accused 'JS' on basis of suspicion– Appeal allowed– Accused acquitted– conviction set aside. (Paras 19 to 21)

For the appellant: Mr. Lakshay Thakur, Advocate.
For the respondent: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/accused (hereinafter referred to as "the accused"), laying challenge to judgment dated 29.07.2009, passed by learned Additional Sessions Judge, Fast Track Court, Chamba, District Chamba, H.P., in Criminal Appeal No. 48 of 2008, whereby the appellant herein was convicted for the commission of the offence punishable under Sections 452 and 307 of Indian Penal Code, 1860 (hereinafter referred to as "IPC") and co-accused Raj Kumar @ Raju was acquitted for the offence punishable under Sections 452 and 307 IPC.

2. The key facts necessary for adjudication of the instant appeal can tersely be summarized as under:

As per the prosecution story, during the night of 30/31.07.2008, Smt. Naro (complainant) was sleeping in her room alongwith her two minor children. Mother-in-law and sister-in-law, of the complainant were also sleeping in the adjoining room. The accused persons, namely Jeet Singh (appellant herein) and Raj Kumar (co-accused), at about 02:30-03:00 a.m. kicked the door of the room of the complainant, which caused unbolting of the door. The accused persons entered the room of the complainant and inflicted injuries on the neck of the complainant with *darat.* On hearing noise, Smt. Durgo (mother-in-law) and Smt. Jaiwanti (sister-in-law) came there and the accused persons fled away from the spot. On hearing the screams of Smt. Durgo and Smt. Jaiwant, other persons also came there. On the night of occurrence it was raining heavily and there was electric cut. The complainant was shifted to CHC, Tissa and the Medical Officer, Tissa, telephonically informed the police. Police, of Police Station Tissa, after entering a *rapat* rushed to the CHC, Tissa. The Medical Officer opined the complainant not fit to give statement and when in the opinion of the Medical Officer she was fit, her statement under Section 154 Cr.P.C. was recorded by the police. The complainant stated that on the night of 30.07.2008, when she was sleeping, some unknown person kicked the door and entered her room. A person was having lighter in one hand and *darat* in the other and he inflicted *darat* blow on her. She further stated that on hearing the noise, her mother-in-law and sister-in-law came and the accused persons fled away from the spot. On the premise of the statement of the complainant, so recorded under Section 154 Cr.P.C., FIR was registered and the investigation ensued. The complainant was medically examined and as per her medical examination, the injury was

opined to be caused by sharp edged weapon and was deep enough to cause her death, thus the injury was dangerous to life. During the course of investigation, the complainant gave supplementary statement, wherein she stated that injury was inflicted by accused Jaggo @ Jeet Singh (appellant herein) at the instance of accused Raju. Police arrested the accused persons and during the personal search of accused Jeet Singh, a gas lighter was recovered, which was taken into possession. Accused Jeet Singh made a disclosure statement in the police custody and got recovered a *darat,* which was taken into possession by the police. Police prepared the site plan and took into possession the blood stained clothes of the complainant, which she was wearing at the time of the occurrence. The investigation revealed that the accused persons in furtherance of their common intention committed criminal house tress pass by entering into the house of the complainant with an intention to commit an offence and also caused hurt to the complainant with such intention and under such circumstances, if by that act, they had caused complainant's death, they would have been guilt of her murder. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as seventeen witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty. The accused persons did not lead any evidence in their defence.

4. The learned Trial Court, vide its judgment dated 29.07.2009/30.07.2009 convicted accused Jeet Singh @ Jaggo (appellant herein) and sentenced him to undergo rigorous imprisonment for a period of one years and to pay fine of Rs. 10,000/- and in case of default of payment of fine to further undergo rigorous imprisonment for four months under Section 452 IPC. He was also convicted and sentenced to undergo rigorous imprisonment for a period of three years and to pay fine of Rs. 10,000/- in case of default of payment of fine to further undergo rigorous imprisonment for a period of four months under Section 307 IPC. The learned Trial Courts, vide the impugned judgment, acquitted co-accused Raj Kumar. So, the accused preferred the present appeal, laying challenge to the impugned judgment passed by the learned Trial Court.

5. I have heard the learned Counsel for the accused/appellant, learned Additional Advocate General for the respondent/State and carefully gone through the records in detail.

6. The learned counsel for the appellant has argued that the learned Trial Court has wrongly appreciated the evidence and law. He has further argued that the appellant has only been convicted on the basis of suspicion. There is no concrete and reliable material which proves the identity of the appellant. He has further argued that there is doubt qua the weapon of offence. He has argued that on the same set of evidence accused Raj Kumar has been acquitted by the learned Trial Court and the appellant was convicted. He has argued that the evidence has lacunae and there are contradictions qua identity of the accused administering blow on the complainant, weapon of offence, motive behind the crime and thus the appellant should be given benefit of doubt. He has argued that the appellant has been convicted wrongly by the learned Trial Court, so the appeal be allowed and the appellant be acquitted. Conversely, the learned Additional Advocate General has argued that the learned Trial Court has rightly convicted the appellant, as there is sufficient convincing and cogent material against him. He has further argued that statements of prosecution witnesses inspire confidence, so the appeal, which sans merits, be dismissed.

7. In rebuttal, the learned Counsel for the appellant has argued that as there are many lacunae in the testimonies of prosecution witnesses and the prosecution witnesses

have made improvements in their depositions, so the appellant should be given benefit of doubt by allowing the appeal and acquitting the accused.

8. In the case in hand, the deposition of complainant, Smt. Naro, who was examined as PW-1, is important. She has deposed that her husband was involved in ND&PS case and lodged in jail, so she was residing in her home alongwith her two children and mother-in-law. She has further deposed that 30.07.2008, at about 02:30-03:00 a.m., the accused persons kicked the door and came inside her room. As per this witness, accused Jeet Singh was armed with *darat* and after entering the room accused Raj Kumar slapped her and accused Jeet Singh inflicted *darat* injury on her. She has deposed that accused Raj Kumar had lighter in his hand. She sustained injury on the left side of her neck. She screamed for help, so the accused persons fled away from the spot. She deposed that she had torch, which she had kept under her pillow. She has further deposed that she alongwith her children was sleeping in the room and her mother-in-law and sister-in-law were sleeping in another room. She has deposed that on that night there was no electricity and it was raining heavily. Her mother-in-law and sister-in-law, on hearing her noise, came on the spot. She knew the accused persons prior to the occurrence. She became unconscious and was shifted to hospital by her *Jeth* and the villagers, where she regained her consciousness. She has further deposed that her statement and supplementary statements were recorded by the police. She handed over her blood stained clothes, i.e., shirt to the police in presence of Shri Pawan Kumar and Smt. Tulsi Devi, memo qua which is Ex. PW-1/B, which bears her signatures. This witness, on seeing the *darat* in the Court denied that it was the same which was used by the accused. She deposed that the *darat* used by the accused was complete, whereas the *darat* produced in the Court is half. She has further deposed that on 18.03.2008 she disclosed the names of the accused persons in her supplementary statement and also stated that accused persons picked up quarrel with her prior to the incident on the premise that accused were fencing on her waterline and they had also cut water supply. She has further stated that the accused persons also used to throw garbage in front of her house. A civil suit qua the land between them is pending in the Court. As per this witness, the lighter, which accused Raj Kumar was having, was green in color. This witness, in her cross-examination, has deposed that her mother, brother, *Jaith* and *Jaith's* sons were present in the hospital, when her statement was being recorded by the police and her sister-in-law was not there. She has specifically deposed that her signature on the statement was not obtained at that time. She has further deposed that when her first statement was recorded by the police, she was not in full senses. She has deposed that she stated to the police that accused Raj Kumar had lighter and accused Jeet Singh had *darat,* but in her statement, Ex. PW-1/A, and also in her supplementary statement it is not so recorded. She has further deposed that she stated to the police that she used to keep torch under her pillow, however, it is not so recorded in her statement given to the police. She admitted that her statement, dated 18.08.2008, does not bear her signatures.

9. Another key prosecution witness is Smt. Durgo Devi, mother-in-law of the complainant (victim). She has deposed that last year during the month of *sawan,* in mid night, when she alongwith her daughter was sleeping and the complainant alongwith her children was sleeping in another room, she wake up to tie bull and noticed two persons, which she identified to be the accused persons. Thereafter, she went to sleep and around 03:00 a.m. she heard noise of her daughter-in-law, so she got up and noticed the accused persons running from there. At that time she identified the accused persons. She raised hue and cry, so villages and her son came on the spot. Her daughter-in-law had sustained injuries on her left side of neck and blood was oozing. The complainant was shifted to hospital by her son and the villagers. She specifically feigned ignorance why the accused

persons caused hurt to her daughter-in-law. She has further deposed that they had no dispute, except the dispute of land. This witness, in her cross-examination, has deposed that she stated in her statement given to the police that she noticed the accused persons while they were standing near the door, but it is not so recorded and instead it is recorded that the accused persons were moving towards her house. This witness has deposed that she stated to the police that accused Jaggo had *darat* in his hand, whereas it is not so recorded in her statement given to the police.

10. PW-3, Shri Kanwar Singh (son of PW-2), deposed that during the night of occurrence his mother was crying loudly and saying *'maar diya',* so he alongwith his brother Bhnnu Ram, Thallu Ram and Bhuri Singh rushed to the spot and noticed that the complainant had sustained injuries on her neck, blood was oozing and she was lying on the ground. As per this witness, they waited for about 1-2 hours till morning and took the complainant to hospital and all the villagers helped. He has further deposed that the complainant complained that the reason for dispute was water supply and checking of the pipe line by the fitter. The accused persons had put fencing on the pipe line and the same was uprooted by the complainant. This witness, in his cross-examination, has deposed that the complainant told him the name of the accused on the date of the incident and thereafter in the hospital. He has deposed that he stated to the police that the complainant told him that injuries had been caused to her by the accused persons, but it is not so recorded in his statement given to the police.

11. PW-4, Shri Akal Beg, Shopkeeper, deposed that about 6-7 months back, at about 05:00 a.m., he was at Nakrod and the complainant was brought in injured condition. He has further deposed that a vehicle was hired and the complainant was shifted to hospital and he also accompanied. This witness accompanied the police personnel to the house of the complainant, where they noticed a broken chain *(maala),* stained with blood, which was taken into possession by the police. There was a *chimta,* which was taken into possession. A *kunda* was lying alongwith a *keel (nail),* which was also taken into possession by the police alongwith other iron articles. As per this witness, police prepared recovery memo, Ex. PW-4/A. He has further deposed that accused took the police to place known as Shaniuna and got recovered a *darat.* He identified the *darat* to be the same. He has specifically deposed that the *darat* was broken. Police took into possession the recovered *darat,* vide memo PW-4/B, which bears his signatures. This witness, in his cross-examination, has deposed that on 14.09.2008, police asked him to accompany them as accused Jeet Singh is to recover a weapon. He has deposed that only *darat,* Ex. P4, was handed over by accused Jeet Singh to the police and not the broken piece. As per this witness, accused Jeet Singh got recovered the *darat* immediately after reaching the spot. He has deposed that the *darat* was sealed in a parcel and seal was not handed over to anyone, however, thereafter he stated that seal was given to him and he lost the same.

12. PW-5, Shri Bhoori Singh, deposed that on 31.07.2009, at about 3-03:30 a.m., his grand mother called him and he heard the noise of weeping, so he alongwith his uncle Punnu, went to the house of the complainant and when he was going, both the accused persons met him on the way. He noticed the complainant in an injured condition and blood was oozing from her wound. As per this witness, the complainant had sustained injuries on her neck and blood was lying on the ground. He has further deposed that the complainant told him that accused persons caused injuries to her. It was raining and he went to call the doctor, but doctor was not found. Subsequently, he went to Police Chowki and police told him that the injured be shifted to hospital and thereafter proceedings will be conducted. This witness, in his cross-examination, deposed that he in his statement given to the police stated that the complainant, on being asked by him, told that accused persons

caused injuries to her, but it is not so recorded in his statement given to the police. As per this witness, on date of incident he had only identified accused Raju. He has further deposed that in this case he was also interrogated by the police. He was called by the police thrice, but he does not remember the date.

13. PW-6, Shri Punnu Ram, deposed that in the month of *sawan,* at about 03:30 a.m., his mother raised noise, so he alongwith others went there. As per this witness, accused Jeet Singh met him on the way and he was proceeding towards the house of accused Raj Kumar. He identified the accused persons in the Court. He has further deposed that he noticed oozing blood from the wounds of the complainant. The complainant told him that accused persons caused injuries to her. Thereafter, they shifted the complainant to Tissa Hospital after about one hour. On the subsequent day police arrived on the spot and recorded his statement. He has further deposed that police came with accused Jeet Singh and he got recovered a *darat,* which was taken into possession. Recovery memo, Ex. PW-4/A, bears his signatures. This witness, in his cross-examination, deposed that he saw accused Jeet Singh from a distance of 4-5 meters. On that day it was raining and it was pitch dark. He was ahead and Bhoori Singh was behind him and thereafter Thallu Ram and lastly Kanwar Singh and they were going towards the house of the complainant. He feigned ignorance that police had suspicion qua the involvement of Bhoori Singh in the incident.

14. PW-7, Shri Khem Raj, deposed that on 12.07.2008 he was in the Police Station for some personal work. In his presence accused Jeet Singh made a disclosure statement that he had concealed a *darat* in the bushes and he can get it recovered. Personal search of accused Jeet Singh was conducted and a lighter was recovered. Police took into possession the lighter vide recovery memo, Ex. PW7/A, which bears his signatures. The said memo also bears the signatures of Shri Virender. Disclosure statement, Ex. PW-7/B, given by accused Jeet Singh, bears his signatures and the same was signed by accused Jeet Singh and witness Shri Virender. As per this witness, accused Jeet Singh divulged that at the time of incident he was having this lighter. This witness, in his cross-examination, has deposed that on being asked by the police, accused disclosed about the *darat.* He has further deposed that both the accused persons were interrogated and both of them made statement qua concealment of the *darat.*

15. PW-8, Shri Resham Singh, deposed that on 30.07.2008, he was in village Chilli for purchasing TV. A boy from Jasourgarh met him and told that Jeet Singh's brother Teko had a TV for sale. Teko told him to come on the next day and make payment of Rs.5000/- to Jeet Singh (accused). He identified accused Jeet Singh in the Court. This witness, in his cross-examination, has deposed that accused Jeet Singh accompanied him for some distance. On the subsequent day, he came to know that the complainant sustained injuries. The complainant is his *bhabhi.* As per this witness, Rinku is his nephew and police interrogated Rinku. Police threatened Rinku to be involved in the present case, but when Pardhan intervened Rinku was saved.

16. PW-9, Shri Allabux, deposed that on 31.07.2009, at about 10:00 a.m., when he was returning from Himgiri to his house at Nakrod, accused Jeet Singh met him near Nakrod and wished him when he asked him as to where he is going. As per this witness, accused Jeet Singh told him that he is going to Himgiri to bring TV. He has further deposed that accused Raj Kumar has litigation qua the land with husband of the complainant. He came to know that the complainant had been beaten by Jeet Singh. He also went to hospital and to the house of the complainant to inquire about the well being of the complainant. On 1st/2nd August he went to Police Station, Tissa, in connection of this case. As per this witness, accused Jeet Singh was also present in the Police Station.

17. PW-10, Shri Pawan Kumar (brother of the complainant), deposed that on 18.08.2008 he was associated by the Police in the investigation of this case. As per this witness, on that day the complainant produced a shirt, Ex. P2, which was taken into possession, vide memo, Ex. PW-1/B, which bears his signatures and the thumb impression of his mother and thumb. When he was going to the house of the complainant, complainant met him on the way, when she was being taken to hospital, so he accompanied her to hospital. The complainant was unconscious and he remained with the complainant in the hospital for three days. This witness, in his cross-examination, has deposed that accused Raju and his father disclosed to him that accused Jeet Singh was in their house on the night of the incident. He has further deposed that he did not state to the police in his statement that the complainant told him to find out whether accused Jeet Singh was present in the village on the night of the incident. He has admitted that accused Jeet Singh hails from village Shineua, which is 50 kilo meters away, via road, from complainant's village.

18. PW-11, Shri R.P. Jaswal, the then Station House Officer, Police Station, Tissa, deposed that Investigating Officer after completion of investigation in the present case handed over the case file to him and he prepared the chargesheet, which was submitted in the Court by him. PW-12, Shri Madan Lal, the then MHC, Police Station, Tissa, deposed that on 31.07.2008, on receipt of statement of the complainant, under Section 154 Cr.P.C., Ex. PW-1/A, he registered FIR, Ex. PW-10/A, which bears his signatures. He also made endorsement, Ex.PW-12/B, on statement, Ex.PW-1/A, and sent the case file to PP Nakrod for investigation. On 31.08.2009, he received case property, through ASI Ashok Kumar, which he kept in the *Malkhana,* after making requisite entries. On 14.09.2008 he received a sealed parcel, through ASI Ashok Kumar, which stated to have contained *darat* and a sealed parcel, which stated to have contained lighter. He made requisite entries in the *Malkhana* registered qua the same. He has further deposed that on 27.11.2008, all the parcels were sent to District *Malkhana* Chamba, vide RC No. 126/08, through Constable Naresh Kumar. As per this witness, as long as parcels remained with him, they were intact and not tampered with.

19. PW-12, HC Madan Lal, deposed that on 31.07.2008 he received statement of the complainant, which was recorded under Section 154 Cr.P.C., Ex. PW-1/A, and thereafter he recorded FIR, Ex. PW-10/A. He has further deposed that to this effect he made endorsement, Ex. PW-12/B, on Ex. PW-1/A. As per this witness on 31.08.2008, ASI Ashok Kumar handed over to him sealed parcels, which stated to have contained a shirt, *mala, chimta* and *chitkani* alongwith sample seal, for being kept in *malkhana.* He made entries qua deposit of the above case property. On 14.09.2008 ASI Ashok Kumar handed over to him two more sealed parcels, which stated to have contained a *darat* (*takua* numa) and a gas lighter. He made entries qua these items in the *malkhana* register. He has further deposed that on 27.11.2008 all the above parcels were sent to District *Malkhan,* Chamba, through Constable Naresh Kumar, vide RC No. 126/08. As per this witness, under his custody the case property remained intact.

20. PW-13, ASI Mulakh Raj, deposed that on 31.07.2008 a telephonic message was received from Medical Officer, CHC, Tissa, that a lady has been brought to the hospital in injured condition. Thereafter, a report was lodged in *roznamcha* and he alongwith Constable Ajay Kumar, HHG Rajeev and SPO Ramesh rushed to the hospital. He has further deposed that he moved application, Ex. PW-13/A, for procuring the Medico Legal Certificate of the injured and also for recording her statement. At about 01:00 p.m. he recorded the statement of the injured, as earlier the patient, as per the opinion of the Medical Officer, was not fit to give statement. The statement of the injured was recorded

under Section 154 Cr.P.C. and it was explained to her and only then the injured put her signatures on it and also admitted its correctness. He has further deposed that statement of the injured was sent to police station, through Constable Ajay Kumar, which formed basis for registration of FIR. After registration of FIR, file was sent to Police Post, Nakrod, for further investigation. This witness, in his cross-examination, admitted that when he was recording the statement of the injured in the hospital, her *nanad* Jaiwanti was also present there. He read over and explained the statement to the injured and she admitted the same to be correct and appended her signatures on her statement, Ex. PW-1/A. He has further deposed that Jaiwanti also admitted statement, Ex. PW-1/A, to be correct and she appended her signatures on it. As per this witness, the injured disclosed the description of some unknown person in her statement, Ex. PW-1/A.

21. One of the important witnesses in the case in hand is PW-14, Dr. Jaswant Singh, the then Medical Officer, CHC, Tissa. He deposed that on 31.07.2008, at about 08:00 a.m., he medically examined Smt. Naro Devi (injured/complainant) and noticed as under:

> ***"Large incised wound was present on left lateral side of neck upto upper margin of scapular bone up left side. The wound was measuring 15 cm x 5 cms from middle. All structures underlying incised. (Muscles stemocleiodomastoid spendeous and lateral scapulae.) The wound was having clear cut edges gaped from the middle. Bleeding profusely (Blood was red in colour. Clotted blood was present over the clothes and surrounding area was dark red in colour. The injury was caused by sharp heavy weapon below the neck and was deep enough to cause death of the victim."***

This witness, after seeing *darat,* Ex. P4, in the Court, opined that the injury sustained by the injured is possible with *darat,* Ex. P4. As per this witness, injury was simple in nature and caused within the duration of 48 hours. He opined the injury to be dangerous to life. He issued Medico Legal Certificate, Ex. PW-14/A, which bears his signatures. This witness, in his cross-examination, deposed that the patient was in her senses. She did not divulge the name of assailant to him and to the person, who was with her. He has further deposed that at 08:45 a.m. police reached the hospital. He has deposed that the statement of the injured was not recorded in her presence.

16. PW-15, Constable Ajay Kumar, deposed that on 31.07.2008, at about 07:55 a.m., Medical officer, Tissa, informed through telephone that a lady had been brought to hospital in an injured state. He alongwith ASI Mulakh Raj, HHG Rajeev Kumar, SPO Rakesh Kumar went to CHC, Tissa. He has further deposed that ASI Mulakh Raj moved an application for procuring the Medico opinion qua the injured. He has further deposed that as per the opinion of Medical Officer the injured was not in a fit state to give statement. Thereafter, they returned to the police station and again went to the hospital at 12 noon. The Medical Officer declared the injured fit, so ASI Mulakh Raj recorded the statement of the injured and it was given to him at about 01:30 p.m. He took the statement of the injured to police station and handed it over to MHC. On the basis of the statement of the injured, FIR was recorded. This witness, in his cross-examination, deposed that statement of the injured, Ex. PW-1/A, was read over to her. He has further deposed that at the time of recording of the statement Smt. Jaiwanti was also present there and she appended her signatures corroborating the version of the complainant (injured Naro Devi).

17. PW-16, Miss Manju Kumari (minor witness). The learned Trial Court, by putting Court questions, satisfied its conscious that the witness has given rational answers

to the questions. As per this witness, accused present in the Court came inside the house and inflicted blows on her mother. She has further deposed that accused Raju was having *darat.* It was dark and thereafter her mother was shifted to hospital. Accused Jaggo was also accompanying accused Raju and her *Bua* (aunt) was also present at that time. This witness, in his cross-examination, has deposed that when she got up at 05:00 a.m. accused persons were not there. She has deposed that her brother asked her to make such statement in the Court. Police did not inquire from her.

18. The last witness in the line of prosecution witnesses is PW-17, ASI Ashok Kumar, Investigating Officer. His deposition is vital and he deposed that on 01.08.2008 he received the case file of the present case for investigation. On the same day he visited the spot and prepared site plan, Ex. PW-17/A. Vide recovery memo, Ex. PW-4/A, he effected the recoveries of articles lying on the spot. He also recorded the statements of the witnesses and on 02.08.2008 he visited the hospital for obtaining medical opinion. He has further deposed that Medical Officer opined that injuries sustained by the injured were dangerous to life, so he added Section 307 IPC. He has deposed that he recorded the supplementary statement of the injured in her parental house at village Ashlund. He took into possession the clothes of the injured into possession and sealed the same in presence of witnesses and seal after its use was handed over to Shri Pawan Kumar. On 09.09.2008 he arrested the accused and accused Jeet produced a lighter, which was taken into possession, vide memo Ex. PW-7/A, and sealed in a parcel. He has further deposed that on 12.09.2008 while accused Jeet Singh was in custody, he made disclosure statement, Ex. PW-7/B, and got recovered *darat,* Ex. P4. The said statement was made in presence of witnesses Shri Khem Raj and Shri Varinder. As per this witness, accused Jeet Singh himself led the police party and got recovered the *darat,* which was concealed in bushes. A sketch of the *darat* was prepared and it was taken into possession, vide memo, Ex. PW-17/D, and sealed in a parcel. The said parcel was sealed with seal having impression 'A' and facsimile seal was handed over to Shri Akkal Beg. He also recorded the statements of the witnesses qua the recovery. He prepared site plan of the place of recovery, which is Ex. PW-17/F. On 26.09.2008 he obtained MLC, Ex. PW-14/A, from the Medical Officer after showing the weapon of offence. He recorded the statements of the witnesses on different dates. After the completion of the investigation, on 28.09.2008 he handed over the case file to the then SHO Shri R.P. Jaswal. This witness was cross-examined at length, but the defence could not extract anything fruitful.

19. After exhaustively discussing the testimonies of the prosecution witnesses, it is safe to hold that the depositions of the prosecution witnesses are marred with contradictions and discrepancies and the same create a doubt in the mind of this Court. The learned Trial Court acquitted accused Raj Kumar @ Raju and convicted accused Jeet Singh @ Jaggo, but this Court, after analyzing the evidence, notices the following lacunae in the prosecution evidence:

(a) The complainant (PW-1), in her deposition made before the Court, stated that the *darat* (alleged weapon of offence) used by the accused was complete, whereas the *darat* recovered by the police was half. Thus, PW-1 did not admit the weapon of offence to be same, as, as per PW-1 the *darat* which was used for causing injuries to her was having complete handle and the one produced in the Court was having a broken handle;

(b) the evidence reveals that the complainant was having a dispute qua uprooting of *baadh* (boundary fence) with accused Raj Kumar and no dispute existed with accused Jeet Singh (appellant herein);

(c) the complainant's statement was recorded by the police twice and when her first statement was being recorded she was not in full senses. As per the

complainant, she divulged to the police that accused Raj Kumar had lighter in his hand and accused Jeet Singh had *darat* in his hand, but it is nowhere recorded in her statements given to the police. Likewise, PW-2 (mother-in-law of the complainant) deposed that accused Jeet Singh had *darat* in his hand, but again it is not so recorded in her statement given to the police;

(d) PW-1 (complainant), in her testimony deposed that she disclosed to PW-5, Shri Bhoor Singh, that accused persons caused injuries to her. Thus, she did not specifically name that which of the accused person caused injury to her. Even if it is believed that she disclosed to PW-5 that accused persons caused injuries to her, but this fact is not so recorded in her statements given to the police;

(e) it has come on record that PW-5, Shri Bhoor Singh, on the day of occurrence only identified accused Raj Kumar @ Raju;

(f) the complainant deposed that she disclosed to PW-6, Shri Punnu Ram, that accused persons caused injuries to her, but again she did not specifically name that whether accused Jeet Singh or accused Raj Kumar caused injuries to her;

(g) PW-16, Miss Manjuu (minor prosecution eye witness) deposed that accused Raj Kumar had *darat,* but as per the complainant accused Jeet Singh was having the *darat* (alleged weapon of offence); and

(h) the motive of the accused Jeet Singh (appellant herein) and his identification have not been clearly proved by the prosecution and it creates a doubt in the prosecution story.

20. It is no longer *res integra* that motive is not necessary for conviction or acquittal of the accused, however, motive may serve as a valuable clue in arriving on a most definitive conclusion. Here, in the present case, the motive of accused Jeet Singh (appellant herein) is unclear and not established. The golden principle of criminal jurisprudence is that thousand guilty may escape, but an innocent should not be convicted. As noticed above, the prosecution evidence lacks credence on many counts. There are doubts qua weapon of offence, identification of accused Jeet Singh, it was accused Jeet Singh who caused injury on the neck of the complainant etc. The intensity of evidence, which is required to convict accused Jeet Singh is certainly lacking. Moreover, there is no satisfactory material about the identity of accused Jeet Singh, so it would be wrong to uphold his conviction. This Court also finds that the material, which has come on record, makes the prosecution story doubtful and thus, it would not be out of place that the learned Trial Court only on the basis of suspicion convicted accused Jeet Singh. It is settled law that suspicion howsoever strong cannot supplant proof.

21. In view of what has been discussed hereinabove, keeping in view the settled position of the law, as discussed hereinabove, and also the testimonies of the prosecution witnesses, which are marred with contradictions and discrepancies, it would be more than safe to reverse the findings of the learned Trial Court, as the prosecution has failed to convincingly and cogently establish the guilt of accused Jeet Singh (appellant herein). Thus, the appeal is allowed and the impugned judgment rendered by the learned Trial Court, whereby the appellant was convicted for the offences punishable under Sections 452 and 307 IPC, is quashed and set aside. The accused/appellant is acquitted for the offences as alleged by the prosecution. Accordingly, the appeal is allowed and is disposed of.

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

Ram Lal Thakur ....Objector/Claimant.

Vs.

Executive Engineer, Kumarsain Division H.P.P.W.D., Kumarsain, H.P.
.....Non-objector/respondent.

OMP(M) No.: 03 of 2017
Date of Decision: 01.08.2019

Arbitration and Conciliation Act, 1996–Sections 2(1)(h) and 31(5)– Pronouncement of award– Duty of arbitrator to deliver copy of award to party – Expression 'party', whether includes party's agent? Held, expression 'party' means a person who is party to an arbitration agreement– Definition is not qualified in any way so as to include agent of a 'party' to such agreement- Therefore delivery of a signed copy of award is to be made on party himself and not on his advocate. (Para 4)

Cases referred:

Benarsi Krishna Committee and others vs. Karmyogi Shelters Private Limited, (2012) 9 SCC 496

State of Maharashtra vs. ARK Builders (P) Ltd. (2011) 4 SCC 616

Union of India vs. Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239

For the objector/ claimant: Mr. I.S. Chandel, Advocate.

For the Non-objector/ respondent: Mr. Dinesh Thakur, Additional Advocate General, with M/s Amit Kumar Dhumal and Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

OMP(M) No.03 of 2017

By way of this application, a prayer has been made for condonation of delay in filing the Objections against the Award dated 06.04.2016 passed by learned Arbitrator under Section 34 of the Arbitration and Conciliation Act, 1996. The contention of the applicant is that the Award under challenge was passed by the Arbitrator on 06.04.2016 and signed copy of the same was dispatched by the learned Arbitrator to the office of the Advocate representing the applicant on 08.04.2016, who received the same on 12.04.2016. After receipt of the same, the counsel of the applicant intimated him on 14.04.2016 telephonically and asked him to collect the copy of the Award. As the applicant at the relevant time was residing at Amethi, Utter Pradesh, on account of his business activity over there, after receipt of the intimation from the counsel, he visited the office of the counsel on 20th October, 2016 and received the copy of the Award passed by the learned Arbitrator and thereafter took steps to file Objections. On these facts and submissions, prayer has been made for condonation of delay in filing the objections, as according to him, as from the date when copy of the Award was received by him from his counsel, the

Objections are within limitation, if benefit of proviso to Sub-section (3) of Section 34 is extended to the applicant.

2. On the other hand, learned Additional Advocate General has argued that in the present case, limitation has to be construed as from the date when signed copy of the Award was delivered to learned counsel representing the applicant. The signed copy of the Award was received by learned counsel on 08.04.2016 and not on 12.04.2016, as would be evident from the postal receipts which have been appended with the petition. Be that as it may, having heard learned counsel for the parties, in my considered view, there is no compliance of the provisions of Section 31(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") by the learned Arbitrator.

3. Section 31(5) of the 1996 Act reads as under:

> *"31(5). After the arbitral award is made, a signed copy shall be delivered to each party."*

4. There is no ambiguity in the statutory provisions that after the Arbitral Award is made, a signed copy shall be delivered to each party. The word "party" has been interpreted by the Hon"ble Supreme Court in ***Union of India Vs. Tecco Trichy Engineers & Contractors,*** (2005) 4 SCC 239, ***State of Maharashtra Vs. ARK Builders (P) Ltd***. (2011) 4 SCC 616 and ***Benarsi Krishna Committee and othersVs. Karmyogi Shelters Private Limited***, (2012) 9 Supreme Court Cases 496 as "party himself and his or her agent". In fact, Hon'ble Supreme Court in ***Benarsi Krishna Committee and others*** Vs. ***Karmyogi Shelters Private Limited*** (*supra*) has held that the expression "party", as defined in Section 2(1)(h) of the 1996 Act, clearly indicates a person who is a party to an arbitration agreement. Hon'ble Supreme Court has further held that said definition is not qualified in any way so as to include the agent of the party to such agreement and any reference, therefore, made in Section 31(5) and Section 34(2) of the 1996 Act can only mean the party himself and his or her agent, or Advocate empowered to act on the basis of a *Vakalatnama*. Hon'ble Court has further held that proper compliance with Section 31(5) would mean delivery of a signed copy of the Arbitral Award on the party himself and not on his Advocate, which gives the party concerned the right to proceed under Section 34(3) of the aforesaid Act.

5. Hon'ble Supreme Court in para-17 of ***Benarsi Krishna Committee and others*** (*supra*) has held as under:

> *"17. In the instant case, since a signed copy of the award had not been delivered to the party itself and the party obtained the same on 15.12.2004, and the petition under Section 34 of the Act was filed on 3.2.2005, it has to be held that the said petition was filed within the stipulated period of three months as contemplated under Section 34(3) of the aforesaid Act. Consequently, the objection taken on behalf of the petitioner herein cannot be sustained and, in our view, was rightly rejected by the Division Bench of the Delhi High Court."*

6. The factual matrix which now emerges from what has been discussed hereinabove is that the signed copy of the Award was not delivered to the applicant/petitioner by the Arbitrator strictly in consonance with the provisions of Section 35(5) of the 1996 Act. However, fact of the matter remains that a signed copy of the said Award was subsequently received by the applicant-petitioner through counsel to whom a signed copy of the Award was sent by the learned Arbitrator. As far as delay in filing the petition is concerned, it has been duly explained by the applicant/objector in this

application that after receipt of the copy of the Award from his counsel on 20.04.2016, he was called by the Department for settlement of the dispute on various dates and one of such date fixed for the said purpose in the office of Secretary (Public Works) to the Government of Himachal Pradesh was 07.07.2016. Due to declaration of holiday on the said date on account of Idu'L Fitr, next date fixed was 11.07.2016 followed with 18.07.2016, but when despite various dates, no fruitful result was coming, the applicant/objector filed objections without any further delay. These are the reasons mentioned in the application as to why the objections could not be filed within limitation.

7. A perusal of the reply filed to the application demonstrates that these facts have not been denied in so many words by the non-applicant, however, the stand taken in the reply is that despite various communications made by the non-applicant to the applicant, he did not turn up for amicable settlement and no settlement could be arrived at.

8. Be that as it may, one thing which is evident from the averments made in the application and the reply filed to the same is that after receipt of the copy of the Award by the applicant/objector, there was some endeavour being made between the parties for amicable settlement of the issue and this, in my considered view, satisfactorily explains the delay in filing the petition.

9. Now, there are two options available before this Court. The first option is that these proceedings can be closed with the direction/observation that as and when a signed copy of the Award is delivered by the learned Arbitrator to the applicant, he can invoke the statutory remedies available to him in accordance with law. Alternatively, as from the date when copy of the Award was received by the applicant/petitioner, as the petition is within limitation, the same can be ordered to be heard in accordance with law after condoning the delay in filing the petition. In my considered view, it will be in the interest of justice in case latter option is followed by the Court. This is for the reason that even if first option is opted by the Court, then the applicant/petitioner after receipt of the certified copy of the Award will have to come before the Court under Section 34 of the 1996 Act and that has already been done by him by way of filing the present petition. Therefore, in order to avoid the multiplicity of litigation, this Court opts for hearing of the present petition by condoning the delay in filing the Objections. This is also in consonance with the findings returned in para-17 by the Hon'ble Supreme Court in ***<u>Benarsi Krishna Committee and others</u>*** (*supra*). Accordingly, this application is allowed and delay in filing the Objections is condoned. Application stands disposed of.

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

Dr. Pankaj Soni .....Petitioner.
Vs.
State of H.P. and others .....Respondents.

CWP No.: 6338 of 2011
Date of Decision: 05.08.2019

Constitution of India, 1950- Article 226 – Writ jurisdiction - Availability – Dispute between petitioner and private respondents regarding village Bowari and right to take water from it- Petitioner contending that residents of four village having customary right to take water from

it and challenging revenue entries showing said 'Bowari' to be in ownership and possession of private respondent No.7– Petitioner seeking writ of Mandamus for directing Deputy Commissioner to take appropriate action against respondent No. 7 and cause removal of his nuisance– Private respondents claiming Bowari having been construed by their ancestors – Held, matter involves seriously disputed questions of fact alleged in petition and such facts cannot be adjudicated while exercising writ jurisdiction – Petition dismissed with liberty to petitioner to approach appropriate court for redressal of grievances raised in it. (Paras 2 to 8)

For the petitioner: Mr. R. L. Chaudhary, Advocate.

For the respondents: Mr. Dinesh Thakur, Additional Advocate General, with Ms. Divya Sood, Deputy Advocate General, for respondents No. 1 to 4.

Mr. Vikrant Thakur, Advocate, for respondent No. 5.

Mr. L.S. Mehta, Advocate, for respondent No. 6.

Mr. K.D. Sood, Senior Advocate, with M/s Shubham Sood, Sukrit Sood and Het Ram Thakur, Advocates, for respondents No. 7 to 9.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has, *inter alia,* prayed for the following reliefs:

> *"(i) That writ in the nature of mandamus may kindly be issued, directing the respondents to remove the tullupump/motor from the old Bowari which was constructed 200 years back by the then King and same is a Gair Mumkin Bowari as per the Revenue Record and is being used by the people of four villages i.e. Lathiani, Upper Rajali, Lower Rajali and Toyashar from the time of their ancestors, but the respondent No. 7, who is Lumbardar of the area as a result of connivance with the revenue department got mutated the public propertyh in his name and now has restrained all the villagers from getting the drinking water, which is not sustainable in the eyes of law.*
>
> *(ii) That writ in the nature of mandamus may kindly be issued, directing the respondents to enter the land measuring 46-2 Kanals, comprised in Khasra No. 65, 130, 169, 185, 201, 205, 2010, 215, 301, 303, 304, 305, 307, 309, 310, 313, 314, 316, 317, 318, 319, 320, 321, 322, 323 and 328 in Khewat No. 23, 24, 25 and 26 in the name of State Government of Himachal Pradesh in accordance with the Himachal Pradesh Common Land (Vesting & Utilization) Act, since the said land from the time of English people was a Shamlat land and as per the Punjab Village Common Land Regulation Act, same was to be mutated in the name of Gram Panchayat and thereafter, in the name of State of Himachal Pradesh. The respondent No. 7 is a Lumberdar and he has got no right over the public property.*
>
> *(iii) That writ in the nature of mandamus may kindly be issued, directing the respondent No. 3 i.e. Deputy Commissioner, Una to decide the representation as per Annexure P-11 within stipulate period and the nuisance*

created by the respondent No. 7 upon the old Bowari may be removed within a time bound period."

2. Case of the petitioner is that the Bawari in issue was constructed over Khasra No. 525 in Mohal Lathiani for the use of general public by the then King and alongwith the said *Bawari*, an orchard was also grown. As per the petitioner, the *Bawari* in issue existed upon *Shamlat* land and villagers as also their predecessors were using the *Bawari* for the purpose of water and the land upon which the orchard was there was being used for the purpose of grazing animals, as a result of *Bartandari* rights for the last 200 years. As per the petitioner, said Bawari is the only source of water for villages Lathiani, Upper Rajali, Lower Rajali and Toyashar and there is no other source of water for the residents of the said villages. As per him, on 13.12.2010, it was published in *'Dainik Tribune'*, a daily vernacular newspaper that the *Bawari* in issue had been encroached upon by *Lumberdar* of the area, i.e., respondent No. 7 herein, who in connivance with the Revenue Agencies, got mutated the land in issue as also *Bawari* in his name. He did not disclose to the residents of the Panchayat that he had become owner of the *Bawari*, however, recently he started claiming so and had also started restraining the villagers from using the *Bawari* as also from using the land for grazing their animals. It is in this background that the petitioner filed the present petition, *inter alia*, praying for the reliefs enumerated hereinabove.

3. Replies to the petition have been filed by the respondents.

4. The stand of the Deputy Commissioner, Una (respondent No. 3) in the reply filed is that inspection of the site was carried out and during the course of inspection, it was found that respondent No. 7 had installed a *Tullupump* in the *Bawari* to lift the water for his own use and as per copy of Jamabandi for the year 2005-2006, the land on which the *Bawari* was situated, was recorded in the ownership and self possession of Hari Chand Hissedar. It is further mentioned in his reply that the *Bawari* was constructed prior to the year 1868. It is further mentioned in the reply that 2 HP Motor which has been installed in the *Bawari* by respondent No. 7 has submersible cable of high quality appended with it, and in view of this, there were no chances of electrocution. It was advised on the spot to respondent No. 7 that water of *Bawari* should be divided into two tanks. One tank may be used by him with submersible pump and other tank should be left open for the general public, to which he agreed. However, the other party wanted that the Gram Panchayat should have exclusive control upon the *Bawari*.

5. In its reply, respondent No. 4, Superintendent of Police, Una has, *inter alia*, mentioned that upon receipt of the complaint of the petitioner, the matter was duly verified by the Police on the spot and it was found that the water tank (*Baiwari*) was situated in ownership and self possession of Hari Chand Hissedar (respondent No. 7) and the Authorities of the Electricity Board had opined that there was no danger of electrocution.

6. The private respondents in their replies have reiterated the factum of their being owner in possession of the land over which the boundary is situated. As per them, though the replying respondents were permitting certain villagers to take water from the said *Bawari*, but the same did not confer any right upon the said persons to file the writ petition. According to them, the *Bawari* in question was constructed more than 100 years back. It was constructed by their predecessors. The replying respondents wanted to repair the same, but the petitioner was objecting to it. Their further stand in the reply is that neither the Panchayat nor anyone else made any contribution for the maintenance and construction of the *Bawari*.

7. There is also on record a compliance report filed by respondents No. 7 to 9, relevant portion of which reads as under:

> *"1. That without prejudice to the submissions made by way of reply to the writ petition and with a view to resolve all disputes and to maintain the Bowari constructed by the ancestors of the replying respondents, the replying respondents have renovated and repaired the bowari and the area around it at a cost of over Rs.3.20 lacs.*
>
> *2. That the bowari now is 2.54 mtrs. in length, 2.80 mtrs. in breadth and 2.25 mtrs. in height. The inlet to the bowari is 15 cms. Above the bowari which is collected in the bowari as is evident from photographs "A". Approximately 7000 gallon water is collected in the bowari. For the excess water outlet has been created by fixing pipe as shown in photograph "B".*
>
> *3. That there three water taps have been provided by way of outlet from the bowari from which water can be freely collected by the villagers. The water taps have been fixed at a height of 4 feet from the bottom of the bowari. Above the point of discharge of water from the three water taps, the storage capacity is 3.5 ft. and the discharge of the excess water is by the outlet thereafter as is evident from photograph "B".*
>
> *4. That the submersible tullu pump has been fixed so as to pump the water at a height of 1.5 ft. above the three water taps and if the water level falls below that level then the water cannot be lifted through the submersible tullu pump by the petitioner.*
>
> *5. That separate stairs inside the bowri have also been constructed for repairs and cleaning the bowari as also for collecting water by going down, if the water level goes below the water taps as the water is collected in the bowari by a fall from the top of the bowari as has been shown in photograph "A". The photograph of the submersible tullu pump which is safe is shown in the photograph "C".*
>
> *6. That the front of the bowari has been enclosed with the grill which has two doors on both sides and which can be used for going down the bowari for collecting water as also for cleaning the same. When the water level in tbe bowari reduces in the Summers the stairs have been provided so as to enable the people entering the bowari and collecting the same with buckets.*
>
> *7. That the grill has been put in front of the bowari as shown in photograph "B" with a view to obviate the monkeys and other stray animals entering the bowari and to keep it neat and clean.*
>
> *8. That there is enough water in the bowari all round the year. The plan prepared by retired Assistant Engineer on 24.10.2016 alongwith the report is attached as "D".*
>
> *9. That the replying respondents have done this repair and renovation work after the orders passed by this Hon'ble Court on 30.04.2012, 12.08.2016 and 03.10.2016. The replying respondents undertake to repair and maintain the bowari and keep it neat and clean, as has also been assured to this Hon'ble Court. The path leading to the bowari has also been repaired by the replying respondents.*
>
> *10. That Shri Ashwani Kumar son of Shri Hari Chand has retired from Health Department as Senior Pharmacist on 30.09.2016 and out of his retiral benefits he has spent a sum of over Rs.3 lacs for the repair and renovation of*

the bowari as his personal contribution and maintaining the philanthropist activities of his ancestors and respondents 7, 8 and 9."

8. Having heard learned counsel for the parties and after going through the respective stand which has been taken by the respondents herein in their replies, in my considered view, there are seriously disputed questions of fact involved in the petition, which can not be adjudicated by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India, as parties shall have to lead evidence to substantiate their respective contentions. In this view of the matter, the present petition is dismissed, but with the observation that in case the petitioner so desires, it shall be open for him to approach the appropriate Court of law for redressal of the grievances which stand raised by way of present petition.

Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Pooja ....Petitioner
Versus
Sunil Kumar ....Respondent

Cr. Revision No. 138 of 2019
Date of Decision 5th August, 2019

Code of Criminal Procedure, 1973–Section 256- Dismissal of complaint in default– Justification– Trial court dismissing complaint in default for no-appearance of complainant or his counsel– Appeal against - Held, on facts, complainant was diligent in pursuing his case and remained present almost on all hearings– On relevant date, case was fixed for recording statement of accused under Section 313 of Code– Presence of complainant was not necessary for that purpose– Trial court should not have dismissed complaint in default rather one opportunity should have been granted to complainant or his counsel to appear– Appeal allowed– Complaint ordered to be restored. (Paras 6 to 8)

Cases referred:
Dole Raj Thakur vs. Pankaj Prashar, 2018(1) Shim.LC 344
Suresh Kumar vs. State of H.P., 2018(3) Shim.LC 1727

For the Petitioner: Mr.Rajiv Rai, Advocate.
For the Respondent: None.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(oral)

This revision petition, arising out of dismissal in default of complaint filed under Section 138 of Negotiable Instrument Act, has been preferred by complainant on the ground that the day on which case has been dismissed in default was fixed for service of respondent/accused through Non-bailable warrants, however, neither counsel nor

complainant could appear on that day due to noting down the wrong date by the counsel, engaged by complainant.

2. Notice issued to the respondent was received unserved. However, on the last date of hearing, learned counsel for the petitioner/complainant had submitted that complaint has been dismissed in absence of respondent when the case was fixed for service of respondent. However, the respondent was not present on that day and therefore, for adjudication of present petition wherein explanation with respect to absence of complainant or his counsel, before the trial Court on the day of passing of impugned order, is to be explained, presence of respondent/accused may not be necessary.

3. Without accepting or rejecting the plea of learned counsel for the petitioner, record of the trial Court was summoned for determining the issue whether service of respondent is necessary for adjudication of present petition or not.

4. Perusal of record indicates that on 26th September, 2018, respondent/accused was not present in the trial Court, despite having the knowledge of date of hearing as when the case was listed on 25.8.2018, for recording the evidence of complainant, though, respondent was not present, however, an exemption application filed on his behalf was allowed and in his absence, statement of one witness was recorded and thereafter the case was fixed for recording his statement under Section 313 Cr.P.C. on 26.9.2018. Because of his absence on 26.9.2018, Non-bailable warrants were issued against the respondent/accused for 29th October, 2018. In record, nothing is mentioned with respect to execution of Non-bailable warrants upon the respondent/accused, however, it has been recorded that case was called thrice but none was present for complainant. The order is silent about presence of respondent/accused or execution of Non-bailable warrants issued against him. Therefore, plea of petitioner is accepted that in the present case, presence of respondent is not necessary and therefore, it is being decided without insisting for service of respondent/accused.

5. Petitioner has filed a complaint under Section 138 of Negotiable Instrument Act on 9.7.2014 before JMIC, Solan. It remained pending before the said Court till 4th August, 2016 and thereafter, it was transferred to the Court of Additional Chief Judicial Magistrate, Solan on 20.10.2016. It was again transferred back to JMIC, Court No.1, Solan on 16.6.2017, where evidence of complainant/petitioner was recorded and case was pending for recording of evidence under Section 313 Cr.P.C. From the record, it is evident that either complainant or his counsel or both of them always remained present in Court on each and every date of hearing, except on 20.10.2016, 16.6.2017 and 16.9.2017 and also on 29.10.2018 when the impugned order was passed. 20th October, 2016 and 16th June, 2017 are the dates when the case was received in the Court of Additional Chief Judicial Magistrate, Solan and JMIC Court No.1, Solan respectively after transfer of same. Before 20.10.2016 the case was listed on 4.8.2016 and on that day, it was fixed for recording the statement of witnesses on 19.11.2016. Similarly before 16.6.2017, case was listed on 23.2.2017 on which date it was ordered to be listed for recording the evidence of complainant witnesses on 19.4.2017. It is apparent that on 20.10.2016 and 16.6.2017 the case was neither fixed for presence of complainant not it was informed to him or his counsel about listing of case on that day, but dates informed to them were 19.11.2016 and 19.4.2017, therefore, this absence cannot be said to be willful or intentional.

6. On 29.7.2018, the case was listed for recording statement of respondent/accused under Section 313 Cr.P.C. For recording the statement under Section 313 Cr.P.C, presence of complainant was not necessary and material circumstances which have come on record against the respondent/accused were to be put to him by Court. The

trial Court must not lose the sight about serious repercussion on the dismissal in default of criminal complaint. Keeping in view the fact that complainant was pursuing his case with due diligence and care on each and every date fixed for that purpose and also led the evidence on her part, the trial Court, as also held by this Court, in ***Suresh Kumar vs. State of H.P.*** reported in ***2018(3) Shim.LC 1727*** and ***Dole Raj Thakur vs. Pankaj Prashar*** reported in ***2018(1) Shim.LC 344,*** should not have dismissed the complaint in default but should have given at least one opportunity to complainant either by continuing the further proceedings by recording statement of accused under Section 313 Cr.P.C. if accused was available for that purpose or should have adjourned it at least for one date so as to enable the complainant or his counsel to appear in the complaint as the absence for one time, that too in a case which is being pursued regularly, may be for more than one genuine reasons and one of which may be, as pleaded by learned counsel for petitioner, recording of date wrongly.

7. While recording the fact that none was present for the complainant, the trial Court has not stated anything about execution of Non-bailable warrants issued against the respondent/accused and also about service of notices in proceedings issued under Section 446 Cr.P.C. against the respondent/accused and his surety. Even the dismissal of main complaint in default would not have any effect on the proceedings initiated under Section 446 Cr.P.C. against the accused and his surety for his willful absence on a date fixed when his presence was required.

8. In view of above discussion, I find merit in present petition and accordingly, petition is allowed and order dated 29.10.2018 dismissing the complaint in default is set aside and complaint is ordered to be restored at its original position before the trial Court i.e. JMIC, Court No.1, Solan. Record be sent back. Petitioner is directed to appear before the trial Court on ***2nd September, 2019*** whereafter the trial Magistrate shall proceed further in accordance with law in main complaint as well as in proceedings initiated against accused and surety under Section 446 Cr.P.C.

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

Smt. Kirpu and others ….Petitioners.
Vs.
Sh. Shiv Ram and others ….Respondents.

CMPMO No.: 293 of 2018
Date of Decision: 06.08.2019

Code of Civil Procedure, 1908 – Order XXII Rules 1 & 2 – Order of court in ignorance of death of a party – Nature of order – Held, any order passed by court when party to a lis was already dead is void. (Pars 7)

For the petitioners: Ms. Seema K. Guleria, Advocate.
For the respondents: Mr. Tek Chand Sharma, Advocate, for respondents No. 1 and 3 to 9.
Respondent No. 2 is stated to have died.

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, prayer is for setting aside order, dated 23.06.2018, passed by the Court of learned Civil Judge (Junior Division), Court No. 7, Shimla in Civil Suit No. 83-1 of 2010, titled as *Smt. Gulabu and others Vs. Sh. Shiv Ram and others,* vide which, an application filed under Order 7, Rule 14 of the Code of Civil Procedure with the prayer to place on record certain documents by the present petitioners, who are plaintiffs before the learned Trial Court, has been dismissed.

2. When this case was taken up for consideration, an application was filed under Order 22 Rules 4 & 9 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as 'the Code'), i.e., CMP(M) No. 653 of 2019 by the petitioners herein to bring on record the legal representatives of deceased respondent No. 2. A perusal of the averments made in the said application demonstrated that respondent No. 2, who is defendant No. 2 in the Civil Suit, had died on 16.06.2017, i.e., during the pendency of the Civil Suit and before the pronouncement of impugned order, which has been assailed before this Court by way of filing present petition under Article 227 of the Constitution of India.

3. Faced with this situation, on 15.07.2019, this Court had passed the following order:

> *"**CMP(M) Nos. 652 and 653 of 2019***
>
> *By way of these applications, a prayer has been made to bring on record legal representatives of deceased respondent No. 2, namely, Sh. Radha Krishan. As per averments made in the application, said respondent is stated to have died on 16.6.2017. This petition has been filed against an order passed by the learned Trial Court on 23.06.2017, vide which, an application filed by the present petitioners, who are the plaintiffs before the learned Trial Court, under Order 7, Rule 14 of the Code of Civil Procedure, stands dismissed. Thus, it is apparent that respondent No. 2, whose local representatives are now being sought to be brought on record by way of present application, was dead much before the impugned order was passed.*
>
> *Before going into the merit of the present petition, learned Counsel for the parties are requested to assist the Court as to what will be the fate of the impugned order, which admittedly was passed when one of the contesting defendants was already dead. List on **22.07.2019**."*

4. Today, when the matter was taken up for consideration, learned counsel for the parties fairly submitted that as after the death of defendant No. 2, the record of the case had become defective, in law, without bringing on record the legal representatives of deceased defendant, learned Court below could not have had further proceeded with the matter and no order on the application filed under Order 7, Rule 14 of the Code could have been passed by the learned Trial Court.

5. At this stage, learned counsel for the respondents-defendants points out and rightly so that in fact onus was upon the plaintiffs before the learned Trial Court, who are the petitioners herein, to have had moved an appropriate application to bring on record the legal representatives of deceased defendant No. 2 and they therefore cannot be permitted to take benefit of their own acts of omission. He further submits that it will be in the interest of justice in case this petition is disposed of by setting aside the impugned order, but with the direction that if before the learned Trial Court an application is filed by the petitioners to

bring on record the legal representatives of deceased defendant No. 2, then the same be decided by the learned Trial Court after hearing the respondents herein, who shall be highlighting the factum of the suit itself having been abated as of now on account of death of defendant No. 2 and timely steps having not taken by the plaintiffs to bring on record the legal representatives of the said defendant.

6. Ordered accordingly.

7. In other words, the impugned order, dated 23.06.2018, which has been passed by the learned Court below on an application filed under Order 7, Rule 14 of the Code is set aside aside, not on merits but on the ground that the said order was passed ignoring the fact that the case record had become defective on account of death of defendant No. 2.

8. It is further ordered that before proceeding with the matter any further, learned Trial Court will first adjudicate upon the effect of the death of defendant No. 2 during the pendency of the suit, meaning thereby, as to whether the suit as of now stands abated or not. In case any application is filed by the plaintiffs to bring on record the legal representatives of deceased defendant No. 2, the same shall be decided after affording opportunity of being heard to the respondents as also to the proposed legal representatives of deceased defendant No. 2 and while deciding the said application reasons for delay in filing the application as also the effect of abatement, if any, shall be taken into consideration by the learned Trial Court before passing any order. In case the Court comes to the conclusion that the suit stands abated either qua defendant No. 2 or as a whole, then appropriate order in this regard shall be passed by the learned Trial Court and in case the learned Trial Court comes to the conclusion that legal representatives of defendant No. 2 are to be brought on record, then also appropriate order shall be passed. Thereafter, learned Trial Court shall also adjudicate afresh the application so filed by the plaintiffs under Order 7, Rule 14 of the Code. It is clarified that the above observations are only for the guidance of the learned Trial Court, but what orders are to be passed by the learned Trial Court henceforth in the suit, shall be the prerogative of the learned Trial Court and it shall not be influenced by any observation made by this Court in this order.

9. The parties through their learned counsel are directed to appear before the learned Trial Court on ***26th August, 2019.***

The petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Suman Thakur …..Petitioner.

Vs.

The State of H.P. and others …..Respondents.

CWP No.: 802 of 2017

Date of Decision: 01.08.2019

Constitution of India, 1950- Articles 14 & 226 – Government Notification dated 11.4.2007 regarding engagement of Anganwari Workers/Helpers – Income criteria– Appellate Authority

(Additional Deputy Commissioner) setting aside appointment of petitioner as Anganwari Helper on ground that income certificate on basis of which appointment was obtained was procured by concealing facts – And petitioner was not eligible for appointment since her family having more income than prescribed under Notification– Petition against– Held, Appellate Authority had got the income of petitioner assessed during pendency of appeal through Naib Tehsildar – Report of Naib Tehsildar not disputed by petitioner– Petitioner admittedly was teaching in a private school and earning emoluments from there– Income of family of petitioner was in excess of that which was prescribed in Notification- Petitioner was not eligible for appointment– Income certificate was obtained by concealing facts– Petition dismissed. (Paras 15 & 16)

For the petitioner: Mr. Naveen K. Bhardwaj, Advocate.

For the respondents: Mr. Dinesh Thakur, Additional Advocate General, with M/s Amit Kumar Dhumal and Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General, for respondents No. 1 to 4.
Mr. Balwant Singh Thakur, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has prayed for quashing of order, dated 12.04.2017 (Annexure P-3), passed by Additional Deputy Commissioner, Kullu in Case No. 07/ADC/2016, titled as *Smt. Sulochana Vs. State of H.P. and others*, vide which, an appeal filed by respondent No. 5 herein against the appointment of petitioner as Anganwari Worker at Anganwari Centre Jhalli under Gram Panchayat Neether, District Kullu, H.P., was allowed and the appointment of petitioner as Anganwari Worker in Anganwari Centre Jhalli was set aside with immediate effect.

2. Facts necessary for the adjudication of the petition are as under:

Applications were invited by the Authority concerned for filling up one post of Anganwari Worker at Anganwari Centre Neeher, District Kullu, H.P. in the year 2016. Petitioner as well as respondent No. 5 applied for the said post. Interviews for selecting the candidate were conducted by the Selection Committee on 02.08.2016 in the office of Child Development Project Officer Neether, District Kullu. On the basis of recommendations of the said Selection Committee, petitioner was offered appointment as Anganwari Worker in the said Centre and she joined as such in compliance to the appointment letter dated 03.08.2016 on the said date itself.

3. Feeling aggrieved by the appointment of the petitioner, an appeal was preferred by respondent No. 5 under Section 12 of the Notification dated 11.04.2007, i.e., the Notification issued by the Government containing the Scheme/Guidelines for engagement of Anganwari Worker/Helper on honorarium basis under the Integrated Child Development Scheme.

4. The appointment of the petitioner was, *inter alia*, assailed on the ground that her income was more than the prescribed limit for being considered for appointment against the said post under the Guidelines. The case of the appellant before the Appellate Authority was that Income Certificate produced by the petitioner dated 01.08.2016, issued by Naib Tehsildar, Sub-Tehsil Neether to the effect that annual income of the family of petitioner was

Rs.35,000/- was based on wrong information and was a result of concealment of facts, because family income of the petitioner was about rupees One Lac annually. As per the appellant, father of the petitioner was a Member of Jhalli Dugadh Utpadak Samiti, Village Jhalli and was earning Rs.26,501/- annually from the business. In addition, he had also earned wages of Rs.10,000/- from MNREGA. Petitioner herself was serving as a TGT Teacher in Laureate Public School, Chawai and was earning salary of Rs.24,000/- per annum. All these facts were concealed by the petitioner when she procured the Income Certificate, on the basis of which, she gained employment.

5. During the pendency of the appeal, the income of the petitioner was got verified from Naib Tehsildar, Neether and report of Naib Tehsilar was placed before the Appellate Authority. Said report of Naib Tehsildar dated 18.02.2017 demonstrated that annual income of the family of the petitioner was Rs.1,00,975/- per annum and Income Certificate dated 01.08.2016, on the basis of which, selection was gained by the petitioner, was found to have been obtained on the basis of concealed facts. On these bases, the Appellate Authority set aside the appointment of the petitioner by allowing the appeal filed by respondent No. 5 by holding that the appointment was gained by the petitioner against the post of Anganwari Worker on the basis of Income Certificate which was wrong and which was rightly set aside/cancelled by Naib Tehsildar in his inquiry subsequently. On these bases, the Appellate Authority set aside the appointment of the petitioner against the post of Anganwari Worker at Jhalli Centre with immediate effect and directed that the candidate, who was at Sr. No. 1 in the waiting list, be appointed against the said post.

6. Feeling aggrieved, the petitioner filed the present petition.

7. Learned counsel for the petitioner has argued that the appellate authority failed to appreciate that inquiry report of the Inquiry Officer was based on wrong calculations, as the Inquiry Officer erred in including honorarium being paid to the mother of the petitioner as Anganwari Helper to the tune of Rs.1800/- per month in the annual income of the family. He further argued that the Inquiry Officer also erred in taking into consideration the alleged salary which the petitioner was getting from Laureate Public School, Chawai without obtaining any Income Certificate from the Drawing & Disbursing Officer of the School, where the petitioner was working as a TGT Teacher on temporary basis for a period of 5/6 months only in the concerned year. He has further argued that the appellate authority failed to appreciate that basis of Family Income arrived at by Naib Tehsildar were completely wrong and his findings that the father of the petitioner was owner in possession of land measuring 02-05-00 bighas, from where he was having income of Rs.7875/- per year, were also incorrect and on these bases, he has argued that as the order passed by the Appellate Authority was solely based upon the report of Inquiry Officer, the impugned order was liable to be set aside and appointment of the petitioner was liable to be upheld.

8. On the other hand learned Additional Advocate General has argued that there was no infirmity with the impugned order, because the Appellate Authority after correct appreciation of the material on record, which included the report of the Inquiry Officer, has set aside the appointment of the petitioner, because she had gained said appointment by procuring a wrong Income Certificate.

9. Learned counsel for the private respondent has also supported the contention of learned Additional Advocate General and in addition, he has argued that the petitioner had gained employment on the strength of a wrong Income Certificate, which she obtained by providing incorrect information to the Authority concerned and, therefore, the petition was liable to be dismissed with heavy cost.

10. I have heard learned counsel for the parties and have also gone through the impugned order as well as the record of the case.

11. It is not in dispute that as per the Guidelines issued by the respondent-Government, in order to be eligible to be considered for appointment against the post of Anganwari Worker, only those incumbents are eligible whose annal income at the relevant time was not more than Rs.35,000/- per month.

12. When the appointment of petitioner was challenged by way of an appeal, report of Naib Tehsildar was sought with regard to the correct annual income of the petitioner. Said report is appended with the petition as Annexure P-2. A perusal of the report demonstrates that the income of the family of the petitioner was assessed by the officer concerned, i.e., Naib Tehsildar Neether, District Kullu to be Rs.1,00,975/-. This figure was arrived at by him by taking into consideration the factum of the petitioner serving as a TGT Teacher in Laureate Public School Chawai from August, 2015 to December, 2015 and thereafter from February, 2016 to July, 2016, i.e., for a period of 11 months for which she was getting emoluments to the tune of Rs.6500/- per month. Authority also took into consideration the income which the family was earning annually from the land owned by the father of the petitioner, which income was assessed at Rs.7875/- per month, as also the honorarium which the mother of the petitioner was getting on account of serving as Anganwari Worker, which from August, 2015 to July, 2016 was assessed to be Rs.21,600/- @Rs.1800/- per month.

13. When the matter was being heard on the previous dates, learned counsel for the petitioner had argued that Naib Tehsildar had erred in coming to the conclusion that the petitioner was getting wages of Rs.6500/- per month for serving as a TGT Teacher, as she was not given any emolument for serving as a TGT Teacher in the School. On this, on 18.06.2019, this Court had passed the following order:

> *"Heard for some time. Before proceeding in the matter any further, petitioner is directed to file an affidavit as to from which and till which date, she served in Laureate Public School, Chawai, what are her qualifications and what were the emoluments paid to her while serving in the said School. Let the needful be positively done within two weeks.*
>
> *List on 22.07.2019."*

14. In compliance thereof, the petitioner has filed an affidavit, dated 23.06.2019, relevant portion of which reads as under:

> *"1. That the applicant/petitioner has served the Laureate Public School, Chawai w.e.f. (Financial Year 2015-16), May, 2015 to December, 2015 and Feb. 2016 and in the Financial Year 2016-17 from March, 2016 to July, 2016 and the deponent was not paid anything. The deponent was signing the papers to the tune of Rs.4150/- initially and then Rs.6500/- PM. The deponent was signing the papers for getting the teaching experience.*
>
> *2. The deponent is BA, MA and B.Ed."*

A perusal of the averments made in this affidavit demonstrate that the petitioner herself has admitted that she was signing the papers to the effect that she was getting wages initially @Rs.4150 per month and thereafter @Rs.6500/- per month for serving as a TGT Teacher in the School. However, she has qualified this by mentioning that she was signing the papers for getting teaching experience, but was not actually paid anything.

15. In my considered view, the affidavit filed by the petitioner, wherein she has admitted that she has signed the papers to the effect that she was initially getting monthly emoluments of Rs.4150/- per month and then Rs.6500/- per month for teaching as TGT Teacher in Laureate Public School Chawai, itself render her ineligible to be considered for the post of Anganwari Worker. Her bald assertion that she was signing these papers only for getting teaching experience deserves outright rejection. Incidentally, in the main petition, there is no averment made while laying challenge to the report of Naib Tehsildar that the petitioner in fact was not receiving any salary for working as a TGT Teacher in Laureate Public School Chawai. All that is mentioned in the petition with regard to the report of the Naib Tehsildar is that he made wrong assessment of her salary from the Laureate Public School Chawai without obtaining the Income Certificate from the Drawing and Disbursing Authority. This clearly demonstrates that the stand of the petitioner now as is reflected in the affidavit that in reality she was not receiving any wages for serving as a TGT Teacher in Laureate Public School Chawai, though she was signing papers qua receipt of the salary, is nothing but an afterthought.

16. Be that as it may, as it is evident from the record that the income of the family of the petitioner from all sources was in excess of Rs.35,000/- per month, this Court does not finds any infirmity with the order passed by the Appellate Authority, vide which the appointment of the petitioner has been set aside on the ground that she gained employment against the post of Anganwari Worker on the basis of an Income Certificate which was obtained by furnishing incorrect information. It is pertinent to mention at this stage that the factum of her mother being engaged as an Anganwari Worker and her drawing an honorarium of Rs.1800/- per month has not been denied by the petitioner. Not only this, the income which the family was getting from the immovable property, as has been assessed by the Naib Tehsildar, has also not been proved to be an incorrect figure by the petitioner. It is not her case that she was not associated by the Naib Tehsildar at the time of inquiry. It is an admitted position that she was serving as a TGT Teacher in Laureate Public School Chawai. Whereas in the writ petition, the petitioner concealed her emoluments as a TGT Teacher, when she was directed by this Court to spell out the same by way of an affidavit, though she stated that on papers initially she was receiving Rs.4150/- and thereafter Rs.6500/- per month, but then she qualified the same that in reality, she was not getting anything and she was only working there for teaching experience, which stand, as already mentioned above, is nothing but an afterthought to substantiate the same.

17. In view of the above, as this Court does not finds any infirmity with the impugned order, dated 12.04.2017 (Annexure P-3), passed by the Appellate Authority, this petition being devoid of any merit, is dismissed. Miscellaneous applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Karam Singh ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 305 of 2011
Judgment reserved on : 14.6.2019

Date of Decision : August 7, 2019

Narcotic Drug and Psychotropic Substances Act, 1985– Section 20– Recovery of charas– Proof– Special Judge convicting accused of possessing commercial quantity of charas – Appeal against – Held, case of prosecution being that it was a chance recovery at a secluded place- And for that reason, independent witnesses were not available –However, evidence revealing that place of alleged recovery was located nearby a market and village– No attempt to call villagers was made– Villagers also frequented that area when investigation was going on – No such person was made to witness even later part of investigation – No efforts made to prove that alleged signature on various parcels were actually of accused particularly when he denied existence of his signature over them– Documents not showing that police team had left police station with investigation kit- Sampling and sealing of case property at spot becomes doubtful– Case does not inspire confidence– Appeal allowed– Conviction set aside. (Paras 10 to 15)

Cases referred:

Amba Lal vs. Union of India & others, AIR 1961 SC 264
Dharampal Singh vs. State of Punjab, 2010(9) SCC 608
Kalpnath Rai vs. State, (1997) 8 SCC 732
Krishan Chand vs. State of Himachal Pradesh, (2018) 1 SCC 222
Masalti vs. The state of U.P., AIR 1965 SC 202
Noor Aga vs. State of Punjab another,(2008) 16 SCC 417
State of Bihar vs. Basawan Singh, AIR 1958 SC 500
State of Punjab vs. Baldev Singh, (1999) 6 SCC 172
State of Punjab vs. Partap Singh, 2004 Drugs cases (Narcotics) 104, Supreme Court
Surjit Singh vs. State of Punjab, 2011(15) SCC 187
Tahir vs. State (Delhi), (1996) 3 SCC 338
Zahira Habibulla H. Sheikh vs. State of Gujarat, 2004 (4) SCC 158

For the appellant	:	Mr. Harish Sharma, Advocate, for the appellant.
For the respondent	:	Mr. Hemant Vaid and Mr. Desh Raj Thakur, Addl. Advocate Generals with Mr. Yudhvir Singh Thakur, Deputy Advocate General for the respondent-State.

The following judgment of the Court was delivered:

***Per:* Anoop Chitkara, Judge.**

Hon'ble Supreme Court of India, vide its order dated 25th October 2017, has remanded this matter to this Court. The order reads as follows,

> "Leave granted.
>
> Heard learned counsel for the parties.
>
> Learned counsel for the State points out that the main reason mentioned in the impugned order for disbelieving the testimony of the witness is that the register of the Hotel where the witness stayed had not been produced. It is also pointed out that some other reasons are also not sound.

We are of the view that approach adopted by the High Court in the impugned judgment is not sound in law. Accordingly, we set aside the impugned order and remand the matter to the High Court for fresh decision on merits in accordance with law.

The appeal is disposed of in the above terms."

2. The matter for consideration before this Court is a criminal appeal, filed by the convict, under sections 374 of the Code of Criminal Procedure, 1973, starting now called as CrPC. The appellant is assailing the judgment of conviction dated 10th June, 2011 passed by Special Judge, Mandi, Himachal Pradesh, in Sessions Trial No. 55 of 2010, titled as State of Himachal Pradesh vs. Karam Singh, convicting the accused for commission of an offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985, starting now called as NDPS Act. The trial Court imposed a sentence of rigorous imprisonment for twelve years and to pay fine of INR 1,20,000/- (Rupees one lac and twenty thousand only) and in default of payment of fine to further undergo simple imprisonment for two years. The Court, in terms of section 428 CrPC, ordered to set off the period of detention, undergone during the trial.

3. Upon the Supreme Court remanding back the matter to this Court, the Convict applied u/s 389 CrPC for suspension of sentence. Vide order dated, 5.3.2018, passed in Cr.M.P No. 218 of 2018, a bench of this Court suspended the sentence of imprisonment. As per the order of the trial Court, dated 16-07-2018, in the file of Cr.M.A 146 of 18, the appellant had deposited the amount of fine of Rs. 1,20,000/.Thus the appellant is out of custody from the date of his release, i.e. 26-11-2014.

<u>BRIEF PRECLUDE</u>:

4. The gist of the evidence apposite to justify the reasoning and to arrive at a fair conclusion is as follows:

(a) On 26.7.2010 at 5.35 a.m., Inspector Bishan Dass made an entry No. 10 in the daily police diary (Ext. PW-12/A), wherein he recorded that he has received a telephone message to send one Head Constable to Police Line Mandi. In compliance with this direction, Inspector Bishan Dass deputed HC Lakshman Dass (PW-14) to the Police Line, and after his departure, he gave information of compliance to the Superintendent of Police.

(b) Vide entry No. 29, dated 26.7.2010 (Ext. PW-11/A), in police daily diary, Police Line Mandi, it was recorded that at 6.10, in the evening, HC Lakshman Dass (PW-14), Constable Vinod Kumar (PW-2) and Constable Jitender Kumar (not examined), departed towards Sundernagar, on the directions of the Superintendent of Police.

(c) When the police party was on their way, HC Tek Chand (PW-1) also joined the patrolling party.

(d) The further case of the prosecution, as revealed from the complaint under Section 154 CrPC (Ruka)(Ext. PW-14/A), is that HC-Lakshman Dass (PW-14), Investigating Officer, Special Investigating Unit, Mandi, along with HC-Tek Chand (PW-1), Constable Jitender Kumar (not examined) and Constable Vinod Kumar (PW-2) were on patrolling duty, in a private vehicle, to detect crime under the NDPS Act. They had proceeded towards Sundernagar and Karsog etc. The police party was patrolling through a trail leading from Kotla to Tewan. On 28.7.2010, at around 6.15 a.m., at a place near Tewan, on that trail, one person was noticed, who was carrying a pink-colored polythene packet in his

right hand. On seeing the police party, such person became perplexed and started turning back. On this, the police party captured him and inquired about his name. The man revealed his name as Karam Singh (accused). The smell of cannabis (charas) was emanating from him. On this, HC-Lakshman Dass (PW-14) acquired reasons to believe from his knowledge that this polythene packet contained charas.

(e) Before proceeding further, the Investigating Officer HC Lakshman Dass (PW-14), asked accused Karam Singh to take his search, in the presence of other two members of the police party, namely HC Tek Chand (PW-1) and Constable Vinod Kumar (PW-2). To this effect, the Investigating Officer HC Lakshman Dass (PW-14), scribed a memo (Ext. PW-1/B), which reveals that the accused Karam Singh did search the Investigating Officer (PW-14), and he did not find anything incriminating therein from his person.

(f) After that, the Investigating Officer (PW-14) gave an option under Section 50 of the NDPS Act, to the suspect, vide consent memo (Ext.PW-1/A). As per the contents of Ext. PW-1/A, Karam Singh consented that he is ready and willing to give his search to the police at the spot itself.

(g) At around 7.00 a.m., vide memo (Ext. PW-1/D), the Investigating Officer (PW-14) checked the polythene packet, which the accused was carrying in his hand. On opening the said packet, he noticed a black substance in the shape of sticks and spheres. The Investigating Officer (PW-14) smelled the content and based on his experience; he prima facie detected such material to be charas (cannabis).

(h) The police weighed the recovered charas, on an electronic scale, which the police party was carrying with them. The contraband weighed 4 kilograms and 850 grams. After that, the Investigating Officer (PW-14) repacked the charas in the same polythene packet, and further put it in a cloth parcel, which the police sealed with six seal impressions of seal-D.

(i) The Investigating Officer (PW-14) filled in three copies of the NCB form (Ext. PW-8/A), and embossed three seals of seal impression-D on it. He also obtained specimen seal impression of seal-D, on a piece of cloth (Ext. PW-1/C), and after use, he handed over the seal, to HC Tek Chand (PW-1).

(j) The police scribed the search memo (Ext. PW-1/D), and HC Tek Chand (PW-1) and Constable Vinod Kumar (PW-2), put their signatures on it in the capacity of witnesses.

(k) The Investigating Officer (PW-14) scribed the written complaint (Ext. PW-14/A) (Ruka), mentioning all the above facts, and sent it to SHO Police Station Karsog, through Constable Vinod Kumar (PW-2), for the registration of FIR. The Investigating Officer (PW-14) requested the SHO, Karsog to intimate the FIR number to him, and pointed out that he is at the spot conducting further investigation.

(l) On receipt of this ruka (Ext.PW-14/A), SHO, ASI Mohan Lal (PW-8) registered the complaint, in FIR No. 129, dated 28.7.2010 (Ext. PW-3/A), in Police Station Karsog against Karam Singh (accused) for the commission of an offence under Section 20 of the NDPS Act.

(m) The Investigating Officer (PW-14) made the spot map (Ext. PW-14/B) and recorded the statements of police officials under Section 161 CrPC.

(n) The Investigating Officer (PW-14) arrested the accused at 10.30 a.m., and in compliance he also informed Budhi Singh, father of the accused, about his arrest on Phone No. 9816503037.

(o) The Investigating Officer (PW-14) proceeded towards the police station, without waiting for Constable Vinod Kumar (PW-2). However, on the way at a place known as Kelodhar, Constable Vinod Kumar met the police party. At that time, the Investigating Officer (PW-14) recorded the statement of Vinod Kumar (PW-2), and then the police party proceeded towards the police station. On reaching the police station, the Investigating Officer (PW-14) handed over the case property, along with the accused, to SHO, ASI Mohan Lal (PW-8).

(p) The special report (Ext. PW-7/A) reveals that ASI Mohan Lal resealed the cloth parcel, containing the contraband, with three seals of seal impression-C. He also embossed the impression of seal-C on a separate piece of cloth (Ext.PW-1/G) and handed over the NCB forms, specimen seals and cloth parcel containing charas to MHC Gian Chand (PW-3), with a direction to deposit the same in the Maalkhana.

(q) On receipt of the case property, MHC Gian Chand (PW-3) kept the same in the police storeroom, and he also made entries to the said effect in the maalkhana register (store register), (Ext. PW-3/B).

(r) On the next day, i.e., 29.7.2010, MHC Gian Chand (PW-3) sent the case property to the State Forensic Science Laboratory, Junga, through Constable Bhaskar Bhanu (PW-4). He also authorized Constable Bhaskar Bhanu to carry the contraband by issuing Road Certificate (Ext. PW-3/D).

(s) The SFSL Junga conducted tests from 6th to 9th August 2010. The report mentions of conducting various scientific experiments, physical tests, chemical, and chromatographic tests, indicating the presence of cannabinol, including the presence of tetrahydrocannabinol. On doing the microscopic examination, the experts noticed cystolithic hairs. On the entire study, the laboratory formed an opinion that the substance under testing was a resinous mass which is charas, and further clarified that the quantity of the resin in the said mass was 27.62%. Thus the laboratory declared the tested substance as charas.

(t) On the receipt of the SFSL report, the SHO ASI Mohan Lal (PW-8) proceeded to lodge prosecution against the accused and accordingly filed police report under Section 173 (2) CrPC.

5. The learned Special Judge took cognizance of the offence and supplied the copies of the police report to the accused in compliance with the provisions of Section 207 CrPC.

6. On 29th October 2010, the learned Special Judge proceeded to charge the accused under Section 20 of the NDPS Act, of possessing 4 kg and 850 grams of charas, to which he did not plead guilty and claimed trial.

7. During the trial, the prosecution examined the spot witnesses, namely the Investigating Officer, HC Lakshman Dass (PW-14), Constable Vinod Kumar (PW-2) and HC Tek Chand (PW-1). However, the prosecution did not examine another spot witness Const. Jitender Kumar. The State also examined the Maalkhana Incharge, MHC Gian Chand (PW-3); Constable Bhaskar Bhanu (PW-4), who had carried the contraband to SFSL, Junga; SHO/ASI Mohan Lal (PW-8), amongst others, which are formal witnesses.

8 After the completion of the prosecution evidence, in compliance with the provisions of Section 313 CrPC, the incriminating material appearing against the accused was put to him, to which he denied all the circumstances. In answer to Question No. 46, he stated that on 27.7.2010, after he had closed the hotel, a car bearing No. HP28A 0852 arrived there. Lakshman Dass, Jitender, and Jagdish were sitting in the car, and they took him away in the presence of Om Parkash. He further stated that on the next date, he informed his father on the phone. To corroborate his plea, he examined Om Prakash (DW-1). The defence also examined Devinder Verma (DW-2), the Nodal Officer of Airtel.

9 After completion of the evidence, the learned Special Judge found the accused guilty of the charged offence and sentenced him as aforesaid. The convict has come up with the present appeal, challenging his conviction and sentence.

DISCUSSION AND ANALYSIS:

10 As the Courts decide cases of circumstantial evidence by culling out the circumstances, similar claims under the NDPS Act might be best analyzed, by going step by step. So this Court is tempted to take the initiative.

STEP 1: Is the case based on prior information or is based on chance recovery-

The case of the prosecution is that the police party did not have any prior information about the accused carrying charas. On noticing the police, the said person fumbled and started returning. This unusual behavior made the Investigating officer suspicious of the said person carrying some contraband. Resultantly, the police captured him, and on his search detected the charas. Thus the present case is based on chance recovery. However, the NDPS Act does not define chance recovery. Therefore, the procedure and safeguards in cases of chance recovery, laid down by the Hon'ble Supreme Court, in its landmark holding, State of Punjab v. Balbir Singh, (1994) 3 SCC 299, shall follow.

STEP 2: Reaching the spot-

Another aspect of the case is how the investigating team reached the spot. To this effect, the learned defence counsel, during the trial, had focused his entire efforts to challenge the travel of the police party. Challenge as the whole was, how HC Tek Chand (PW-1) joined the team, doubts regarding staying of investigating team in a hotel, and non-production of the register of the said hotel. In the cases based on prior information, the prosecution might be under some obligation to prove the facts of their departure up to the spot. However, the present case is of chance recovery, as the police had no prior information about the accused carrying some contraband substance. It was the behavior of the accused on which they stumbled upon the charas. Therefore the investigating team was required to prove their presence only at that spot, where later on they captured the accused.

The case of the prosecution is that they were patrolling at a place which was about half a kilometer ahead of Kotlu on a trail. The case of the police is that they had stayed in a private hotel during the previous night, but they did not make any entry because the hotel owner was known to another police official. It is well known that the hoteliers face so many problems, on account of the behavior of the tourists, or crimes committed in hotels or thefts in the hotels. Therefore, they would undoubtedly look for an opportunity to oblige the police. It is quite possible that the hotel owner would not have charged any money from the police for their stay, thus not to be burdened with the liability of paying the taxes, he would not have made such entries. Had he made such entries, then he would have to pay taxes from his pocket. For this reason, the explanation of police officials that the hotel owner did not enter their stay in the hotel register is believable.

STEP 3: Spotting the accused-

The spot witnesses testified in one voice that when the accused saw the police, he turned back and this aroused suspicion, which led to his search and consequent seizure.

STEP 4: Efforts to associate independent witnesses-

The case set up by prosecution is that they were patrolling on a trail, which was half a kilometer ahead of Kotlu. The initial document, which mentions about the efforts of the Investigating Officer to associate independent witnesses, is the ruka (Ext. PW-14/A). Based on this ruka, an FIR (Ext. PW-3/A) was registered, which is its literal reproduction. The Investigating Officer stated that the spot is secluded and deserted, and due to this reason, there is no movement of any person. For this reason, the investigating officer could not associate any non-police witness. In the Special Report (Ext. PW-7/A) similar fact was reiterated. However, when the spot witnesses testified during the trial, then HC Tek Chand (PW-1) did not utter a single word to corroborate the statement made in the initial recovery documents wherein the reason for non-association of independent witnesses was the absence of movement of people because the area was secluded and deserted. In his cross-examination, HC Tek Chand explicitly stated that when the investigation was going on at the spot, then people were going from that place. He also mentioned that the Investigating Officer had not sent any person to call for any independent witness. Now, this is totally in contradiction with the case set up by the prosecution, wherein the stand is that because there was no movement of people on the spot, as such no independent witness was associated. The conclusion is that no effort was made by the Investigating Officer to call for an independent witness.

Another spot witness Constable Vinod Kumar (PW-2) also did not utter a word in his examination-in-chief about the absence of people on the spot and that being the reason for non-association of independent witnesses. He admitted that at place Kotlu there is a small market.

Even though at this stage, the learned Addl. Advocate General has made vehement submission before this Court, that with the relevant connectivity interse the seizure of the contraband, made through memos comprised in Ext. PW1/D being cogently established upto the stage of the production of the case property in Court (i) and thereupon he makes a further submission that the non-joining of independent witnesses in the relevant proceedings despite their evident availability is wholly insignificant, and, rather hence absolute credence is meteable, vis-à-vis, the testification(s) of the official witnesses. However, the afore contention is inapt to sway the conscience of the Court, as upon the apposite recovery memos, though the signatures of the accused, are, borne, and, are espoused by the prosecution, to be authored by the accused, however, with the accused in proceedings drawn under Section 313 CrPC, making denial of occurrence of his authentic signatures thereon, (ii) thereupon it was imperative for the prosecution, to through expert evidence, bely the afore contest made, by the accused in proceedings drawn under Section 313 CrPC, vis-à-vis, his authoring the signatures borne in the relevant parcel and, upon the relevant seizure memos, and, to also cogently prove that qua the accused, making his valid signatures upon memos and his making his authentic signatures on the sealed parcel(s).

Contrarily, the afore evidence remains un-adduced, thereupon the effect of existence of the signatures, if any, of the accused, on the seizure memos, is, redundant, and, therefrom the ensuing sequel is, yet, it was imperative upon the Investigating Officer to associate independent witnesses in the relevant proceedings, and, whereas theirs remaining

unassociated, despite, their availability, rather engendering the inference qua the Investigating Officer concerned, intending to smother the truth, vis-à-vis, the genesis of the prosecution case, and, also, a further inference is sparked, vis-à-vis, his conducting a skewed and slanted investigation in the apposite FIR.

The reasoning of Sessions Judge:

Regarding the non-association of any independent witness, in paragraphs 28 the Special Judge says that because the police party had no prior information about the contraband being recovered, therefore, it was not possible to join independent witnesses. The Special Judge also concluded that simply because independent witnesses were not joined, it will not make the case of the prosecution suspicious. Trial Court relied upon judgment of Hon'ble Supreme Court, titled, Kashmira Singh vs. State of Punjab, 1999 Cri.L.J. 2876, and judgment passed by a Division Bench of this Court, titled Chet Ram vs. State, Criminal Appeal No. 151 of 2006, decided on 25.7.2008. The findings of these judicial precedents were on different parameters.

In paragraph-33 of the impugned judgment although the Special Judge placed reliance on the decision of Ajmer Singh vs. State of Haryana, (2010) 3 SCC 746. However, the ratio of the said judgment does not give a total go bye to the effect of non-joining of the independent witnesses. The Special Judge concluded that the prosecution case could not be doubted due to the non-availability of the witnesses because it was not possible in the facts and circumstances of the situation, and because it was a case of chance recovery. The learned Special Judge did not notice the fact that the search was conducted in the morning around 7 a.m., on a trail frequented by people. The investigation had continued for four hours, and during this period, people had crossed the path. Despite numerous opportunities to associate the independent witnesses, the Investigating Officer did not associate anyone at any stage of the investigation. Another fact which was lost sight of was that no efforts were made to call witnesses from the nearby villages or the local market.

However, the appreciation of the entire evidence, in the factual scenario, points to an inference that the police intentionally did not associate any independent witness; either because nothing took place at the spot or things did not take place as was projected by the investigation team. The police captured the accused half a kilometer away from Kotlu. Constable Vinod Kumar (PW-2) says that there was a small market at Kotlu. The time was 6.15 in the morning, and in the rural areas, the shops are close to the habitats. In this case, the difficulty for the complainant is that he did not make any attempts to associate any independent witness. The only statement is that the Investigating Officer was trying to make phone calls to somebody after apprehending the accused, but due to lack of signal, he could not do so. The prosecution could not even prove the lack of signals because it has come in the evidence of SHO Amar Chand (PW-9) that there are towers of BSNL and in the statement of the Investigating Officer, he admitted that there were towers of BSNL, Air Cell, Airtel and other companies. Later on, he clarified that he had called the father of the accused, informing him of the arrest of his son. Thus he did not make phone calls to associate independent witnesses.

The case of the defence is that the Investigating Officer HC Lakshman Dass (PW-14), Jitender, and Jagdish carried the accused from his shop in a car. The defence suggested this version to the prosecution witnesses. In answer to the statement under Section 313 CrPC, the accused has explicitly stated in the following terms, "I was closing the hotel on 27.7.10. A car bearing registration No. HP-28A-0852 came. Laxman Dass, Jitender and Jagdish were sitting in that car. I was taken in that car in the presence of Om Parkash. I telephoned my father on the next date."

Dealing with this aspect, in paragraphs- 36 & 37 of the judgment, the Special Judge did not believe the version of the defence witness Om Prakash (DW-1) on the ground that he did not report the matter to the police though he was a friend of the accused.

The case of the police is that they had reached the spot in the private car of HC Lakshman Dass (PW-14), who mentioned the number of the said vehicle as HP 33B 2218. The accused examined Om Prakash as DW-1. He stated that on 27.7.2010 at 6.30 p.m. when the accused had closed his shop, then two police officials along with one Jagdish resident of Ashala came in vehicle No. HP 28 0852. He stated that Jagdish called the accused, and in his presence, the police took him away. Next day the father of the accused called him, and he narrated the entire incident to him. Reason for the father of the accused calling him is that he runs a tea stall at the same place, which is adjacent to the hotel of the accused. The Prosecutor cross-examined DW-1 Om Praksah, to which he stated that he did not inform any person that police had taken the accused. He says that the police officials who had taken the accused had two stars and one was having no star. The witness further admits that Jagdish was his classmate and he did not inquire from Jagdish that why accused was taken by the police. He also admitted that he did not report this incident to the police. The effort of the State was that had this incident taken place, and then he would have informed the police. But once the father of the accused had spoken with him (DW-1) and he apprised him to this effect, then this witness did not need to take the trouble to tell the police. The Indian Police Stations are not revered as temples, and people visit their only under compulsions.

The law is no more res Integra that statements of police officials cannot be discarded because they are police officials. However, before that is done, their testimonies must inspire confidence.

While dealing with a case under Terrorists and Disruptive Activities (Prevention) Act 1987, in Tahir v. State (Delhi), (1996) 3 SCC 338, Supreme Court observed,

> "6. …In our opinion no infirmity attaches to the testimony of police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of the evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can from basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence does not in any way affect the creditworthiness of the prosecution case."

In State of Bihar v. Basawan Singh, AIR 1958 SC 500, Constitutional Bench of Supreme Court holds,

> "10. If the witnesses are not accomplices, what then is their position? In Shiv Bahadur Singh's case it was observed, with regard to Nagindas and Pannalal, that they were partisan witnesses who were out to entrap the appellant in that case, and it was further observed: "A perusal of the evidence ……leaves in the mind the impression that they were not witnesses whose evidence could be taken at its face value." We have taken the observations quoted above from a full report of the decision, as the scrutinize report does not contain the discussion with regard to evidence. It is thus clear that the decision did not lay down any universal or inflexible rule of rejection even with regard to the evidence of

> witnesses who may be called partisan or interested witnesses. It is plain and obvious that no such rule can be laid down; for the value of the testimony of a witness depend on diverse factors, such, as the character of the witness, to what extent and in what manner he is interested, how he has fared in cross-examination etc. There is no doubt that the testimony of partisan or interested witnesses must be scrutinized with care and there may be cases, as in Shiv Bahadur Singh's case (Shiv Bahadur Singh v. State of Vindhya Prasad, 1954 SCR 1098) where the Court will as a matter of prudence look for independent corroboration. It is wrong, however to deduce from that decision any universal or inflexible rule that the evidence of the witnesses of the raiding party must be discarded, unless independent corroboration is available."

In Masalti v. The state of U.P., AIR 1965 SC 202, a four member bench of Supreme Court, holds,

> "14. There is no doubt that when a criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the Court as genuine whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

In State of Punjab v. Baldev Singh, (1999) 6 SCC 172, Constitutional bench of Supreme Court, observed,

> "14. The provisions of Sections 100 and 165 CrPC are not inconsistent with the provisions of the NDPS Act and are applicable for affecting search, seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure, comes across a person being in possession of the narcotic drug or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided there under. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. In Balbir Singh case after referring to a number of judgments, the Bench opined that failure to comply with the provisions of CrPC in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se does not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view."

In Kalpnath Rai v. State, (1997) 8 SCC 732, Supreme Court, while dealing with a case under Terrorist and Disruptive Activities (Prevention) Act, 1987, observed,

> "90. There can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of the police officer is found acceptable it would be an erroneous proposition that court must reject the prosecution version solely on the ground that no independent witness was examined…"

In State of Punjab v. Partap Singh, 2004 Drugs cases (Narcotics) 104, Supreme Court, in its order, observed,

> "2. … We also noticed the fact that the investigating agency has not associated any independent witnesses even though they were available in the nearby vicinity. On facts of this case this by itself is a good ground to reject the appeal. The appeal fails and the same is dismissed."

In Dharampal Singh v. State of Punjab, 2010(9) SCC 608, Supreme Court observed,

> "16. …It has come in the evidence of the prosecution witnesses that an attempt was made to join person from public at the time of search but none was available. In the face of it mere absence of independent witness at the time of search and seizure will not render the case of the prosecution unreliable."

In Ajmer Singh v. State of Haryana, (2010) 3 SCC 746, Supreme Court holds,

> "16. The learned Counsel for the appellant has submitted that the evidence of the official witness cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned Counsel. It is clear from the testimony of the prosecution witnesses PW-3 Paramjit Singh Ahalwat, D.S.P., Pehowa, PW-4 Raja Ram, Head Constable and PW-5 Maya Ram, which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence."

In Surjit Singh v. State of Punjab, 2011(15) SCC 187, keeping in view the fact of search and seizure in the presence of DySP, a gazetted officer, the Supreme Court holds,

> "4. …It is true that no independent witness had been involved and no attempt had been made in that direction. However, keeping in mind that the seizure had

been effected at about 5:30a.m. and was the outcome of a sudden meeting between the police party and the appellant, it was difficult to get an independent witness. In any case, we find that Sub Inspector Jaspal Singh, PW 3 SI Kirpal Singh, P.W. 7, DSP Bhulla Singh and several others had also been present at the time of the incident and all have supported the seizure that had taken place. Even assuming that SI Jaspal Singh bore some animosity the possibility of false implication has been dispelled by the presence of the other police officers particularly DSP Bhulla Singh."

In Sumit Tomar v. State of Punjab, (2013) 1 SCC 395, Supreme Court observed,

"3. …According to the prosecution, on 27.06.2004, at about 5.00 p.m., a special barricading was set up by the police party at Basantpur Bus Stand, Patiala. At that time, the police party signaled to stop a silver colour Indica Car bearing No. DL-7CC-0654 which was coming from the side of Rajpura. The driver of the said car (appellant herein), accompanied with one Vikas Kumar (since deceased), who was sitting next to him, instead of stopping the car tried to run away, but the police party immediately blocked the way and managed to stop the car. In view of the above discussion, we hold that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with."

The Supreme Court in Krishan Chand vs. State of Himachal Pradesh, (2018) 1 SCC 222, holds,

"21. From the evidence which has come on record, it is quite clear that the place, where the accused is alleged to have been apprehended, cannot be said to be an isolated one as the house of Govind Singh DW-2 is situated on the edge of Patarna Bridge. Thus the version of the complainant PW-6 that independent witnesses could not be associated as it was an isolated place does not inspire confidence. Moreover, from the evidence of Govind Singh PW-2 the case of the prosecution regarding apprehension of the accused, at Patarna bridge, while being in possession of bag containing 7 kgs of charas, becomes highly doubtful because had he been so apprehended, by the police, this fact was to come to his notice, for the reason, that his house is situated at the edge of the bridge in which he resides, along with his family."

In the light of the binding judicial precedents, the application of the law, when no efforts are made to associate independent witnesses, is summarized as follows:

The provisions of Sections 100 and 165 CrPC are consistent with the requirements of the NDPS Act and are applicable for affecting search, seizure, or arrest under the NDPS Act. (Ref: Baldev Singh).

Judicial approach has to be cautious in dealing with interested or partisan evidence but such evidence should not be rejected because it is partisan. (Ref: Masalti v. U.P.).

There is no universal or inflexible rule that the evidence of the witnesses of the raiding party must be discarded, unless independent corroboration is available. (Ref: Basawan v. Bihar).

In the absence of independent witnesses, the rule of prudence requires a more careful scrutiny of the evidence, since the police officials can be said to be interested in the result of the case projected by them. (Ref: Tahir v. Delhi).

Value of the testimony of a witness depends on diverse factors, such, as the character of the witness, to what extent and in what manner he was interested and how he fared in cross-examination etc. (Ref: Basawan v. Bihar).

In the absence of independent witnesses, the presence of gazetted officer of the police, at the time of the search, would dispel the possibility of false implication. (Ref: Surjit Singh v. Punjab).

Absence of independent witness during the police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of the police officer is found acceptable it would be an erroneous proposition that court must reject the prosecution version solely on the ground that no independent witness was examined. (Ref: Kalpnath Rai).

In case of proven evidence that an attempt was made to join person from public at the time of search but none was available, then in such a factual matrix, mere absence of independent witness at the time of search and seizure will not render the case of the prosecution unreliable. (Ref: Dharampal Singh v. State of Punjab)

Since the charge under the NDPS Act is serious and carries onerous consequences, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. (Ref: Ajmer Singh v. Haryana).

It may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence. (Ref: Ajmer Singh v. Haryana).

It is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, the conviction may base on their testimony. (Ref: Sumit Tomar v. Punjab).

On the facts of each case, if the explanation of the police officials that independent witnesses could not be associated does not inspire confidence, then, coupled with other contradictions, it would lead to the inference that the prosecution did not come up with clean hands. (Ref: Krishan Chand v. H.P.)

In Zahira Habibulla H. Sheikh v. State of Gujarat, 2004 (4) SCC 158, Supreme Court observed,

> (41). "Witnesses" as Benthem said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process...

In the present case, the Investigating Officer stated that the village Nehar was at a distance of 500 meters from village Kotlu. He admitted that people frequented this road. It came in the evidence that village Kotlu was 500 meters from the spot. It means that within a kilometer, there was not only a village but also a small market. The fact that people used the trail, where the police conducted seizure, is proved. The evidence also establishes that people had crossed that trail during the time when the investigation was going on at the spot. Even if the Investigating Officer had associated independent witness at some later stage, it would have proved the presence of the police party at the spot and the seizure at

the place. Despite having a phone, none of the police officers tried to call someone at the spot, to corroborate the presence of the accused, police, and the recovery of the contraband from the spot. In this case, there is a total failure of the Investigating Officer to make an effort to associate independent witnesses. The Investigating Officer was working under the notion that there is no requirement of law to associate any independent witness. It was morning time. Allegedly the time was 6.30 a.m., and the investigation had continued for about 4½ hours. So it means that by the time the investigation concluded it would have been 11 a.m. Therefore, despite the fact that the day had broken and the people were crossing the spot, he did not make any effort to associate an independent witness. Such conduct might lead to a possible inference that no search, seizure, and investigation took place at the spot.

STEP 5: Option under Section 50 of NDPS Act-

The police claimed that they recovered chars from the bag held by the accused in his hand. Since the police did not seize the charas from the person of the accused, as such, they were under no obligation to comply with the mandatory requirements of section 50 of the NDPS Act. Thus section 50 of the NDPS Act shall not apply and the law is no more res integra. A three member bench of the Supreme Court, in State of H.P. v. Pawan Kumar, (2005) 4 SCC 350, holds:

> "18. There is another aspect of the matter, which requires consideration. Criminal law should be absolutely certain and clear and there should be no ambiguity or confusion in its application. The same principle should apply in the case of search or seizure, which come in the domain of detection of crime. The position of such bags or articles is not static and the person carrying them often changes the manner in which they are carried. People waiting at a bus stand or railway platform sometimes keep their baggage on the ground and sometimes keep in their hand, shoulder or back. The change of position from ground to hand or shoulder will take a fraction of a second but on the argument advanced by learned Counsel for the accused that search of bag so carried would be search of a person, it will make a sharp difference in the applicability of Section 50 of the Act. After receiving information, an officer empowered under Section 42 of the Act, may proceed to search this kind of baggage of a person which may have been placed on the ground, but if at that very moment when he may be about to open it, the person lifts the bag or keeps it on his shoulder or some other place on his body, Section 50 may get attracted. The same baggage often keeps changing hands if more than one person are moving together in a group. Such transfer of baggage at the nick of time when it is about to be searched would again create practical problem. Who in such a case would be informed of the right that he is entitled in law to be searched before a Magistrate or a Gazetted Officer? This may lead to many practical difficulties. A statute should be so interpreted as to avoid unworkable or impracticable results. In Statutory Interpretation by Francis Bennion (3rd Edn.) para 313, the principle has been stated in the following manner:
>
> > "The Court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. Sometimes however, there are overriding reasons for applying such a construction, for example where it appears that Parliament really intended it or the literal meaning is too strong."

The learned author has referred to Sheffield City Council vs. Yorkshire Water Services Ltd., (1991) 1 WLR 58 at p. 71, where it was held as under:

> "Parliament is taken not to intend the carrying out of its enactments to be unworkable or impracticable, so the Court will be slow to find in favour of a construction that leads to these consequences. This follows the path taken by Judges in developing the common law. '.....the common law of England has not always developed on strictly logical lines, and where the logic leads down a path that is beset with practical difficulties the Courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society."

19. While interpreting a provision in the Finance Act, 1972, Lord Denning in S.J. Grange Ltd. vs. Customs and Excise Commissioners, (1979) 2 All ER 91, observed that if the literal construction leads to impracticable results, it would be necessary to do little adjustment so as to make the section workable.

...

26. The Constitution Bench decision in Pooran Mal vs. Director of Inspection, 1974 (1) SCC 345, was considered in State of Punjab v. Baldev Singh, 1999 (6) SCC 172, and having regard to the scheme of the Act and especially the provisions of Section 50 thereof, it was held that it was not possible to hold that the judgment in the said case can be said to have laid down that the "recovered illicit article" can be used as "proof of unlawful possession" of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used, a very strict view of Section 50 of the Act, was taken and it was held that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word "person" occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him."

Given the settled law, the investigating officer was not under any legal obligation to extend the offer, as contemplated u/s 50 of the NDPS Act, to the accused.

STEP 6: Search, seizure, weighing, sampling and sealing-

The investigating officer and other police officials, present at the spot, testified in a single tone that everything, including measuring the weight of charas, and its sealing in the cloth parcel, took place at the spot. However, none of them uttered a single word that the police team had the investigating kit with them. It is not their case that they had summoned or procured the sealing material at the spot. There is not even a whisper about the procurement or availability of this evidence. The State wants this Court to believe that since the case property was weighed and sealed, as such, the material was available. However, the issue is whether sealing, etc., took place at the spot or later on in the Police Station, and the burden to prove this fact is on the prosecution and not on the accused.

HC Lakshman Dass (PW-14), Constable Vinod Kumar (PW-2) and Constable Jitender Kumar had left the police station for detection of crime. The Superintendent of Police, District Mandi, had directed them to do so. In the daily diary register of police line Mandi, the concerned person recorded the fact of the departure of the police team. The prosecutor proved this fact by tendering in evidence the extracts of the register as Ext. PW-11/A. This departure report is silent about the fact that the team had carried the investigation kit along with them. PW-1 Tek Chand, who had joined the police team, at a later point of time, also did not state that he had carried the investigation kit.

In the absence of the earliest evidence of the police party carrying weights and scale, it would be doubtful to believe the version of the police. None of the police officials state that they had taken the investigation kit from the police station. It renders the prosecution story of having weighed and sealed the substance on the spot, to be extremely doubtful, if not false. The burden is always upon the prosecution to prove its case, and it shifts to the accused under Sections 35 and 54 of the NDPS Act only when the prosecution had discharged its initial burden.

In the absence of the Investigation kit, how could the police procure the NCB form. A bare perusal of the NCB form, Ext PW-8/A, reveals that it is a printed form with words NCB-1 'TEST MEMO' written on it. The police team did not have to keep it with them in routine unless they had explicitly carried it.

It is not the case of the prosecution that the police brought the NCB form, weighing scale, cloth parcels, seal impression of seal-T, sealing wax (laakh), thread and needles at the spot, from nearby police post or the police station.

If there is a violation of only this ground, in the absence of other contradictions, then how much weight it deserves, shall depend upon the facts of each case. The willful abstinence to associate independent witnesses in this case coupled with this lapse makes it doubtful to believe that seizure and sealing did take place at the spot or subsequently in the police station.

The counsel for the accused did not confront the police witnesses that they were not carrying any investigation kit at the spot. This was due to the reason that the case of the defence was that nothing took place at the spot. Even otherwise, the absence of cross examination would not mean that the prosecution is discharged of its initial burden to prove its case beyond reasonable doubt.

It is well settled by the Constitution Bench of the Supreme Court in Amba Lal vs. Union of India & others, AIR 1961 SC 264 wherein the Supreme Court considered the application of the Sea Customs Act and the Land Customs Act viz-a-viz Section 106 of Indian Evidence Act by holding as under:

> 8. ...Section 106 of the Evidence Act in terms does not apply to a proceeding under the said Acts. But it may be assumed that the principle underlying the said section is of universal application. Under that section when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. This Court in Shambhu Nath Mehra v. State of Ajmer, 1956 SCR 199 (AIR 1956 SC 404) considering the earlier Privy Council decisions on the interpretation of S. 106 of the Evidence Act, observed at p. 204 (of SCR) thus :

> "The section cannot be used to undermine the well-established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."
>
> If S. 106 of the Evidence Act is applied, then, by analogy, the fundamental principles of criminal jurisprudence must equally be invoked."... ...

In Bansidhar Mohanty v. State of Orissa, AIR 1955 SC 585, a four member bench of Supreme Court holds,

> 5. ...We do not think it is any part of the duty of the defence advocate to fill up the lacunae in the evidence adduced by the prosecution.

STEP 7: Handing over of the seal to some independent witness-

The search memo (Ext. PW-1/D) mentions that the Investigating Officer, HC-Lakshman Dass (PW-14) handed over the seal after its use to HC Tek Chand (PW-1). The Special Report (Ext. PW-7/A) also corroborates this fact. During the trial, HC Tek Chand (PW-1) states that he had received the seal. HC Tek Chand produced the seal which was a 'metal cube' having impressions B, C, O, D, V, and F embossed on its six sides. The defence did not rebut the comparison of this seal with the seal impression over the parcel. Therefore, the link evidence to the effect that PW-1 Tek Chand had taken possession of the seal, after its use, is proved.

STEP 8: Handing over the further investigation to some other investigating officer-

This rule of caution is applicable only in the cases of chance recovery and in those cases of prior information where the complainants themselves conducted the initial search. So, it would have applied provided the search was conducted after the pronouncement of judgment of a three member bench of Supreme Court in Mohan Lal v. State of Punjab, 2018(4) R.C.R.(Criminal) 101. Subsequently, in Varinder Kumar v. State of H.P., AIR 2018 SC 3853, another three-member bench of Supreme Court, clarified that the law laid down in Mohan Lal, shall apply prospectively. The investigation in the present case is prior to 16 Aug 2018, the date of the decision of Mohan Lal, thus it does not apply in this case.

STEP 9: Production of accused and the case property before SHO, resealing or drawing of samples by SHO, u/s 55 of NDPS Act and handing over of the case property to the police official, in charge of police malkhana/store, for keeping it in a safe and getting substance tested from laboratory-

On 28.7.2010 ASI Mohan Lal (PW-8) was officiating as the SHO of Police Station Karsog. He testified that HC Lakshman Dass (PW-14) had handed over to him the case property and the accused. He resealed the case property with own seal and after resealing, handed over it to MHC Gian Chand (PW-3) for depositing the same in the Maalkhana. HC Gian Chand, MHC Police Station Karsog, corroborates this fact, in his testimony, by admitting the receipt of the case property, which had been resealed by SHO Mohan Lal (PW-8). He further testified that he had kept the case property in the police store (maalkhana), and entered the fact of depositing, in the Maalkhana register at Sr. No. 403 (Ext. PW-3/B). Thus, all these facts stand proved, and such evidence is unrebutted.

STEP 10: Special Report u/s 57 of NDPS Act-

The Investigating Officer, HC Lakshman Dass (PW-14) testified that he had handed over the case property to the SHO, ASI Mohan Lal (PW-8), who was the officiating SHO of the police station on 28.7.2010. He testified that on 2.9.2010 after the completion of the investigation, he had handed over the case file to the regular SHO, Amar Chand Sharma (PW-9) of the concerned police station, who corroborated this fact.

HC Ram Lal (PW-7) who was posted in the office of Sub Divisional Police Officer Sundernagar as his reader, stated that Sh. Raj Kumar Chandel, who was the SDPO at the relevant time, had handed him over the Special Report (Ext. PW-7/A) on 29.7.2008 at 12.40 p.m. He further testified that he had entered the receipt of such Special Report at Sr. No. 115 of the concerned register (Ext. PW-7/B). The prosecution did not examine Sh. Raj Kumar Chandel, SDPO; however, they tendered his statement by way of an affidavit, Ext.PW-6/A. From the bare perusal of the Special Report (Ext. PW-7/A), it appears that the same bear the signatures of ASI Mohan Lal. However, when ASI Mohan Lal entered into the witness box as PW-8, the prosecution did not prove this report through him. He is silent in his examination-in-chief as well as cross-examination about the special report. Therefore, the prosecution has failed to prove the Special Report (Ext. PW-7/A) as per Indian Evidence Act, 1872, hence, this fact is not tested, and this Court cannot place any reliance on it. However, the provisions of Section 57 of the NDPS Act are directory and not mandatory. Even otherwise it appears to be an unintentional omission by the Public Prosecutor, and it would have no bearing on the merits of the case.

In Varinder Kumar v. State of Himachal Pradesh, 2019 (1) RCR (Criminal) 1003, a three member bench of Supreme Court observed,

> 7. …Sections 52 and 57 of NDPS Act being directory in nature is of no avail to the appellant.

STEP 11: Production of seized stuff, in Court, during trial-

During the trial, the first witness who appeared in the Court was the spot witness HC Tek Chand (PW-1), and he also tendered in the evidence the case property as substantive evidence.

STEP 12: Link evidence-

After the seizure of the contraband, the Investigating Officer HC Lakshman Dass (PW-14) had placed the same in a cloth parcel. The first most document, made regarding the placing of charas in the cloth parcel, was the search memo (Ext. PW-1/D), in which the Investigating Officer mentions that only the fact of placing the charas along with the polythene packet in a cloth parcel. Similar averments were made in the FIR (Ext. PW-3/A), Special Report (Ext.PW-7/A), and ruka (Ext.PW-14/A). HC Tek Chand (PW-1) stated on oath that the Investigating Officer HC Laxman Dass (PW-14) placed back the charas in the same polythene bag and sealed in a parcel of cloth and seals were affixed thereupon.

The next spot witness, the prosecution examined, was Constable Vinod Kumar (PW-2) who corroborated the version of HC Tek Chand (PW-1). The parcel was shown to the witness, and it was noticed that the said parcel was stitched from one side.

Now on comparison of this fact of stitching of the package, with the initial seizure documents, it is nowhere mentioned in the search memo (Ext. PW-1/D), FIR (Ext. PW-3/A), special report (Ext. PW-7/A) and ruka (Ext.PW-14/A) that the police had stitched the parcel at the spot. The initial version is definite that the charas, along with polythene packet, was placed back in the cloth parcel. Now, this is a material contradiction in comparison to the factual situation recorded in the above documents. When this witness was confronted with the stitching portion, his simple statement is that it was stitched at the spot. However, there is no corroboration to the newly improved fact of stitching at the spot. Neither earlier documents state so nor do the PW-1 HC Tek Chand, who had testified before the recording of statement of PW-2.

The Investigating Officer, HC Laxman Dass stepped into the witness box as PW-14. In his examination-in-chief, he stated that “This polythene bag was wrapped in a piece of cloth. The parcel was sealed with six impressions of seal D”. Now the Investigating Officer is silent about the stitching part. Why this material contradiction has come is apparent from the fact that stitching would need a needle and thread, and it would also lead to the conclusion that nothing was done at the spot. At this stage, a doubt would arise in the mind of the reader that the SHO of the Police Station may have stitched this parcel during the process of resealing. Now ASI Mohan Lal (PW-8) was officiating as the SHO at that particular point of time. He stated on oath that the Investigating Officer HC Laxman Dass had brought before him one parcel sealed with six impressions of seal-D. He further says that he resealed the parcel with three impressions of seal-C in the presence of HC Tek Chand, MHC Gian Chand, and the Investigating Officer ASI Lakshman Dass. He did not say that he had stitched the parcel.

The FSL report did not narrate that the laboratory, while returning the parcel, had stitched one side of the parcel. Resultantly, the prosecution failed to prove the link evidence. Thus the link in evidence is not complete that right from the stage of sealing until its reopening by the laboratory, the sealed parcel remained intact and untampered.

Regarding the link evidence, the Special Judge observed in paragraphs 49 to 53 of the judgment by placing reliance on various precedents in law. There is no dispute with the law on which the Special Judge had placed reliance, but he did not discuss that how the cloth parcel was found to have been stitched, when it was produced before the trial Court, although initially there was no averment regarding its stitching nor did the police prove possessing of any needle or thread at the time of recovery. Hence, prosecution did not prove that the bag allegedly containing charas was untampered from its seizure to its production in the Court.

In Noor Aga v. State of Punjab another,(2008) 16 SCC 417, Supreme Court observed as under:

> 91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

11. The presumption under section 35 and 54 of NDPS Act would come into play only when the prosecution discharges the initial burden upon him, by proving its case beyond reasonable doubts. In the present case, the prosecution could not cross this hurdle.

In Abdul Rashid Ibrahim Mansuri v. State of Gujarat, a three member bench of Supreme Court, 2000(2) SCC 513, holds,

> “21. No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto-rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in sub- section (2) as "beyond a reasonable doubt". If the Court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he

had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the Court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. Even so, it is for the accused to dispel any doubt in that regard.

22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

12. Learned Special Judge, pronounced the judgment of conviction on the following points:

a) While repelling the contention of the learned defence counsel that by improvement of version of HC Tek Chand (PW-1) regarding chasing of the accused by the police officials, the trial Court relied upon the judgment of the Supreme Court in Tehsildar Singh vs. State of UP, AIR 1959 SC 1012 and came to the conclusion that the suggestion which was put by the defence counsel was inadmissible, and the accused could not derive any advantage due to the defective cross-examination. The Special Judge further held that even otherwise the contradiction was minor and it would not discredit the witness coupled with the fact that the defence counsel did not cross-examine the Investigating Officer on this aspect. This reason given by the Special Judge in paragraphs 14 to 20 of the impugned judgment appears to be by law.

b) The second point was relating to the contention of the defence counsel that there was no notification regarding the constitution of the Special Investigating Unit; therefore, police had no jurisdiction to visit the spot and conduct the investigation. The Special Judge has returned his findings on this point in paragraph 22 of his judgment. He relied upon the decision of the Supreme Court reported in State of M.P. vs. R.C. Sharma, (2005) 12 SCC 628. In paragraph 23, the Special Judge concluded that even if there were some illegality in the investigation, it would not affect the trial. This Court is of the concerned opinion that the findings as to whether there was any illegality in the investigation are not required to be answered in the present case because it would not cast any specific bearing in the outcome of the case.

c) In paragraphs- 39 to 44 of the judgment the Special Judge discussed non-application of Section 42 of the NDPS Act although even in the preceding paragraphs the Special Judge had concluded that it was a case of chance recovery. Hence he has rightly observed that Section 42 would not come into operation.

13. After careful appreciation of the entire evidence, application of law and judicial precedents, the findings returned by the trial Court, convicting the accused, are not

based on the correct and complete appreciation of testimonies of prosecution witnesses. It does not lead to an irresistible conclusion of the guilt of the accused, beyond reasonable doubts.

14. One question which will always come to the mind of the Court is that such a considerable quantity would not be planted unless there is animosity against the accused. In answer to the statement under Section 313 CrPC, accused did not level any such allegations against any of the police officials. Therefore, it cannot be said that the police had falsely planted this kind of charas on the accused. But then it does not mean that the prosecution need not prove its case simply because such type of assumption would always be there in the mind of the Court. The quantity involved in this case is commercial quantity, which will provide a minimum ten years of imprisonment, without any remission. Law is settled that graver the punishment, the stricter is the proof and higher the obligation upon the prosecution to prove the charges. Supreme Court in State of Himachal Pradesh v. Trilok Chand & Anr, (2018) 2 SCC 352, holds,

> "13. ...It is imperative that the law the Court should follow for awarding conviction under the provisions of N.D.P.S. Act is "stringent the punishment stricter the proof." In such cases, the prosecution evidence has to be examined very zealously so as to exclude every chance of false implication...."

In Noor Aga v. State of Punjab, 2008(16) SCC 417, Supreme Court observed,

> "16. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs. 2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., 'proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of 'wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused."

15. Therefore, appreciation of the evidence and application of law cited hereinabove, take this Court to only one conclusion that the possibility of the investigating team not revealing the true and correct facts cannot be ruled out. After careful scrutiny, the evidence of the police officials, does not inspires confidence, being neither trustworthy nor reliable, and it cannot from basis of conviction. The prosecution has miserably failed to prove its case beyond reasonable doubts.

16. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 10th June 2011 passed by Special Judge, Mandi, Himachal Pradesh, in Sessions Trial No. 55 of 2010, titled as State of Himachal Pradesh vs. Karam

Singh, is set aside and the accused is acquitted of the charged offence. The fine amount, if deposited, be refunded to the accused. Bail bonds 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 TARLOK SINGH CHAUHAN, J.

Kuldeep Singal …Appellant/Plaintiff.
Versus
Rakesh Kumar and others …Respondents/Defendants.

R.S.A. No. 688 of 2008
Date of decision: 02.08.2019

Himachal Pradesh Tenancy and Land Reforms Act 1972 (Act) –Section 118 – Bar of transfer of land to non-agriculturist – Will –Whether bequeath is also hit by Section 118 of Act – Held, by virtue of explanation added to Section 118 of Act, Will is deemed to be a transfer of property which Will take effect on demise of testator – Therefore, no Will of land can be executed in favour of non-agriculturalist of Himachal Pradesh – 'C' executed Will in favour of non-agriculturalist in 1994 – 'C' died in 2004 – Explanation to Section 118 of Act was added in 1997 – As such, Will in favour of non-agriculturalist is not valid. (Paras 11 & 12)
Code of Civil Procedure, 1908– Order XII Rule 6– Judgment on admission – Held, no decree contrary to law can be passed merely on ground of admission of claim of plaintiff by defendant. (Para 14)
Indian Evidence Act, 1872– Section 18– Admission- Evidentiary value– Held, court has discretion to accept or not to accept admission made by defendant in written statement. (Para 14)

Cases referred:
Som Kirti alias Som K. Nath vs. State of H.P. Latest HLJ 2013 (HP) 1223
Sudha Devi vs. M.P. Narayanan and others AIR 1988 SC 1381

For the Appellant: Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisht, Advocate.
For the Respondents: Mr. Vikram Thakur, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The plaintiff is the appellant, who after having lost before both the learned Courts below, has filed the instant second appeal.

The parties shall be referred to as the 'plaintiff' and the 'defendants'.

2. The plaintiff filed a suit for declaration that by virtue of Will dated 25.10.1994 executed by Chetu in his favour, he had become owner of the land comprised in Khasra Nos. 69, 69 and 72 measuring 5 bighas situated in Tikkeri to the extent of 18 biswas

and the Will was presented before the Revenue Officer, who on 6.1.2005 illegally rejected the mutation. It was further averred that the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 (for short 'Act') were not applicable in his case and as such, the order passed by the Revenue Officer is ineffective and not binding on the plaintiff.

3. The respondents contested the claim by filing written statement. However, after filing of the same, they did not turn up and were thus proceeded ex parte before the trial Court.

4. The plaintiff led ex parte evidence wherein apart from oral submissions, he has also produced on record certain documents.

5. The learned trial Court after taking into consideration the pleadings and evidence so led by the plaintiff dismissed the suit by concluding that the claim set-up by the plaintiff was barred under Section 118 of the Act, constraining the plaintiff to file an appeal before the learned lower Appellate Court, but the same was also dismissed vide judgment and decree dated 1.9.2008.

6. Undeterred, the plaintiff has filed the instant appeal before this Court and the same was admitted on 6.7.2009 on the following substantial questions of law:

> *"1. Whether the Courts below were justified in dismissing the suit of the plaintiff/appellant when the defendants had themselves admitted the claim of the appellant?*
>
> *2. Whether the provisions of Section 118 as amended in May, 1997 of the H.P. Tenancy and Land Reforms Act, 1987 were applicable or attracted at all to the facts and circumstances of the case?*
>
> *3. Whether the State Legislature can enact a law which is repugnant to the Central Acts and if so, its effect on the facts of the present case?*
>
> *4. Whether in view of the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 vis a vis the provisions of Succession Act, 1925 and the Hindu Succession Act, 1956 and Articles 14 and 21 of the Constitution of India can a person be prevented from making a Will with respect to his property?*
>
> *5. In case the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 are found to be repugnant and contrary to the provisions of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 and Articles 14 and 21 of the Constitution of India then what is the effect of same to the facts of this case."*

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

8. Since all the substantial questions of law are intrinsically interlinked and interconnected, therefore, they were taken up together for consideration and are being disposed of by a common reasoning.

9. It is not in dispute that the sole basis on which the plaintiff has based his suit is the Will executed in his favour on 25.10.1994. Without going into the question as to whether the Will has been proved or not and accepting the same as it is for the time being, the question will arise as to whether the plaintiff can claim right to the property contrary to the provisions of Section 118 of the Act as admittedly the plaintiff is not an 'agriculturist'. The reason being that no doubt the Will is stated to have been executed on 25.10.1994, but

the fact of the matter is that Chetu admittedly died on 14.9.2004 and therefore, the Will came into operation only after the death of Chetu i.e. on 14.9.2004.

10. The difference between a transfer and a Will are well-recognised. A transfer is a conveyance of an existing property by one living person to another (that is transfer inter vivos). On the other hand, a Will does not involve any transfer, nor effect any transfer inter vivos, but is a legal expression of the wishes and intention of a person in regard to his properties which he desires to be carried into effect after his death. In other words, a Will regulates succession and provides for succession as declared by it (testamentary succession) instead of succession as per personal law (non-testamentary succession). The concept of transfer by a living person is wholly alien to a Will. When a person makes a Will, he provides for testamentary succession and does not transfer any property. While a transfer is irrevocable and comes into effect either immediately or on the happening of a specified contingency, a Will is revocable and comes into operation only after the death of the testator. Thus to treat a devise under a Will as a transfer of an existing property in future, is contrary to all known principles relating to transfer of property and testamentary succession.

11. By the time Chetu died, the law had undergone a change and the relevant provisions at that time were as under:

> ***"118. Transfer of land to non-agriculturists barred.-*** *(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, no transfer of land (including transfer by a decree of a civil court or for recovery of arrears of land revenue) by way of sale, gift, will, exchange, lease, mortgage with possession, creation of a tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist.*
>
> ***Explanation****: For the purpose of this sub section the expression "Transfer of Land" shall not include -*
>
> *(i) transfer by way of inheritance;*
>
> *(ii) transfer by way of gift or will executed, in favour of any or all legal heirs of the donor or the testator, as the case may be;*
>
> *(iii) transfer by way of lease of land or building in a municipal area; but shall include-*
>
> *(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist; and*
>
> *(b) an authorisation made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as it he is a real owner of that land]"*
>
> *The amendment in the principal Act was carried through H.P. Tenancy and Land Reforms (Amendment) Act, 1994 and explanation was added by H.P. Tenancy and Land Reforms (Amendment) Act, 1997. When Will came into operation, both these amendments were operative and valid. Therefore, it cannot be said that the Revenue Officer had acted illegally or without jurisdiction. The learned trial Court was right in observing that the plaintiff was not an agriculturist and as such not entitled to the declaration. It was also not the case of the plaintiff that he is a legal heir of the testator."*

12. At this stage, it needs to be noticed that vires of the H.P. Tenancy and Land Reforms Act was assailed before this Court in ***Som Kirti alias Som K. Nath vs. State of H.P. Latest HLJ 2013 (HP) 1223*** and one of the questions raised in that petition was regarding the prohibition of Transfer of Property by way of a Will and the said contention was negated by this Court by observing as under:

> *"**69**. It has also been argued on behalf of the petitioners that Section 118 is repugnant to Section 59 of the Indian Succession Act, 1925. The Section 59 provides every person of sound mind not being a minor may dispose of his property by Will. The Section 59 provides competency of a person to dispose of his property by Will, but the said Section nowhere provides in whose favour the Will can be executed. The Will is included in entry 5 List-III which is not referable to transfer of land. The Section 118 prohibits transfer by way of Will in favour of a person who is not an agriculturist. The Section 59 of the Indian Succession Act,1925 refers to 'dispose of property' as against 'transfer' ordinarily understood under the Transfer of Property Act, 1882. In **Mahaboob Sirfraz Vanth Sri Rajah Parthasarathy Appa Rao Zamindar of Bhadrachalam** vs. **Sri Raja Venkatadri Appa Rao and others AIR1922 Madras, 457 (FB)**, it has been held that the Transfer of Property Act applies only to alienations inter vivos and has no application to disposal of property by Will. In **Raja Surendra Vikram Singh** vs. **Rani Munia Kunwar and another AIR 1944 Oudh 65**, it has been held that Transfer of Property Act does not relate to wills, and 'transfer' is defined in the Oudh Estates Act as an alienation inter vivos. A will on the other hand is not in form a transfer, but means "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". Thus, the disposal of immoveable property by Will would not amount to transfer as the property does not pass on to the beneficiary at the time the will is executed. It is merely an intention expressed by the testator with regard to his property that after his death it should devolve on the beneficiary.*
>
> ***70**. The learned counsel for the petitioners has submitted that the Act was repugnant to the Urban Land (Ceiling and Regulation) Act,1976 (for short Ceiling Act) till the Ceiling Act remained on the statute book. He has fairly stated that Ceiling Act has been repealed by the Urban Land (Ceiling and Regulation) Repealing Act, 1999 w.e.f. 22.3.1999 but submitted that during the continuation of the Ceiling Act, the amendments carried out in the Act could not be carried out by the State Legislature in view of over-riding effect of the Ceiling Act on the subject matter covered by various amendments. He has relied preamble, definitions of 'land pertinent', 'to hold', 'urban land' and 'vacant land' defined in Section 2 of the Ceiling Act. He has also relied Section 4 (11) and Section 6 (1) of the Ceiling Act. The ceiling limit was provided in Section 4 whereas Section 6 had provided persons holding vacant land in excess of ceiling limit to file statement. On behalf of the State, Schedule-I of the Ceiling Act has been referred and it has been submitted that it is clear from the preamble of the Ceiling Act that Act provided for imposition of ceiling on vacant land in urban agglomerations which was defined in Section 2 (n). The ceiling limit of vacant land in urban agglomerations falling in categories (A), (B), (C), (D) specified in Schedule-I of the Act was provided in Section 4. The perusal of Schedule-I to Ceiling Act would show that the State of Himachal Pradesh was not included in Schedule-I. In other words practically Ceiling Act was not applicable in State of Himachal Pradesh. In any case now the Ceiling Act has*

been repealed w.e.f. 22.3.1999. In these circumstances, there is no question of repugnancy of the Act with Ceiling Act during the period the Ceiling Act was in force. The Act is not repugnant to aforesaid Acts. The petitioners have not dialated how the Act is repugnant to Indian Stamp Act, 1899 and Indian Registration Act, 1908.

71. *The connected question is whether authorization made by owner of land by way of will, agreement to sell, special power of attorney, general power of attorney and benami transaction with intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of the land amounts to transfer of land. The expression 'transfer of land' has not been defined in the Act but it has been dealt with and explained in Section 118 as follows:*

> ***"118. Transfer of land to non-agriculturists barred.-*** *(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, no transfer of land (including transfer by a decree of a civil court or for recovery of arrears of land revenue) by way of sale, gift, will, exchange, lease, mortgage with possession, creation of a tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist.*
>
> ***Explanation****: For the purpose of this sub section the expression "Transfer of Land" shall not include -*
>
> *(i) transfer by way of inheritance;*
>
> *(ii) transfer by way of gift or will executed, in favour of any or all legal heirs of the donor or the testator, as the case may be;*
>
> *(iii) transfer by way of lease of land or building in a municipal area; but shall include-*
>
> > *(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist; and*
> >
> > *(b) an authorisation made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as it he is a real owner of that land]"*

72. *In* ***Suraj Lamp and Industries Private Limited (2) through Director*** *vs.* ***State of Haryana and another (2012) 1 SCC 656****, it has been held as SA/GPA/will transaction do not convey any title nor create any interest in an immovable property. SA/GPA/will transactions are not "transfers" or "sales" and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreements of sale. However, in the same judgment, the Supreme Court has also observed:*

> *"2. The modus operandi in such SA/GPA/ will transactions is for the vendor or person claiming to be the owner to receive the agreed consideration, deliver possession of the property to the purchaser and execute the following documents or variations thereof:*
>
> *(a) An agreement of sale by the vendor in favour of the purchaser confirming the terms of sale, delivery of possession and payment of*

full consideration and undertaking to execute any document as and when required in future or An agreement of sale agreeing to sell the property, with a separate affidavit confirming receipt of full price and delivery of possession and undertaking to execute the sale deed whenever required.

(b) An irrevocable general power of attorney by the vendor in favour of the purchaser or his nominee authorizing him to mange,deal with and dispose of the property without reference to the vendor. Or A general power of attorney by the vendor in favour of the purchaser or his nominee authorizing the attorney holder to sell or transfer the property and a special power of attorney to manage the property.

(c) A will bequeathing the property to the purchaser (as a safeguard against the consequences of death of the vendor before transfer is effected).

3. These transactions are not to be confused or equated with genuine transactions where the owner of a property grants a power of attorney in favour of a family member or friend to manage or sell his property, as he is not able to manage the property or execute the sale, personally. These are transactions, where a purchaser pays the full price, but instead of getting a deed of conveyance gets an SA/GPA/will as a mode of transfer, either at the instance of the vendor or at his own instance."

73. *The Supreme Court as a general proposition of law has held that SA/GPA/will are not 'transfers' or 'sales' and cannot be treated as completed transfers or conveyances. In **Suraj Lamp** (supra), the Supreme Court was not dealing with a provision like Section 118 of the Act. It is common knowledge that sometimes transactions are entered to meet the loop-holes in law with a purpose to defeat the law and to avoid registration charges. The Legislative intention in enacting Section 118 is explicit to check all possible transactions to circumvent the law on the subject. The nomenclature of the document is immaterial, what is material is facts and circumstances which led to execution of sale and benami transaction in favour of a person with the intention to put a non-agriculturist in possession as if he is the real owner. The veil is to be pierced to find out real transaction behind sale agreement/general power of attorney, will and benami transaction. The 'transfer' or 'transfer of land' in Section 118 of the Act is to be understood in that context and not as provided in the Transfer of Property Act or any other similar enactment. In b (supra) also the Supreme Court has noticed modus operandi for executing sale agreement/general power of attorney and will is to receive the agreed consideration, deliver possession of the property to the purchaser and then to execute the documents like agreement to sell, irrevocable general power of attorney, general power of attorney, will, affidavit etc.*

74. *The Supreme Court in **Pandey Oraon** vs. **Ram Chander Sahu and others 1992 Supp. (2) SCC 77**, has noticed Section 71-A of Chotanagpur Tenancy Act which provides as under:*

"If at any time it comes to notice of the Deputy Commissioner that transfer of land belonging to a raiyat who is a member of the Scheduled Tribes has taken place in contravention of Section 46 or any other provision of this Act or by any fraudulent method (including decrees obtained in suit by fraud or collusion) he may, after giving reasonable

opportunity to the transferee who is proposed to be evicted, to show cause and after making necessary enquiry in the matter, evict the transferee from such land without payment of compensation...”

The Supreme Court held as follows:

“5. ‘Transfer’ has not been defined in the Act. The term has a definition in Section 5 of the Transfer of Property Act which states:

“5. ‘Transfer of Property’ means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons and ’to transfer property’ is to perform such act.”

6. In Section 71-A in the absence of a definition of transfer and considering the situation in which exercise of jurisdiction is contemplated, it would not be proper to confine the meaning of transfer to transfer under the Transfer of Property Act or a situation where transfer has a statutory definition. What exactly is contemplated in the provision is where possession has passed from one to another and as a physical fact the member of the Scheduled Tribe who is entitled to hold possession has lost it and a non-member has come into possession would be covered by transfer and a situation of that type would be amenable to exercise of jurisdiction within the ambit of Section 71-A of the Act.

*7. The provision is beneficial and the legislative intention is to extend protection to a class of citizens who are not in a position to keep their property to themselves in the absence of protection. Therefore, when the legislature is extending special protection to the named category, the court has to give a liberal construction to the protective mechanism which would work out the protection and enable the sphere of protection to be effective than limit by (sic) the scope. In fact, that exactly is what has been said by a three Judge bench of this Court in almost a similar situation in **Manchegowda v. State of Karnataka (1984) 3 SCR 502** and what was said by a three Judge bench followed by a later decision of this Court in **Lingappa Pochanna Appelwar v. State of Maharashtra (1985) 2 SCR 224**. To the same effect is the observation of this Court in **Gamini Krishnayya v. Guraza Seshachalam AIR 1965 SC 639. The House of Lords in D (a minor) v. Bershire County Council (1987) 1 All ER 20 (HL)** said that broad and liberal construction should be given to give full effect to the legislative purpose. We would, therefore, in the facts and circumstances appearing in this case, hold that the authorities under the Act were justified in extending the provision of Section 71-A of the Chotanagpur Tenancy Act to the situation which emerged and the High Court took a wrong view in limiting the concept of transfer to the statutory definition in the T.P.Act and holding that Section 71-A was not applicable in a case of this type. On this basis, it must follow that the action of the statutory authority was justified and the conclusion of the Full Bench must not be sustained. We accordingly allow the appeal and reverse the decision of the High Court.”*

***75**. In **Lala Devi Dass** vs. **Panna Lal AIR 1959 Jammu and Kashmir 62 (FB),** it was noticed that ‘land’ is not specifically defined in the Land Alienation Act, but a definition of ‘permanent alienation’ is given in sub section (3) of*

Section 2 of the Act which includes sale, gift, bequest grant of occupancy rights and exchange other than an exchange made for the purpose of consolidation of holdings. It was held that a bequest is specifically included in 'permanent alienation' which is synonymous to the term 'transfer' so the permanent alienation of land as defined in the Land Alienation Act by bequest is prohibited under the provisions of the Land Alienation Act. As noticed above, the expression 'transfer of land' has not been defined in the Act, but it has been used and explained in Section 118 of the Act. In this situation, the ratio of ***Pandey Oraon*** *(supra) is fully applicable where in absence of definition of 'transfer' keeping in view the legislative intention the Supreme Court has not confined the meaning of transfer to 'transfer' under the Transfer of Property Act. The 'transfer of transfer to 'transfer' under the Transfer of Property Act. The 'transfer of land' in Section 118 is to be interpreted in consonance with legislative intent while considering an agreement to sell, general power of attorney, will, benami transaction executed with the intention to put a non-agriculturist in possession as real owner of the land transferred. Therefore, the contention that agreement to sell, general power of attorney, will, benami transaction do not amount to transfer of land and restriction imposed for such transactions under Section 118 of the Act is beyond the legislative competence of the State Legislature, has no force and is rejected."*

13. For completion of record, it needs to be observed that the aforesaid judgment was assailed by the petitioners therein before the Hon'ble Supreme Court by way of Special Leave to Appeal (C) Nos. 9559-9561/2014, titled Som Kirti @ Som K. Nath etc. and others vs. State of Himachal Pradesh and others and the same was dismissed on merits vide order dated 30.6.2014.

14. As regards the admission of the claim, no decree contrary to law could have been passed by the learned Court below. Moreover, the Court below had the discretion not to accept the admission made by the defendants in the written statement. The plaintiff was under obligation to have led cogent, convincing and reliable evidence in support of his case. As such, the proof is not dispensed with it even in ex parte proceedings. In addition thereto, the plaintiff had only submitted in examination-in-chief an affidavit, but had not appeared in the witness box to testify about its correctness and mere tendering of affidavit is of no effect.

15. Even otherwise Sections 1 and 3 of the Evidence Act when read with together, make it clear that affidavit is not regarded as evidence under the Act, but can be used as evidence only if for sufficient reason the court passed an order under Order XIX Rule 1 and 2 of the CPC. Affidavits, though, are not included in Section 3 of the Act, same can be used as evidence, if law specifically permits certain matters to be proved by affidavit. Mere swearing of affidavit does not make statement contained therein a piece of evidence. Swearing is only a guarantee of the authenticity of the affidavits but not of its contents. (See: ***Smt. Sudha Devi vs. M.P. Narayanan and others AIR 1988 SC 1381***).

Accordingly, all the substantial questions of law are answered against the appellant/plaintiff.

16. In view of the aforesaid discussion and for the reasons stated above, I find no merit in this appeal and consequently, the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

****

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

Nand Lal & others …Petitioners.
Versus
Bhakra Beas Management Board & others …Respondents.

CWP No. 2526 of 2009-E
Date of Decision: August 6, 2019

Constitution of India, 1950– Article 14– Nomination for doing higher course i.e. Sub-Fire Officers' Course– Guidelines for such nomination based on principle of merit cum seniority– Challenge thereto– Petitioner contending that earlier, nominations used to be made on basis of seniority alone and even the college imparting training had been asking the department to send officers for training on basis of seniority– And formulation of guidelines by the department which ignores seniority and lays merit cum seniority principle for nominations, is arbitrary– Held, mere communication of imparting institute to nominate officers for training course on basis of seniority does not create any right in favour of petitioner to insist to adhere to same practice nor debars Sponsoring Board from framing guidelines in that regard– Course demands young and physically fit officials to be promoted to post of Sub-Fire Officers– Guidelines further providing that candidates have to undergo physical fitness cum trade proficiency test– Weightage given to physical fitness standards– Guidelines not denying chances of promotion to persons not undergoing said training course– Guidelines not arbitrary or unconstitutional- Petition dismissed. (Paras 18, 21 & 23)

Case referred:
Maharashtra Public Service Commission Through its Secretary vs. Sandeep Shriram Warade and others, (2019) 6 SCC 362

For the Petitioners:	M/s Subhash Sharma, Surinder Verma, Arun Kumar and Ashok K. Tyagi, Advocates.
For the Respondent:	Mr. Naresh K. Sood, Senior Advocate with Mr.Aman Sood, Advocate, for respondents No.1 and 2. Mr.Vir Bahadur Verma, Central Government Counsel, for respondent No.3. Mr.Anup Rattan, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

<u>Vivek Singh Thakur, J.</u>

Petitioners herein are Firemen/Leading Firemen, who have joined respondent No.1 Bhakra Beas Management Board (hereinafter referred to as 'Respondent-Board' in short) during 1989-1994 on different dates. Respondent-Board used to nominate its employees serving as Firemen/Leading Firemen for doing Sub Fire Officer's Course from respondent No.3 National Fire Service College, Nagpur (hereinafter referred to as 'Respondent No.3-College' in short)

2. It is the case of petitioners that prior to issuance of guidelines (Annexure P-9) for sponsoring Firemen/Leading Firemen for Sub Fire Officer's Course based upon merit-

cum-seniority principle, Respondent-Board had been adopting the criteria of seniority alone for nominating candidates/employees for above referred course. The petitioners have assailed these guidelines (Annexure P-9) on the ground that these are arbitrary as the same are substituting the long lasting principle of seniority by merit-cum-seniority for sending the eligible employees for the above referred course to Respondent No.3-College, which is not mandated by Respondent No.3-College, rather requirement of Respondent No.3-College is that concerned candidate has to produce an undertaking from the sponsoring authority that his nomination has been done strictly in accordance with the seniority and therefore, persisting by Respondent-Board to adhere to the impugned guidelines is arbitrary and also that impugned guidelines are contrary to the requirement of Respondent No.3-College, whereas, it is prerogative of the said College to determine the candidates to whom training is to be imparted in the above said course and as communication Annexure P-5 and application form Annexure P-13, clearly reflecting that the sponsored candidates have to be sent purely on seniority basis therefore it is not permissible to the Respondent-Board to frame the impugned guidelines.

3. It is further case of petitioner that Respondent-Board is favouring respondent No.4 unduly on the basis of recommendation (Annexures P-6, P-7 and P-8) of politicians and other influential persons, including his father for sending him for aforesaid Sub Fire Officer's course. It is apprehended that Respondent-Board instead of adopting principle of seniority would be under pressure to recommend the names of juniors on the basis of political or other recommendations.

4. It is also contended on behalf of petitioners that the guidelines (Annexure P-9) have no rationale as the petitioners, who have been serving for more than 10 years with the Respondent-Board, would be pushed behind to the private respondent for promotion to the post of Sub Fire Officer on selection of private respondent and other juniors for the aforesaid course by applying the impugned guidelines and as such, criteria set up for selection in guidelines (Annexure P-9) for nomination, would also prove counterproductive to the affairs of Respondent-Board as implementation thereof would deprive the senior persons from promotion to the next post i.e. Sub Fire Officer. It is further grievance of the petitioners that over long years of service, they have considerably lost the youthful virility, which they had at the time of their entry into service, whereas, private respondent is a young man and asking petitioner to compete in such like circumstances alongwith said respondent would be amounting to have a contest amongst unequals, which is not permissible under law.

5. According to the petitioners, arduous tests as referred in guidelines (Annexure P-9) would be putting them in a most disadvantageous position vis-a-vis the private respondent, who is too young to the petitioners, which will be violation of fundamental rights of the petitioners, provided under Articles 14 and 16 of the Constitution of India.

6. Therefore, a prayer has been made for quashing and setting aside the guidelines Annexure P-9 with further prayer for issuing writ in the nature of mandamus directing Respondent-Board to consider the names of the petitioners for sending them to undergo Sub Fire Officer's Course in Respondent No.3-College, strictly on the basis of seniority.

7. Petition has been contested by the respondents. Respondents No.1 and 2 have filed reply, whereas, respondents No.3 and 4 have not preferred to file reply, but are banking upon stand taken by Respondent-Board.

8. It is contended on behalf of Respondent-Board that there are three functional Fire Stations of Respondent-Board at Sunder Nagar, District Mandi; Nangal, Punjab; and Talwara in Hoshiarpur District, Punjab and earlier Respondent-Board had not framed any policy and guidelines for sponsoring/nominating candidates for undergoing training for various courses from Respondent No.3-College and Firemen/ Leading Firemen, for Sub Fire Officer's Course, were being recommended on the basis of seniority to the Respondent-Board from establishment of respective Chief Engineers for approval of Chairman of Respondent-Board.

9. It is submitted by learned Counsel for the Respondent-Board that Fire Fighting Service is an essential service of emergent nature and of vital importance, meant to deal with unforeseen immediate emergent exigencies on account of Fire Hazards, accidents or other natural calamities involving fire fighting and rescue operations to save life and property and also prevent and save loss or damages to vital installations, Power Houses, Dams, Generating Units, Equipments, vital Machineries, Buildings and other components of the projects at Sunder Nagar, Nangal and Talwara and to achieve above objective, fire staff is required to be well trained, physically fit, equipped with adequate knowledge and skills for safety measures, Fire Fighting Operations and to deal with other natural calamities and therefore, Respondent-Board has framed guidelines to sponsor the best available candidates for the training of Sub Fire Officer.

10. It is also submitted by learned counsel for the Respondent-Board that though for filling up the post of Sub Fire Officer by promotion amongst Leading Firemen, a person qualified in Sub Fire Officer's Course from Respondent No.3-College, with two years experience in Fire Service, is eligible to the post of Sub Fire Officer. However, it is not the only mode of promotion to the said post rather as in Bhakra Beas Management Board Class III and Class IV Employees' (Recruitment and Conditions of Service) Regulations, 1994 (hereinafter referred to as the 'Service Regulations' in short), it is also provided that a Leading Fireman shall also be entitled for promotion, who is matric with Fire Course from Ministry of Defence or Home Affairs with four years experience in Fire Service and who is matric without any Fire Course with five years experience in Fire Service and thus it is canvassed that undergoing of Sub Fire Officer's Course from Respondent No.3-College is not the only criteria for promotion as Sub Fire Officer and therefore, plea of petitioners of marring their chance of promotion by supersession by juniors, after completing Course from Respondent No.3-College, is not tenable.

11. It is further the case of Respondent-Board that no Fireman has been sponsored for training of Sub Fire Officer's Course in the past, but only Leading Firemen were sponsored and sent to said training and since April, 1995, no one has been sent to undergo training of Sub Fire Officer's Course from the establishment of Respondent-Board at Sunder Nagar, as no eligible employee came forward for such training and further that seniority was never a criteria approved by competent authority, but during past, senior most eligible employees were being recommended for the training to the aforesaid Course and now keeping in view the requirement of the job, Respondent-Board has fixed a criteria by issuing guidelines to adopt uniform policy for sponsoring/nominating candidates for training to Respondent No.3-College, which is within the domain of Respondent-Board and the letter issued by Respondent No.3-College is not restrictive in nature and does not debar Respondent-Board from considering the employees for sponsoring on the basis of merit-cum-seniority, particularly keeping in view the nature and requirement of the post for which training is to be imparted.

12. It is further submitted that apprehension of petitioners, regarding extension of special treatment to respondent No.4, is not based on the true facts as Respondent-Board

has never extended any out of way benefit to respondent No.4 nor anybody else has been sponsored for the training in issue. It is also stated that Respondent-Board has devised guidelines to be followed as a matter of policy so as to adopt systematic, transparent sponsorship based on universally accepted principle of merit-cum-seniority so as to impart training to the best available employees.

13. Learned counsel for the Respondent-Board has also placed on record instructions received by him from Additional Superintending Engineer, Sunder Nagar of Respondent-Board vide communication dated 01.08.2019, wherein it is stated that no Leading Firemen/Firemen have been sent to Respondent No.3-College by Respondent-Board from Sunder Nagar for training since the year, 2009. Under further instructions received by him, it is also submitted that like others respondent No.4 has also not been sponsored for the training.

14. It is also argued on behalf of Respondent-Board that as per instructions issued by Respondent No.3-College relied upon and placed on record by petitioners as Annexures P-3 and P-4, maximum age for sending Firemen/Leading Firemen to the training is 35 years and relaxation to such candidate up to 45 years was allowed only for 67th Sub Fire Officer's Course, which had commenced from 12.07.1993 and none of the petitioners was below the age of 35 years at the time of filing the petition and even if hypothetically it is considered that they would have been entitled for age relaxation, then also only four petitioners, namely Nand Lal (petitioner No.1), Praveen Kumar (petitioner No.5), Prem Singh (petitioner No.10) and Kartar Singh (petitioner No.12) would have been eligible being below 45 years of age at the time of filing the petition, but it is a fact that since 1995 especially after filing of petition in the year 2009, no candidate with or without relaxation of age has been sponsored for the training in question and as of now all of them are not even entitled for relaxation of age. Therefore, they have no right to assail the guidelines and claim sponsorship for training on the basis of seniority.

15. Learned counsel for respondents No.3 and 4 have adopted the arguments addressed on behalf of Respondent-Board.

16. Considering the rival contentions of the parties and going through the record, I am of the considered opinion that petitioners have no case in their favour for issuing writ or direction as prayed for.

17. Document Annexure P-4 relied upon by the petitioners is a memo for imparting inservice training of Fire Services at Respondent No.3-College (National Fire Service College, Nagpur), wherein at Sl. No. 3 qualification/experience requirement for eligibility to undergo Sub Fire Officer's Course is provided, according to which a person with matriculation educational qualification, below the age of 35 years has been notified to be eligible for sponsorship to the training course. Communication Annexure P-3 relied upon by the petitioners does not create right in favour of an employee for relaxation in age up to 45 years, rather it discloses that relaxation in age up to 45 years was allowed only for 67th Sub Officer's Course commencing from 12.07.1993. Therefore, as contended on behalf of Respondent-Board all petitioners were over aged at the time of filing present petition and only four of them were below 35 years, whose names would have been recommended only after relaxation. But relaxation was available up to 67th Course only. Relaxation of age cannot be claimed as a matter of right. However, it is also matter of fact that since 2009 no one has been sponsored for training and as of now all petitioners have crossed age of 45 years beyond which relaxation is not available.

18. No doubt, document Annexure P-2 speaks about sponsorship of employee on the basis of seniority-cum-merit and Annexure P-3 indicates sponsorship of Firemen/Leading Firemen on the basis of seniority and also memo Annexure P-4 and communication Annexure P-5 call for sponsorship of employees on seniority basis, however, it does not create any right in favour of the petitioners to insist to adhere to the same practice nor it debars Respondent-Board from framing/issuing guidelines for sponsoring candidates, which are otherwise neither arbitrary nor irrational or unreasonable, but have been framed for sponsoring the best available candidates, who are suitable for training keeping in view the nature and requirement of the job.

19. The Apex Court in ***Maharashtra Public Service Commission Through its Secretary vs. Sandeep Shriram Warade and others,*** **(2019) 6 SCC 362**, has reiterated the well established law as under:-

> "9. The essential qualifications for appointment to a post are for th employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is bet suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the mater has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

20. It is also settled that arbitrary, irrational, unreasonable or unconstitutional criteria can be quashed and set aside by the Courts, but where the criteria prescribed by the employer is rationale and having the nexus with the nature and requirement of the job courts are not supposed to interfere with.

21. In present case, nature and requirement of the job, as referred supra in the contention raised on behalf of Respondent-Board, definitely demands young and physically fit officials i.e. Firemen and Leading Firemen, to be promoted to the post of Sub Fire Officers and for the said purpose, Respondent-Board has issued guidelines to select the candidates for sponsoring on merit-cum-seniority basis. As per guidelines, for sponsoring, candidates have to undergo physical Fitness-cum-Trade Proficiency Test. 60% weightage has been provided for Physical fitness standards, which may include endurance test to check the fitness of the employee to undergo rigors of the duty of Fire Brigade Personnel and 40% weightage has been provided to the trade proficiency to be assessed on the basis of suitable written test/viva-voce. Further it is categorically provided in the guidelines that participation for selection process shall be voluntary and this specialized training is not to be treated as 'Right to All', but only most proficient in trade, physically fit and agile out of the lot shall be entitled for recommendation for training. There is nothing on record to indicate that any of the clause of the guidelines is arbitrary, irrational, unreasonable or unconstitutional. The plea of petitioners that it would mar the chance of their promotion is also not tenable as the promotion is not provided only to the candidates undergone Sub Fire Officer's Course with Respondent No.3-College, but also to others. There are three modes of promotion. For first

mode, providing promotion to candidate with Training from Respondent No.3-College, only difference is candidate with course shall be considered for promotion with two years experience in Fire Service, whereas, in other two modes candidate shall be considered with experience of four years and five years respectively. Eligible petitioners will definitely be considered for promotion after completing the requisite years of service and in fact all the petitioners, as it is their case that they are serving for more than ten years, are eligible to be considered for promotion subject to availability of the posts and fulfilling the other condition/ requirement for promotion.

22. From the information placed on record, it is also evident that respondent No.4 or anybody else has not been sent or sponsored for training from Respondent No.3-College since the year, 2009 i.e. after filing of present petition. Therefore, apprehension of petitioners that Respondent-Board is in preparation to sponsor the name for training on the basis of political recommendations, is misconceived, rather it has come on record that by issuing guidelines, Respondent-Board is trying to evolve fair selection process for sponsoring candidates for training in Respondent No.3-College.

23. In view of the above discussion, I find no merit in the contentions raised by the petitioners, rather find force in contentions put forth by the Respondent-Board and therefore, writ petition is dismissed being devoid of merits.

Pending application(s), if any, also stand disposed of.

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

Dhanpat Lal Sharma …..Petitioner.
Versus
Bhakra Beas Management Board (BBMB) and another …..Respondents.

CWP No.7957 of 2010.
Judgment reserved on: 06.08.2019.
Date of decision: 13.08.2019.

Constitution of India, 1950- Articles 14 & 226 – Promotion to higher post – Absence of R & P Rules – Effect and guiding principles – Held, in absence of any valid R & P Rules governing promotions to higher post, promotions are to be made on principle of seniority cum- merit – Principle has to be followed even while making promotions on adhoc basis. (Para 8)
Constitution of India 1950 – Articles 14 & 226 – Inter-se seniority –Absence of statutory rules – Determination and principles – Held, in absence of statutory rules for determining inter-se seniority, it is to be reckoned from period of initial appointment i.e., continuous period/ length of service should be taken into consideration. (Para 9)
Constitution of India 1950 – Articles 14 & 226 – Promotion – Regular employees vis-a-vis non-regular employees – Held, regular employees will have preferential right for promotion over non-regular employees. (Para 12)

Cases referred:
Ajit Singh and others (II) vs. State of Punjab and others, (1999) 7 SCC 209
Anil Kumar vs. BBMB and another, CWP No. 770 of 1996 decided on 11.02.2010

Badrinath vs. Government of Tamil Nadu and others, (2000) 8 SCC 395
Bharat Krishan Sahni vs. Bhakra Beas Management Board, (2001) 2 SCT 804: SLR 2001(4) 540
Hardev Singh vs. Union of India and another, (2011) 10 SCC 121
Hari Datt Kainthla and another vs. State of H.P and others, AIR 1980 SC 1426
Haryana State Warehousing Corporation and others vs. Jagat Ram and another, (2011) 3 SCC 422
Jai Ram Sharma vs. Jammu Development Authority, (1996) 9 SCC 214
Major General H.M. Singh, VSM vs. Union of India and another, (2014) 3 SCC 670
Union of India and others vs. Sangram Keshari Nayak, (2007) 6 SCC 704

For the Petitioner : Mr. Deven Khanna, Advocate.
For the Respondents: Mr. N.K. Sood, Senior Advocate with Mr. Aman Sood, Advocate for respondent No.1, with Mr. Naveen Singla, Law Officer, Mr. Ravi Vasudev, Deputy Manager/P.D. and Mr. Gurjinder Singh, Clerk (Record Keeper), B.B.M.B. along with record.
Mr. Anand Sharma, Senior Advocate with Mr. Karan Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

"Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down" (Justice Brennan).

2. The aforesaid observations are fully applicable to the instant case as the petitioner has un-necessarily been dragged into unwarranted and otherwise avoidable litigation.

3. This writ petition has been filed for grant of the following substantive reliefs:

> *"(i) That the respondent Board may be directed to consider the petitioner for promotion to the post of Joint Director(Legal) from the date when the respondent No.2 was promoted to the said post vide order dated 17.5.2010, Annexure P-5, with all consequential benefits;*
>
> *(ii) That if this Hon'ble Court comes to the conclusion that it is necessary to quash the promotion of respondent No.2 in order to consider the claim of petitioner for promotion to the post in question, in that event his promotion order dated 17.5.2010, Annexure P-5 may be quashed and set aside and respondent may be directed to consider the petitioner for such promotion from the date of promotion of respondent No.2, with all consequential benefits;*
>
> *(iii) That the petitioner may also be held entitled to arrears of salary and consequential retiral benefits with interest at market rate on delayed payment."*

4. On 10.07.1979, the petitioner was appointed as Legal Assistant by way of direct recruitment in BSL Project, Sundernagar, under Beas Construction Board (in short 'BCB'). However, on completion of works of the 'BCB', the services of the petitioner were

thereafter taken over by the Bhakra Beas Management Board (in short 'BBMB') with effect from 31.08.1984. On 29.05.1986, the respondent-Board conducted interviews for the post of Assistant Personal Officer (Legal) in which the petitioner was selected and appointed as such on adhoc basis. Subsequently, vide order dated 03.10.1996, the petitioner was promoted on the upgraded post of Personal Officer(Legal) on adhoc basis. Thereafter, on 31.03.1998, the post of Personal Officer(Legal) was upgraded and was re-designated as Senior Personal Officer (Legal) and subsequently in the year 2009, the post of Senior Personal Officer (Legal) was further re-designated as Senior Law Officer. On 17.05.2010, the post of Senior Law Officer in the administration of Chief Engineer, BBMB, Nangal was upgraded to that of Joint Director/Personal-cum-Legal with immediate effect and vide another Office Order dated 17.05.2010, respondent No.2 was promoted on the said post.

5. The instant petition has been filed by the petitioner, firstly, on the ground that respondent No.2 could not have been considered for promotion in preference to regular employees i.e. the petitioner. Secondly, the petitioner being Senior most Law Officer was required to be considered before considering and promoting respondent No.2, who was junior to him.

6. Respondent No.1 has contested the petition by filing reply wherein it is contended that since promotion of respondent No.2 is purely on adhoc basis, therefore, the petitioner has got no legal and vested rights in claiming such promotion. Further, it has been claimed that since respondent No.2 has already been inducted in the respondent-Board against the share quota posts and being an employee of the partner State Electricity Board, he is senior most Officer against the share quota posts of the partner State. However, the claim of the petitioner being senior to respondent No.2 has not been denied.

7. Respondent No.2 has also contested the petition by filing separate reply wherein similar defence to the one taken by respondent No.1 has been taken. Here, again the seniority of the petitioner has not been denied.

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

8. At the outset, it needs to be observed that there are admittedly no statutory rules governing the field for promotion to the post of Joint Director/Personal-cum-Legal. It is more than settled that in absence of any other valid rule, promotions are to be made on the general well accepted principle of seniority-cum-merit. (Refer: ***Hari Datt Kainthla and another*** *vs.* ***State of H.P and others, AIR 1980 SC 1426)***. This principle has to be followed even while making promotions on adhoc basis.

9. Equally settled is the proposition that in absence of any statutory rules for determining inter se seniority, the general principle of determination of seniority is that it is to be reckoned from the period of initial appointment i.e. continuous period/length of service should be taken into consideration.

10. Counted in whatsoever manner, it is not in dispute that the petitioner admittedly is senior to respondent No.2 and this fact is not even disputed by either of the respondents. Then why still, respondent No.2, who was not even regular employee of respondent No.1 and was admittedly junior to the petitioner, was promoted, is not at all forthcoming. Save and except, a feeble attempt was made by learned counsel for the respondents to canvass that such promotion was against share quota as respondent No.2 was the employee of partner Punjab State Electricity Board. But, there is no material whatsoever to support, much less justify this contention.

11. The instant case reflects a sordid, despotic and nepotic function of respondent No.1, who in the most brazen and blatant manner has flouted and defied the mandate of law by indulging in favourtism in appointing respondent No.2 while totally ignoring the case of the petitioner, who was not only senior to respondent No.2, but was also a regular employee of the respondent-Board, as compared to respondent No.2, who was simply on deputation.

12. It is settled proposition of law that regular employees will have first preferential right for promotion over non-regular employees.

13. In ***Jai Ram Sharma*** *vs.* ***Jammu Development Authority (1996) 9 SCC 214,*** the Hon'ble Supreme Court held as under:-

> "*4.Counter-affidavit has been filed by the respondent contending that appellant's seniority was considered with effect from the date when the vacancy had arisen after the retirement of the 5th respondent. The above action is obviously illegal and an arm twist to nepotism. When the appellant was a regular candidate as Office Superintendent, he was entitled to be considered in preference to the deputationist, who is not a member of the service as on that date. He was wrongly denied of his legitimate right to be considered for appointment on the date when the 5th respondent was appointed. It is, therefore, directed that the appellant must be considered to have been regularly appointed with effect from the date on which the 5th respondent was promoted as PRO and in terms of the order passed by this Court. His entitlement would be considered according to the rules within a period of three months from the date of the receipt of the order.*"

14. In ***Bharat Krishan Sahni*** *vs.* ***Bhakra Beas Management Board, (2001) 2 SCT 804: SLR 2001(4) 540*** the Hon'ble Punjab & Haryana High Court held as under:

> *"12. I am not in a position to subscribe to the argument of learned counsel for the respondents. The staff which is sent to the Board in order to work, in fact, is a staff which has been sent there on transfer. The control of such transferee staff is still with the parent Department. They are not the employees of the Board. They are the employees of the respective Governments. That staff is not on deputation even as they do not get any deputation allowance. A partner State sends its staff in order to carry out the work of the project. So we can say that the staff of the Board comes from different sources and the control of that staff is with their respective States. Since they are not the regular employees of the Board, so they cannot rub their shoulders with the regular staff, which was appointed by the Board for the working of the Board."*

15. In ***Anil Kumar*** *vs.* ***BBMB and another, CWP No. 770 of 1996***, decided on 11.02.2010, the Hon'ble Punjab and Haryana High Court held as under:

> "12. *I have given thoughtful consideration to the submissions made on behalf of counsel for the parties. In view of the law declared by the Hon'ble Supreme Court in Jai Ram Sharma's case (supra) and in the case of Bharat Krishan Sahni (supra), no joint seniority could be made by the respondent Board of the State Govt. employees working in BBMB on deputation or on transfer and the BBMB regular employees. It is also settled law that deputationists cannot be considered in preference to regular employees for promotion. Therefore, the Punjab Govt. memo dated 23.4.1992 relied upon by the counsel for the respondent Board would be of no help. Apparently, the petitioner has been*

> *discriminated inasmuch as the first available post ought to have been filled up by eligible available regular employee of the Board and then the remaining posts could be filled up from State Govt. employees working in BBMB because preference in promotion was required to be given to BBMB regular employee and not to the State Govt. employees. The petitioner is thus entitled for promotion on preference over deputationists/transferees from State Governments against first available post on his having become eligible for promotion on 27.7.1995.*
>
> *13. Regarding the non framing of Rules by BBMB with respect to Class I and Class II posts it would suffice to observe that the observations of Hon'ble Supreme Court as made in case of Sohan Lal and others (Annexure P-1), ought to have been adhered fully by framing regulations for entire service whereas the BBMB has framed regulations only concerning Class III and Class IV posts. I find force in the contention of counsel for the petitioner that the higher authorities in BBMB who belong to State Govt. are intentionally not framing such regulations so as to deny this benefit to the regular employees like petitioner in the Board. It is hoped that the BBMB would seriously consider framing of regulations for Class I and Class II posts in terms of the decision of Hon'ble Supreme Court in Sohan Lal's case (supra) so that there is no discrimination amongst the various categories of employees working in BBMB."*

16. To say the least, respondent No.1 which is a 'State' within the meaning of Article 12 of the Constitution of India has conducted in itself of untrustworthiness and like a belligerent litigant has dragged the petitioner to an un-necessary and otherwise avoidable litigation. Instead of gracefully accepting its mistake, respondent No.1 could not resist the temptation of litigation and has fought this legal battle as if it was a war. The battle otherwise is "uneven" as on one side is a public institution whereas on the other side is a private individual.

17. As such, this Court has no hesitation to conclude that public money has been wasted because of adamant behaviour of officer of respondent No.1 due to litigious attitude adopted by this Officer in pursuing the instant litigation before this Court and trying to justify the promotion of respondent No.2 which otherwise is not at all justifiable.

18. Admittedly, the case of the petitioner has not at all been considered by the respondent-Board for promotion. Once that be so, then the petitioner's fundamental right under Articles 14 and 16 stands breached. It is settled proposition of law that though an employee does not have a fundamental right for promotion, however, he has a fundamental right for being considered for promotion.

19. In ***Ajit Singh and others (II)*** *vs.* ***State of Punjab and others (1999) 7 SCC 209***, the Hon'ble Supreme Court held as under:

> "22. *Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in the matters relating to employment or appointment to any office under the State". It has been held repeatedly by this Court that sub-clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said sub- clause particularizes the generality in Article 14 and identifies, in a constitutional sense "equality opportunity" in*

matters of employment and appointment to any office under the State. The word 'employment' being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

"Promotion" based on equal opportunity and 'seniority' attached to such promotion are facets of fundamental right under Article 16(1):

23. Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of `seniority-cum- suitability', the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotees but in all cases the senior most person at the basic level is to be considered first and then the others in the line of seniority). That is how right to be considered for promotion and the `seniority' attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1).

Right to be considered for promotion is not a mere statutory right:

24. The question is as to whether the right to be considered for promotion is a mere statutory right or a fundamental right.

25. Learned senior counsel for the general candidates submitted that in Ashok Kumar Gupta Vs. State of U.P. (1997) 5 SCC 201), it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4A) are "fundamental rights". Such a view has also been expressed in Jagdish Lal and some other latter cases where these cases have been followed. Counsel submitted that this was not the correct constitutional position.

26. In this connection our attention has been invited to para 43 of Ashok Kumar Gupta (supra). It reads as follows:- (SCC p. 239)

> *"43. It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or class of posts depends upon the operation of the conditions of service. Article 16(4) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as a fundamental right where they do*

> *not have adequate representation consistently with the efficiency of administration... before expiry thereof (i.e. 5 years rule), Article 16(4) has come into force from 17.6.1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right."*

A similar view was expressed in Jagdish Lal versus State of Haryana, (1997) 6 SCC 538 and followed in some latter cases. In the above passage, it was laid down that promotion was a statutory right and that Articles 16(4) and 16(4A) conferred fundamental rights.

27. In our opinion, the above view expressed in Ashok Kumar Gupta, and followed in Jagdish Lal and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion(i.e. whether on basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta (1997) 5 SCC 201: 1997 SCC(L&S) 1299 right from 1950."

20. The Hon'ble Supreme Court in ***Badrinath*** *vs.* ***Government of Tamil Nadu and others (2000) 8 SCC 395***, held as under:

> "*47.Every officer has a right to be considered for promotion under Article 16 to a higher post subject to eligibility provided he is within the zone of consideration. But the question is as to the manner in which his case is to be considered. This aspect is a matter of considerable importance in service jurisprudence as it deals with 'fairness' in the matter of consideration for promotion under Article 16. We shall therefore refer to the current legal position."*

21. The Hon'ble Supreme Court in ***Union of India and others*** *vs.* ***Sangram Keshari Nayak (2007) 6 SCC 704***, held as under:

> *"11.Promotion is not a fundamental right. Right to be considered for promotion, however, is a fundamental right. Such a right brings within its purview an effective, purposeful and meaningful consideration….."*

22. The Hon'ble Supreme Court in ***Hardev Singh*** *vs.* ***Union of India and another*, *(2011) 10 SCC 121,*** held as under:

> *"17. It cannot be disputed that no employee has a right to get promotion; so the appellant had no right to get promotion to the rank of Lieutenant General but he had a right to be considered for promotion to the rank of Lieutenant General and if as per the prevailing policy, he was eligible to be promoted to the said rank, he ought to have been considered. In the instant case, there is no dispute to the fact that the appellant's case was duly considered by the SSB for his promotion to the rank of Lieutenant General."*

23. In ***Major General H.M. Singh, VSM*** *vs.* ***Union of India and another, (2014) 3 SCC 670***, the Hon'ble Supreme Court held as under:

> "*28.The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The*

answer to the aforesaid query would be in the affirmative, subject to the condition, that the respondents were desirous of filling the vacancy of Lieutenant General, when it became available on 1.1.2007. The factual position….. he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view, that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential order dated 29.2.2008, and thereafter, by a further Presidential order dated 30.5.2008……"

30. Besides the above, we are also of the considered view, that consideration of the promotional claim of the senior most eligible officer, would also fall in the parameters of the rule providing for extension, if the exigencies of service so require. It would be a sad day if the armed forces decline to give effect to the legitimate expectations of the highest ranked armed forces personnel. Specially when, blame for delay in such consideration, rests squarely on the shoulders of the authorities themselves. This would lead to individual resentment, bitterness, displeasure and indignation. This could also undoubtedly lead to, outrage at the highest level of the armed forces. Surely, extension of service, for the purpose granted to the appellant, would most definitely fall within the realm of Rule 16A of the Army Rules, unless of course, individual resentment, bitterness, displeasure and indignation, of army personnel at the highest level is of no concern to the authorities. Or alternatively, the authorities would like to risk outrage at the highest level, rather than doing justice to a deserving officer. Reliance on Rule 16A, to deprive the appellant of promotion, to our mind, is just a lame excuse. Accordingly, extension in service granted to the appellant, for all intents and purposes, in our considered view, will be deemed to satisfy the parameters of exigency of service, stipulated in Rule 16A of the Army Rules.

31…..This because of denial of due consideration to the appellant, who was the senior most eligible serving Major-General, as against the claim of others who were junior to him. And specially when the respondents desired to fill up the said vacancy, and also because the vacancy had arisen when the appellant still had 14 months of remaining Army service. Surely it cannot be overlooked that the Selection Board had singularly recommended the name of the appellant for promotion, out of a panel of four names. In such an eventuality, we would have no other alternative but to strike down the action of the authorities as being discriminatory and violative of Article 16 of the Constitution of India."

24. In ***Haryana State Warehousing Corporation and others*** *vs.* ***Jagat Ram and another, (2011) 3 SCC 422,*** the Hon'ble Supreme Court held as under:

"17. In applying the principle of granting promotion on the basis of seniority-cum-merit, what is important is that the inter se seniority of all candidates who are eligible for consideration for promotion should be identified on the basis of length of service or on the basis of the seniority list as prepared,

inasmuch as, it is such seniority which gives a candidate a right to be considered for promotion on the basis of seniority-cum-merit.

18. As was indicated in State of Mysore vs. Syed Mahmood, AIR 1968 SC 1113 that where the promotion is based on seniority-cum-merit, the officer cannot as a matter of right claim promotion by virtue of his seniority alone, which principle is also reflected in Regulation 8(2) of the 1994 Regulations. Consequently, the candidate had to be fit to discharge the duties of the higher post and if his performance was assessed not to meet such a requirement, he could be passed over and those junior to him could be promoted despite his seniority in the seniority list.

19. In the instant case, the only feature which weighed with the Corporation in granting promotion to Ram Kumar was a comparative assessment between his performance and that of Jagat Ram. While Jagat Ram had got only one "outstanding" remark in 10 years, Ram Kumar had obtained "outstanding" remark in all the 10 years. Accordingly, he was preferred to Jagat Ram, whose qualifications were inferior to that of Ram Kumar by comparison. But, as has been rightly held by the Division Bench of the High Court, in cases of seniority-cum-merit, the comparative assessment is not contemplated and is not required to be made.

20. There is nothing on record to indicate that Jagat Ram was not capable of discharging his functions in the promoted post of Assistant Manager (Administration). He was denied promotion only on 15th ground of the superior assessment that had been made in favour of Ram Kumar, which, in our view, runs contrary to the concept of seniority-cum-merit.….”

25. It needs to be reiterated that public offices, both big and small, are sacred trusts. Such offices are meant for use and not abuse and in case repositories of such offices surpass the rule, then the law is not powerless and would step into quash such arbitrary orders.

26. As observed above, respondent No.1 is admittedly a State within the meaning of Article 12 of the Constitution of India and, cannot, therefore, act like a private individual, who is free to act in a manner whatsoever he likes, unless it is interdicted or prohibited by law. It is settled that the State and its instrumentalities have to act strictly within the four corners of law and all its activities are governed by Rules, Regulations and Instructions and in absence of any of these, they have to act fairly, justly and above all impartially.

27. From the above discussion, it is manifest that action of respondent No.1 is neither fair nor just, as it was required to consider the case of a Senior Officer before promoting a Junior Officer that too a deputationist to the post in question i.e. Joint Director/Personal-cum-Legal as against the petitioner, who was a regular employee of the respondent-Board and had a blemishless records.

28. In view of the aforesaid discussion, I find merit in this petition and the same is accordingly allowed. The respondent Board is directed to consider the petitioner for promotion to the post of Joint Director/Personal-cum-Legal from the date when respondent

No.2 was promoted to the said post vide order dated 17.5.2010, (Annexure P-5), with all consequential benefits.

29. Insofar as prayer No.2 regarding quashing of promotion of respondent No.2 is concerned, the same is disallowed because it is too late in the day as respondent No.2 has already retired from service and it would be extremely harsh, at this stage, to withdraw the promotion of respondent No.2 as the same would entail serious financial and other consequences.

30. Since, the petitioner has been dragged into an un-necessary and unwarranted litigation, therefore, respondent No.1 is burdened with costs of ₹50,000/-which shall be paid to the petitioner on or before 15th September, 2019. The costs at the first instance will be paid by respondent No.1 from its own coffers and thereafter the same shall be recovered from the erring Official/Officer(s) irrespective whether they are still serving or have retired from service. The inquiry against the erring Official/Officer(s), irrespective of their ranks and files, shall be conducted personally by the Secretary, Bhakra Beas Management Board and report thereof be submitted to this Court positively by **31.12.2019**.

31. For compliance, list on **01.01.2020.**

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

State of Himachal Pradesh …Petitioner.
Versus
Kulwant Singh Katoch …Respondent.

Cr. Revision No.33 of 2019.
Reserved on : 3.7.2019.
Decided on: 1st August, 2019.

Code of Criminal Procedure 1973– Sections 397 & 401– Bail order– Revision against– Held, order granting bail is purely interlocutory and revision against it is not maintainable. (Para 11)

Case referred:
Gurcharan Singh and others. vs. State (Delhi Administration), 1978 AIR 79
Raj Kumar Sharma and others vs. State (Delhi Administration), 1977 STPL 3647
Ram Naresh Singh vs. State of Madhya Pradesh, 1994 STPL 3896

For the petitioner : Mr. Ashok Sharma, Advocate General, Mr. Shiv Pal Manhans, Additional Advocate General with Mr. Raju Ram Rahi, Dy. Advocate General.
Respondent in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present Criminal Revision Petition, under Section 397 read with Section 401 of the Code of Criminal Procedure, is maintained by the petitioner-revisionist for quashing and setting aside the impugned order, dated 31.10.2018, passed by the learned Chief Judicial Magistrate, Solan, District Solan, in Case No.39/22 of 2018, for an offence punishable under Sections 420, 417, 193, 218, 120-B and 467 of the Indian Penal Code.

2. The key facts, giving rise to the present petition are that Additional Superintendent of Police, Solan, has written a letter to the Station House Officer, Solan, wherein it is alleged that on 16.7.2018, a letter was received from this Registry, whereby Hon'ble High Court directed to make detailed inquiry and to submit the report to the learned Sessions Judge, Solan, on 17.8.2018 and directed the Additional Superintendent of Police, Solan and it appears that Bhesh Ram son of late Shri Dhani Ram, is neither indigent nor working as a labourer and the said statement given by the persons before this Court on 25.4.2018, in Criminal Revision No.140 of 2017, appears to be factually incorrect. From the perusal of order dated 20.8.2018, passed by the learned Sessions Judge, Solan, it is found that Shri Bhesh Ram and his Counsel has given wrong statement before this Court and thus, an offence punishable under Sections 420, 417, 193, 218, 120-B and 467 of the Indian Penal Code, registered at Police Station, Sadar, District Solan, came to be registered against them. Thereafter, registration of the case, accused persons were arrested and they were produced before the learned Court below for seeking judicial remand whereby, they were granted bail, vide order dated 31.10.2018.

3. Feeling aggrieved, the impugned order, dated 31.10.2018, passed by the learned Court below, State-revisionist maintained the present revision petition.

4. Reply to the petition has been filed and it has been submitted that the present criminal revision petition is not maintainable and is liable to be dismissed. It is specifically denied that the impugned order dated 31.10.2018, passed by the learned Court below is based on surmises and conjectures. It has also been specifically denied that the learned Court below has no jurisdiction to grant bail to the accused persons. Grant and refusal of bail is purely discretion of the Judge and such discretion is unfettered and exercised judiciously. The learned Court below after considering the material available on record, has rightly passed the impugned order by exercising its discretion in judicial manner. As such, the present criminal revision is not maintainable and the same is liable to be dismissed.

5. Mr. Ashok Sharma, learned Advocate General has strenuously argued that wrong statement has been given by the respondent saying that Shri Bhesh Ram, was a poor person and labourer and such statement given by him before the learned Court was totally abuse of the process of law. He has argued that the learned Court below was having no jurisdiction and in these circumstances, present revision petition is required to be allowed, to meet the ends of justice for the reason that one of the offence, respondent was charged is punishable with life imprisonment i.e. Section 467 of the Indian Penal Code.

6. Mr. Kulwant Singh Katoch-respondent in person has submitted that as per the certificate given by the Tehsildar, Bhesh Ram, income was `35,000/- per annum and he was under the scheme of "*Rajiv Gandhi Ann Yojna*" by Gram Panchayat, Kainthari, District Solan. He has further submitted that the present revision petition is not maintainable and the same deserves to be dismissed. In support of his contentions, he has also relied upon the judgment in ***Ram Naresh Singh vs. State of Madhya Pradesh, 1994 STPL 3896, Madhya Pradesh High Court*** and ***Gurcharan Singh and others. vs. State (Delhi Administration), Raj Kumar Sharma and others vs. State (Delhi Administration), 1977 STPL, 3647, Supreme Court of India,*** to this aspect.

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

8. After hearing learned counsel appearing on behalf of the parties and going through the entire record in detail, this Court finds that the present case was triable by the Magistrate and the Magistrate has granted the bail. The learned Court below while passing the impugned order has considered the material facts, which have come on record and has held as under :

> *"It is clear from police application that after registration of the case, notice under Section 41A of Cr. P.C was given to the accused persons by the police. It is further clear from the police application that accused persons joined the investigation. It further appears from the record that the police has made recoveries of all the documents and police has itself stated that now no recovery is to be made from the accused persons and they are not required for any interrogation. It shows that police has completed the investigation. Moreover, as per Section 41A (3) of Cr. P.C it is provided that where the person complies or continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice, unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested. Here police has not assigned any reason for arresting the accused persons, whey they complied with notice under Section 41A Cr. P.C. Therefore, there is no justification to remand the accused persons in to judicial custody. Accused Kulwant Katoch is practicing lawyer at District Court, Solan and there is least chances of his abscond if he is released on bail. Accused Bhesh Ram is also a local resident of District Solan, and his relatives and property is situated within the District Solan, H.P and there is also least chances of his abscond in the event of his bail.*
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> *As far as contention of ld. APP is concerned, that accused persons Kulwant Katoch, Advocate is an influential person and can tamper with the prosecution evidence if released on bail, then, I am of the view that all the material documents have been recovered by the police and it is in their custody. Now there is no chances of any tampering with such documents. It is also submitted by ld. APP that offence under Section 467 IPC is punishable with imprisonment for life and therefore, this Court has no jurisdiction in this matter. However, I am also the view that Section 467 IPC is triable by the Judicial Magistrate 1st Class, therefore, this Court has jurisdiction to pass orders in the bail application. Thus, keeping in view aforesaid discussions and reasons on record, there is no reason to curtail the liberty of the accused persons and accused persons cannot be remanded into judicial custody. Hence, bail applications of the accused persons are considered and accused persons are ordered to be released on bail on their furnishing personal bond in the sum of `50,000/- each with one surety each in the like amount.*

9. In ***Ram Naresh Singh vs. State of Madhya Pradesh, Hon'ble Madhya Pradesh High Court, 1994 STPL, 3896 (M.P),*** has held as under :

> *"Now there remains the question as to whether the bail granted to the non-applicants can be cancelled or not. In this regard, it must be mentioned that it is settled position that the liberty once granted to an accused cannot be curtailed by cancellation of bail, unless certain conditions are fulfilled. The Hon'ble Supreme Court in 1992 SCC 870 : 1992 Cri. LJ 3712 (SC)*

(Aslambabalal Desai vs. State of Maharashstra) has ruled that bail granted under Sections 437 (1) or (2) can be cancelled under Section 437 (5) and 439 (2) where :

1. The accused misused his liberty by indulging in similar criminal activity;

2. Interferes with the course of investigation;

3. Attempts to tamper with evidence or witnesses,

4. Threatens witnesses or indulges in similar activities which would tamper smooth investigation,

5. Attempts to make him scarce by going underground or becoming unavailable to the investigating agency;

6. Attempts to place himself beyond the reach of his surety.

The Hon'ble Supreme Court has further observed that these are the grounds which are only illustrative and non exhaustive. It has further been observed that cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to. I may mention here that the applicant has not raised a little finger about these grounds. Simple argument advanced by the learned counsel for the applicant is that the bail should not have been granted as the offence was serious. To my mind, it cannot be said to be a sufficient ground to cancel the bail.

10. Hon'ble Supreme Court of India in ***Gurcharan Singh and others vs. State of (Delhi Administration) and Raj Kumar Sharma and others vs. State (Delhi Administration).*** It is gainful to reproduce para-21 of the judgment (supra), which is as under :

Section 437, Cr. P.C. is concerned only with the court of Magistrate. It expressly excluded the High Court and the Court of Session. The language of S. 437 (1) may be contrasted with S. 437 (7) to which we have already made a reference. While under sub-sec (1) of S. 437, Cr. P.C the words are : "If there appear to be reasonable grounds for believing that he has been guilty". Sub-sec. (7) says: "that there are reasonable grounds for believing that the accused is not guilty of such an offence". This difference in language occurs on account of the stage at which the two sub-sections operate. During the initial investigation of a case in order to confine a person in detention, there should only appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life, whereas after submission of charge-sheet or during trial for such an offence the court has an opportunity to form somewhat what clear opinion as to whether there are reasonable grounds for believing that the accused is not guilty of such an offence. At that stage the degree for certainty of opinion in that behalf is more after the trial is over and judgment is deferred than at a pre-trial stage even after the charge-sheet. There is a noticeable trend in the above provisions of law that even in case of such non-bailable offences a person need not be detained in custody for any period more than it is absolutely necessary, if there are no reasonable grounds for believing that he is guilty of such an offence. There will be, however, certain overriding considerations to which we shall refer hereafter. Whenever a person is arrested by the police for such an offence, there should be materials produced

> *before the courts to come to a conclusion as to the nature of the case he is involved in or he is suspected of. If at that stage from the materials available there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, the court has no other option than to commit him to custody. At that stage, the court is concerned with the existence of the materials against the accused and not as to whether those materials are credible or not on the merits."*

11. The learned Court below has held Section 467 of the Indian Penal Code is triable by the learned Judicial Magistrate 1st Class, so, the learned Court below can grant the bail. Section 467 of the Indian Penal Code, the learned Magistrate has granted the bail rightly, which was triable by him. Further, the petitioner, who is practicing Advocate, always available and the facts of the case also shows that no tempering can be done in the evidence, as the case is only based upon the documentary evidence. So, this Court finds that the order of the learned Court below needs no interference, as the order is as per law, revisional powers are not required to be exercised. In **Ram Naresh Singh vs. State of Madhya Pradesh, Hon'ble Madhya Pradesh High Court, 1994 STPL, 3896,** clearly held that grant of bail is interlocutory order, so no revision lies. Relevant para-5 of the judgment reads as under :

> "I have considered the contentions raised before me. At the out set, I may mention that it cannot be disputed that the order granting bail is an interlocutory order and no revision lies against such an order in view of the provisions of Section 397 (2), Cr. P.C. This proposition was also laid down by Hon'ble the Supreme Court in case of Amarnath v. State of Haryana, 1977 CAR 273. Thus, now it is beyond doubt that an order granting bail is an interlocutory order and no revision lies, against such an order."

12. After applying the aforesaid law (supra) to the facts and circumstances of the present case, the present revision petition is not maintainable, deserves dismissal and is accordingly dismissed. No order as to costs. Pending application(s), if any, also stands disposed of.

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

Smt. Krishna Devi ….Petitioner.

Vs.

The BBMB through its Chairman and others …..Respondents.

CWP No.: 611 of 2017

Date of Decision: 05.08.2019

Constitution of India 1950- Articles 14 & 226 – Regularization of part -time services – Writ jurisdiction – Held, initial appointment of petitioner was on part time basis – Her engagement was not through process of recruitment by way of notice to general public – No policy of Board in vogue either to regularize services of part-time workers or to convert them as daily wage workers – Writ not maintainable – Petition dismissed. (Paras 8 & 9)

Punjab Reorganizations Act 1966 (Act) –Sections 79 & 97 – **Bhakra Beas Management Board Rules**-Scope of – Held, services of employees of Bhakra Beas Management Board are governed by regulations framed by Board under Sub-section (9) of Section 79 of Act – Rules

framed by State of Himachal Pradesh, governing service conditions of its employees are not applicable to employees of Board simply because some of its offices are located within territory of Himachal Pradesh. (Para 11)

For the petitioner: M/s A.K. Gupta and Babita Kumari, Advocates.
For the respondents: Mr. N.K. Sood, Senior Advocate, with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has prayed for issuance of a writ of mandamus to the respondent-Board to regularize her services as a Sweeper from the due date, with all benefits incidental thereof.

2. Case of the petitioner is that she is serving as a Part Time Sweeper with the respondent-Board at Sunni w.e.f. 22.09.1989. Till date, her services have not been regularized in spite of her repeated requests, which amounts to unfair labour practice on the part of the respondent-Board, as engaging workmen on Daily Wage/Part Time/Badli basis for years together is in contravention of Schedule-V of the Industrial Disputes Act, 1947. As per the petitioner, in the State of Himachal Pradesh, Part Time Workers, who have completed eight years of service have been brought on Daily Wage establishment and the said formula/Policy would be applicable even to the Management of the respondent-Board, as it is having its offices within the jurisdiction of the State of Himachal Pradesh and as a model employer, respondent-Board is to adopt the said Policy.

3. Respondents No. 1 to 3 have denied the claim of the petitioner by filing a common reply. It is mentioned in the reply that Hydro-meteorological stations of the respondent-Board are in operation in Satluj Catchment area for measurement of Hydro-meteorological data under Hydrology Division, BBMB, Nangal, for which regular employees work in one shift of eight hours each in order to observe and communicate the data of discharge of water from various sites to control stations at Nangal and Chandigarh. According to the respondents, the Board was maintaining its offices and residential accommodations for staff including about four quarters and offices of Junior Engineer & Wireless at Rampur, Sunni and Berthin. In these three stations, Part Time Sweepers were deployed, as Board was not having any full time job requirement. After the commissioning of Kol Dam by NTPC Authorities, discharge site at Sunni has submerged under water in Kol Dam Reservoir and BBMB has stopped all discharge measurements and data communication arrangements at Sunni discharge site from 01.03.2015 onwards. As a result thereof, the services of regular staff earlier at Sunni were being utilized at other stations having vacancy except for one Gauge Reader for observing only rainfall data with rain gauge installed and a Part Time Sweeper for cleanliness of BBMB residential and office complex at Sunni. Nagar Parishad, Sunni had shown interest in hiring BBMB Building and the case had been forwarded to the higher authorities in the Board for approval and in case the said proposal was implemented, then in that event, respondent-Board will not have any job requirement of Part Time Sweeper at Sunni and in such an eventuality, the services of the petitioner shall be dealt with in accordance with law.

4. By way of rejoinder, the petitioner has reiterated that in terms of the Policy of the Government of Himachal Pradesh, the petitioner is liable to be conferred the status of a Daily Wager after completion of 10 years of service and for regularization thereafter.

5. I have heard learned counsel for the parties and have also gone through the pleadings as also the documents appended therewith.

6. Before proceeding further, it is relevant to mentione that keeping in view the prayer of the petitioner, vide order, dated 10.06.2019, this Court had observed that it would be in the interest of justice in case the respondent-Board comes up with some Policy of either regularizing the services of the petitioner or converting her services at least to the status of a Daily Wager, so that the petitioner, who has spent a substantial period of her life in the service of the respondent-Board, has some sense of security as far as her job is concerned. For the said purpose, the case was ordered to be listed today.

7. Learned Senior Counsel informs the Court that the respondent-Board has no Policy to convert the status of Part Time Worker to that of Daily Wager and therefore, the case be heard on merit, as Board was not contemplating to formulate any such policy in near future.

8. The petitioner has appended as Annexure P-1 alongwith the petition copy of appointment letter, dated 28.09.1989, vide which, she was appointed as a Part Time Sweeper at Sunni BBMB Colony of the respondent-Board w.e.f. 01.10.1989. A perusal of the said letter demonstrates that appointment of the petitioner was as a Part Time Sweeper. It is her own case that till date, she is working as a Part Time Sweeper. The prayer made by her for issuance of a writ of mandamus to the respondent-Board to regularize her services, in my considered view, cannot be granted. This Court is not oblivious to the fact that the petitioner has been serving the respondent-Board as a Part Time Sweeper since the year 1989, however, it is settled law that in exercise of its writ jurisdiction, High Court cannot direct the employer to regularize the services of an employee, especially when the initial engagement of the incumbent is through back-door or in other words not through a process of recruitment by way of notice to the general public.

9. This Court realizes that the petitioner is working as a Part Time Sweeper, yet fact of the matter remains that in the absence of their being any Policy of the respondent-Board of either converting its Part Time Workers as Daily Wage Workers or regularizing their services, the Court cannot pass any directions to the respondent-Board in this regard. Of course, had there been any such Policy of the respondent-Board and if the petitioner was being discriminated by the Board as far as the implementation of the Policy is concerned, then obviously this Court would have come to the rescue of the petitioner. However, in the absence of any such Policy, no relief, as prayed for, can be granted in favour of the petitioner.

10. As far as the contention of learned counsel for the petitioner that as the place where the petitioner is posted is within the State of Himachal Pradesh, therefore, the Policy of the Government of Himachal Pradesh with regard to bringing Part Time Workers on Daily Wage establishment is *ipso facto* applicable upon respondent-Board is concerned, in my considered view, the same is totally misplaced and unsustainable in law.

11. Bhakra Beas Management Board owes its origin to the Punjab Reorganization Act, 1966. It is a statutory Board. There exists Bhakra Beas Management Board Rules, which have been framed by the Central Government in exercise of powers conferred by Section 97 of the Punjab Reorganization Act, 1966. The services of the employees of the Board are governed by the Regulations which have been framed by the Board under Sub-section(9) of Section 79 of the Punjab Reorganization Act, 1966. Simply because a few offices of the said Board are situated within the territorial jurisdiction of the State of Himachal Pradesh, this does not mean that the Rules which have been framed by

the Government of Himachal Pradesh governing the service conditions of its employees shall apply to the establishment of the Board situated within the State of Himachal Pradesh. Even the Policies of regularization/ bringing Part Time Workers on Daily Wage establishment etc. of the Government of Himachal Pradesh cannot be said to be *ipso facto* binding upon the Board with regard to those establishment of it which are situated within the State of Himachal Pradesh. Respondent-Board is an independent statutory entity and framing of Policies etc. which shall regulate the service conditions of its employees, is the prerogative of the Board and the same are applicable and binding upon its employees irrespective of the fact as to in which part of the country they are serving. The service conditions framed by the employer are not subservient to the service conditions of the Government of the place where the office of the employee is situated, especially when the employer happens to be a statutory Board, which has its own statutory Regulations governing the service conditions etc. of its employees and workmen.

12. Accordingly, this petition is disposed of by holding that though this Court cannot issue a writ of mandamus directing the respondent-Board to either bring the services of the petitioner on Daily Wage establishment or to regularize her services in the absence of their being any such Policy of the respondent-Board, however, keeping in view the peculiar facts and circumstances of the case, the respondent-Board may again sympathetically re-consider as to whether the services of the petitioner can be converted to the status of a Daily Wager and whether she can be called upon to serve at any other place where work is available with the respondent-Board. Miscellaneous applications, if any, also stand disposed of.

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

Reliance General Insurance Co. Ltd. ...Appellant.
Versus
Renuka Massey & Ors. ...Respondents

FAO(MVA) No. 246 of 2016
Judgment reserved on : 01.07.2019
Date of decision: 08.07.2019.

Motor Vehicles Act, 1988– Section 166 – Motor accident– FIR– Evidentiary value– Held, allegations made in FIR perse would not be admissible in evidence – But when FIR is made part of claim application then Tribunal and Appellate Court would be entitled to look into same. (Para 7)

Motor Vehicles Act 1988– Section 166 – Motor accident– Contributory and composite negligence – Inter-se distinction – Held, in contributory negligence, person himself contributes to accident – And he cannot claim compensation for injuries sustained by him in accident to extent of his own negligence– In composite negligence, persons who has suffered does not contribute to occurrence of accident in any manner and it is result of combination of negligence of two or more other persons- Here, injured need not establish extent of responsibility of each wrong doer separately. (Para 11)

Cases referred:

Andhra Pradesh State Road Transport Corp. & Anr. vs. K. Hemlatha & Ors., 2008 (6) SCC 767

Kamlesh and Ors. vs. Attar Singh & Ors., (2015) 15 SCC 364,
Khenyei vs. New India Assurance Co. Ltd. & Ors., (2015) 9 SCC 273
Magma General Insurance Co. Ltd. vs. Nanu Ram @ Chandu Ram & Ors, 2018 (11) SCALE 263
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700
National Insurance Co. Ltd. vs. Rattani, 2009 (2) SCC 75
Rajesh vs. Rajbir Singh, 2013 ACJ 1403 (SC)
Rajesh & Ors. vs. Rajbir Singh & Ors, (2013) 9 SCC 54
Reshma Kumari vs. Madan Mohan, 2013 ACJ 1253(SC)
Sarla Verma vs. DTC, 2009 (6) SCALE 12
Sarla Verma and others vs. Delhi Transport Corporation and another, 2009 ACJ 1298 (SC)
T.O. Anthony vs. Karvarnan and Ors., 2008 (3) SCC 748
United India Insurance Co. Ltd vs. Mahima Singh and Ors, 2019 ACJ 697

For the Appellant — Mr. Jagdish Thakur, Advocate.
For the Respondents — Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht, Advocate, for respondents No. 1 to 3.
Mr. Desh Raj Thakur, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Aggrieved by the award passed by the learned Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P., whereby the appellant has been directed to pay a sum of Rs. 12,53,200/- with interest at the rate of 7.5% per annum from the date of petition, to the date of realization, the appellant-Insurance Company has filed the instant appeal.

2. Mr. T. C. Massey (deceased) husband of claimant/respondent No. 1 and father of the claimants/respondents No. 2 and 3 died in a motor vehicle accident on 06.04.2009. The vehicle involved in the accident was a car bearing registration No. HP-17A-7598 owned by respondent No. 4 Gurdeep Singh and was being driven by respondent No. 5 Sangeet Singh and was duly insured with the appellant company. The case of the claimants was that while deceased was coming towards Paonta Sahib in the aforesaid vehicle, it met with an accident in which deceased succumb to injuries and the claimants being dependent on him, are entitled to compensation on account of his death. It was averred that the accident occurred due to rash and negligent driving of the driver, who could not control the car in question which dashed against an unknown truck, whose driver at once applied brakes of the truck leading to the accident.

3. Three folds point-wise submissions are made by the learned counsel for the appellant; *(i)* that the learned Tribunal erred in ignoring the law laid down by the Hon'ble Supreme Court in ***National Insurance Co. Ltd. vs. Rattani 2009 (2) SCC 75***, wherein it has been held that when the FIR is made basis for the grant of compensation, then the Tribunal ought to look into the contents of the same even though the same may not have a substantive piece of evidence; *(ii)* since, this is a case of contributory negligence, therefore, the entire compensation could not have been awarded in favour of the claimant; and *(iii)*, the award is not in tune and in conformity with the judgment of the Constitution Bench of the

Hon'ble Supreme Court in ***National Insurance Co. Ltd. versus Pranay Sethi and others 2017 ACJ 2700***.

4. On the other hand, Mr. Bimal Gupta, Senior Advocate, while answering the point-wise submissions made by the appellant, would argue that it is more than settled law that an FIR is not a substantive piece of evidence, therefore, its contents cannot be made the basis for deciding the case. Secondly, he would urge that the instant case is not one of the contributory negligence but composite negligence, therefore, the claimants have rightly been awarded the entire award.

5. In reply to the submissions regarding the award not being in conformity with the judgment in ***Pranay Sethi's case***, it is argued that apart from the compensation already awarded by the learned Tribunal, the claimants are further entitled to award of Rs.40,000/- each as loss of filial as held by the Hon'ble Supreme Court in ***Magma General Insurance Co. Ltd. vs. Nanu Ram @ Chandu Ram & Ors 2018 (11) SCALE 263***.

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

Point Nos. (i) & (ii)

6. Both these questions are intrinsically interlinked and inter connected, therefore, they are taken up together for consideration and are being disposed of by a common reason.

7. Ordinarily, the allegations made in the FIR would not be admissible in evidence *per se.* In case, the same is made part of the claim petition, the Tribunal and Appellate Court would **entitle** to look into the same. This is so held by the Hon'ble Supreme Court in ***National Insurance Col. Ltd. vs. Rattani Devi, 2009 (2) SCC 75.***

8. Bearing in mind the aforesaid exposition of law, now if the claim petition is adverted to, it has been specifically averred that FIR No. 216 dated 07.04.2004 was registered qua this accident. It shall be apposite to refer to para-9 in its entirety, which reads thus:-

9. Name and Address of Police Station in whose jurisdiction the Accident took place and was registered		Police Station, Yamuna Nagar City, where FIR No. 216, Dt. 07/04/2009 was registered U/s 279, 337, 304A IPC at about 01:50 AM on 07/04/2009

9. It is, thus, amply clear that the basis of the petition happens to be the FIR. Now, in case the FIR is perused, it is specifically stated therein that the vehicle in question dashed against an unknown truck as a result whereof the deceased sustained injuries and succumbed to the same.

10. However, the learned trial Court by placing reliance on the statement of PW4 Paramjit Singh came to the conclusion that it was the driver of the Car who was driving the vehicle in rash and negligent manner. But this statement is contrary to the pleaded case of the claimants themselves.

11. Now, the further question whether it is a case of contributory negligence or composite negligence as contended by the learned Senior Counsel for the respondents. It is settled law that there is a difference between contributory and composite negligence. In case of contributory negligence, a person who has himself contributed to the accident cannot

claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who suffered has not contributed to the accident but due to the outcome of combination of negligence of two or more other persons. In case of contributory negligence, the injured need not establish the extent of responsibility of each wrongdoer separately nor it is necessary for the Court to determine the extent of liability of each wrongdoer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence (Refer:- ***T.O. Anthony vs. Karvarnan and Ors., 2008 (3) SCC 748, Andhra Pradesh State Road Transport Corp. & Anr. vs. K. Hemlatha & Ors., 2008 (6) SCC 767***).

12. Judged in light of the aforesaid exposition of law, it would be noticed that the specific case set up by the claimants was to the effect that the driver of the offending vehicle has dashed against an unknown truck.

13. Rule 23 of the Rules of the Road Regulations, 1989 provides for distance from vehicles in front and reads as under:-

> ***"23. Distance from vehicles in front***
>
> *The driver of a motor vehicle moving behind another vehicle shall keep at a sufficient distance from that other vehicle to avoid collision if the vehicle in front should suddenly slow down or stop."*

14. Since, it is the pleaded case of the claimants themselves that the vehicle in question dashed against an unknown truck, it is legitimate to infer that the driver of the car moving behind that truck had not kept sufficient distance from that vehicle to avoid collision and it is for that reason that the car collided with the unknown truck.

15. Shri Bimal Gupta, learned Senior Counsel for the claimants/respondents would still urge that even if it is the case of collision as aforesaid, even then this is not a case of contributory negligence but would be a case of composite negligence. In support of his contention, he has cited the following judgments:-

1. *T. O. Anthony vs. Karvarnan & Ors. (2008) 3 SCC 748*
2. *Khenyei vs. New India Assurance Co. Ltd. & Ors. (2015) 9 SCCC 433.*
3. *Kamlesh and Ors. vs. Attar Singh & Ors., (2015) 15 SCC 364*
4. *National Insurance Co. Ltd. vs. Pranay Sethi & Ors. (2017) 16 SCC 680.*
5. *Magma General Insurance Co. Ltd. vs. Nanu Ram, 2018 SCC OnLine SC 1546.*

16. In the first judgment, ***T. O. Anthony vs. Karvarnan & Ors. (2008) 3 SCC 748***, the facts therein admittedly were that the vehicle in question was coming from the opposite side and collided with each other. It is in this background that the Hon'ble Supreme Court observed as under:-

> *5. The Tribunal assumed that the extent of negligence of the appellant and the first respondent is fifty:fifty because it was a case of composite negligence. The Tribunal, we find, fell into a common error committed by several Tribunals, in proceeding on the assumption that composite negligence and contributory negligence are the same. In an accident involving two or more vehicles, where a third party (other than the drivers and/or owners of the vehicles involved) claims damages for loss or injuries, it is said that compensation is payable in*

respect of the composite negligence of the drivers of those vehicles. But in respect of such an accident, if the claim is by one of the drivers himself for personal injuries, or by the legal heirs of one of the drivers for loss on account of his death, or by the owner of one of the vehicles in respect of damages to his vehicle, then the issue that arises is not about the composite negligence of all the drivers, but about the contributory negligence of the driver concerned.

6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error.

17. In ***Khenyei vs. New India Assurance Co. Ltd. & Ors. (2015) 9 SCC 273***, a distinction between composite and contributory negligence as set out in para-15 and thereafter taking into consideration the law on this subject, the following principles were laid down in paras 22 to 22.4, which read as under:-

***22. What emerges from the aforesaid discussion is as follows** :*

22.1 In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

22.2 In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. Hecan recover at his option whole damages from any of them.

22.3 In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter

se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

22.4 It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award.

18. In ***Kamlesh and Ors. vs. Attar Singh & Ors., (2015) 15 SCC 364***, the facts therein were that a Maruti Car coming from opposite side collided with the Temo in which the deceased was traveling. Again the facts that this case was regarding head on collision between two vehicles coming from opposite direction. It is in this background, the Hon'ble Supreme Court observed as under:-

7. We have heard learned counsel for the parties and perused, inter alia, the evidence on record of Ram Parshad PW2 and Devender PW.3. The method and manner in which the accident has taken place leaves no room for doubt that it was a case of composite negligence of drivers of both the vehicles, that is the driver of Maruti car and driver of tempo. Though Police has registered a case against driver of the tempo Attar Singh and has filed a chargesheet but the same cannot be said to be conclusive. Though, Attar Singh has stated that it was in order to oblige the driver of the Maruti car, a case wasregistered against him. Be that as it may. It appears both the drivers have tried to save their liability. In such circumstances, the version of eye-witnesses, PW.2 and PW.3 assumes significance. The fact remains that car had dashed the tempo on the middle portion near footstep. Thus the method and manner in which the accident has taken place leaves no room for doubt that both the drivers were negligent. Man may lie but the circumstances do not is the cardinal principle of evaluation of evidence. No effort has been made by the High Court to appreciate the evidence and method and manner in which the accident has taken place. Both the aforesaid witnesses have stated Maruti Car was in excessive speed. However, it appears driver of tempo also could not remove his vehicle from the way of Maruti Car. Thus, both the drivers were clearly negligent. It appears from the facts and circumstances that both the drivers were equally responsible for the accident. Thus, it was a case of composite negligence. Both the drivers were joint "tort-feasors", thus, liable to make payment of compensation.

8. The law in the case of an accident arising out of composite negligence has been considered by a 3 Judges' bench of this Court in ***Khenyei v. New India Assurance Co. Ltd. & Ors., 2015 AIR(SC) 2261*** *wherein following propositions have been laid down:*

"(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

9. In view of the aforesaid, the amount determined/awarded by the Claims Tribunal was Rs.5,81,000/- along with 6 per cent interest from the date of filing of the petition till the date of realization of the amount is upheld as no appeal for its enhancement was filed before the High Court by the claimants. It would be open to the claimants to recover the entire amount from any of the respondents, that is from owner, driver and insurer of the Maruti car or respondent No.4, driver of the tempo as their liability is joint and several with respect to claimants. It would be open to the respondents to settle their inter se liability as per the aforesaid decision of this Court. Appeal is allowed. No order as to costs.

19. Evidently, the entire case law cited by the learned counsel for the claimants only relates to head on collision between two vehicles coming from opposite direction. It is in this background that the Hon'ble Supreme Court has held the cases to be one of composite negligence as against the case of contributory negligence and, therefore, none of the judgments apply to the facts of the instant case where admittedly the moving car collided with an unknown truck that was moving in the same direction. Therefore, in this background, the entire compensation amount could not have been ordered to be paid to the claimants as it is a case of contributory negligence but some deductions towards contributory negligence were required to be made.

Point No. (iii)

20. It was claimed that the deceased was 52 years old and employed as Laboratory Manager in M/s TI Steels Pvt. Ltd. and was getting a salary of Rs.25,000/- per month. The claimants placed on record the Income Tax return of the deceased which reveals his income to be Rs. 1,34,232/- and he had paid tax of Rs. 2496/-. The learned Tribunal after relying upon the judgment of the Hon'ble Supreme Court in ***Rajesh & Ors. vs. Rajbir Singh & Ors, (2013) 9 SCC 54***, worked out the income after deducting the income tax to be Rs. 1,32,000/- per annum and then applying the ratio laid by the Hon'ble Supreme Court in ***Sarla Verma vs. DTC, 2009 (6) SCALE 129*** and in ***Rajesh's case supra***, the learned Tribunal made an addition of 15% to the actual monthly salary to workout the salary which was then taken to be Rs. 1,51,800/- per annum. Since, the deceased had left three legal heirs, 1/3rd of the income is to be deducted as personal and living expenses and the net

salary was worked out to be Rs.1,01,200/-. After applying the multiplier of 11, the compensation was then assessed to Rs.11,13,200/-. In addition thereto, the petitioners were held entitled to Rs.1,00,000/- as loss towards consortium, Rs.25,000/- towards funeral expenses and Rs.15,000/- under the head of loss of estate.

21. Now as regards the award of compensation, there can be no dispute that the compensation awarded by the learned Tribunal is now required to be determined in accordance with the decision of a Constitutional Bench of the Hon'ble Supreme Court in ***National Insurance Co. Ltd.*** *versus* ***Pranay Sethi and others 2017 ACJ 2700***.

22. Why this case came to be referred to the Constitutional Bench, the answer is not difficult to find and the same is set out in para-1 of the judgment itself which reads thus:

> *"Perceiving cleavage of opinion between Reshma Kumari v.Madan Mohan, 2013 ACJ 1253 (SC) and Rajesh v. Rajbir Singh 2013 ACJ 1403 (SC), both three-Judge Bench decisions, a two-Judge Bench of this Court in National Insurance Co. Ltd. v. Pushpa, (2015) 9 SCC 166, thought it appropriate to refer the matter to a larger Bench for an authoritative pronouncement, and that is how the matters have been placed before us."*

23. The conflict between the judgments as extracted above was resolved by concluding that the decision in ***Rajesh*** *versus* ***Rajbir Singh, 2013 ACJ 1403 (SC)*** was not a binding precedent as it had not taken note of the decision in ***Reshma Kumari*** *versus* ***Madan Mohan, 2013 ACJ 1253(SC)***. The Hon'ble Supreme Court after considering the entire conspectus of law arrived at the following conclusions:-

> "*i) The two-Judge Bench in Santosh Devi, 2012 ACJ 1428 (SC), should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, 2009 ACJ 1298 (SC), a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.*
>
> *(ii) As Rajesh, 2013 ACJ 1403 (SC) has not taken note of the decision in Reshma Kumari,2013 ACJ 1253 (SC), which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.*
>
> *(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 and 50 years. In case the deceased was between the age of 50 and 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.*
>
> *(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 and 50 years and 10% where the deceased was between the age of 50 and 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.*

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 14 and 15 of Sarla Verma 2009 ACJ 1298 (SC), which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma, 2009 ACJ 1298 (SC), read with para 21 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures under conventional heads, namely, loss to estate, loss of consortium and funeral expenses should be Rs.15,000, Rs.40,000 and Rs.15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10 per cent in every three years."

Conclusions (iii) to (viii) are relevant for the adjudication of these cases.

24. It is thus clear from the aforesaid that the compensation henceforth to be awarded in favour of the claimants is essentially to be abide by the aforesaid conclusions, more particularly, conclusions No.(iii) to (viii) which except for conclusions No.(v) and (vi) are self-speaking.

25. Now, as regards conclusions No. (v) and (vi), it would be apposite to extract paragraphs No.14, 15 and 21 along with table as referred to in ***Sarla Verma and others*** *versus* ***Delhi Transport Corporation and another, 2009 ACJ 1298 (SC)*** which read thus:-

"*14. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra's case, 1996 ACJ 831 (SC), the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six.*

15. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent/s and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependant on the father. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where family of the bachelor is large and dependant on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

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

Age of the deceased	Multiplier scale as envisaged in Susamma Thomas	Multiplier scale as adopted in Trilok Chandra	Multiplier scale in Trilok Chandra as clarified in Charlie	Multiplier specified in second column in the Table in Second Schedule to MV Act	Multiplier actually used in Second Schedule to MV Act (as seen from the quantum of compensation)
(1)	(2)	(3)	(4)	(5)	(6)
Up to 15 years	-	-	-	15	20
15 to 20 years	16	18	18	16	19
21 to 25 years	15	17	18	17	18
26 to 30 years	14	16	17	18	17
31 to 35 years	13	15	16	17	16
36 to 40 years	12	14	15	16	15
41 to 45 years	11	13	14	15	14
46 to 50 years	10	12	13	13	12
51 to 55 years	9	11	11	11	10
56 to 60 years	8	10	9	8	8
61 to 65 years	6	8	7	5	6
Above to 65 years	5	5	5	5	5

26. Evidently, the judgment in ***Pranay Sethi's case*** (supra) has brought about radical and fundamental changes with regard to award of compensation. For this purpose, this Court would deal with the case by drawing a comparative table of the amount actually awarded by the learned Tribunal along with modified award.

27. Bearing in mind the aforesaid exposition of law and the law laid down in ***Pranay Sethi's case (supra)***, it would be noticed that since the deceased was working in a

private establishment only an increase of 10% instead of 15% could have been awarded in his favour by the learned Tribunal. In addition thereto, as against the amounts of Rs. 1,00,000/- awarded towards loss of consortium, an amount of Rs. 25,000/- awarded towards funeral expenses and Rs.15,000/- awarded towards loss to estate, the claimants would only be entitled to an amount of Rs.40,000/- towards loss of consortium, Rs.15,000/- towards funeral expenses and Rs.15,000/- towards loss to estate.

28. As regards the grant of loss of filial, even though it is vehemently contended by learned counsel for the appellant that the judgment in ***Magma's case (supra)*** is *per incurium* as being contrary as it is not considered in the judgment of the ***Pranay Sethi's case (supra)***, the same need to be rejected as it was after considering ***Pranay Sethi's case (supra)***, that the Hon'ble Supreme Court while considering one of the heads of awarding compensation i.e. loss of consortium, observed as under:-

> ***8.7 A Constitution Bench of this Court in Pranay*** *Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.*
>
> *In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium','parental consortium', and 'filial consortium'.*
>
> *The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.*
>
> *Spousal consortium is generally defined as rights pertaining to the relationship of a husband wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation."*
>
> *Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."*
>
> *Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.*
>
> *Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.*
>
> *The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.*
>
> *Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.*

A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Pranay Sethi (supra).

In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs. 40,000 each for loss of Filial Consortium.

29. Yet the claimants cannot be held entitled to any compensation under this head because filial consortium is the right of the parents to compensation in the case of an accidental death of a child, the reason being that an accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. This was so held by the Hon'ble Supreme Court in Magma's case (supra) itself as would be evident from underlined portion above.

30. Admittedly, the claimants in the instant case happen to be the wife and children of the deceased, therefore, are not entitled to claim compensation under the head "Filial Consortium"..

31. In view of the aforesaid discussion, the compensation that would eventually work out is as under:-

Sr.No.	**Award passed by the Tribunal**	**Modified Award by this Court**
	Details/Particulars	Details/Particulars
(i)	Age of the deceased: 52 years	
(ii)	Assumed salary plus 15% addition: Rs.11,000/- + Rs. 1650/- = 12,650/- Annual: Rs.12,650 x12 = 1,51,800/-	Modified proved salary plus 10% addition: Rs.11,000/- + Rs. 1100/- = 12,000/- Annual: Rs.12,000 x12 = 1,44,000/-
(iii)	After deduction of 1/3rd of Rs. 1,51,800/- i.e. Rs. 50,600/- = 1,01,200/-	After deduction of 1/3rd of Rs. 1,44,000/- i.e. Rs. 48,000/- =Rs. 96,000/-
(v)	Multiplier of 11: Rs. 1,01,200 x 11=Rs.11,13,200/-	Multiplier of 11: Rs.96,000x11 =Rs. 10,56,000/-
(vi)	**<u>Plus</u>** Loss of consortium =RS.1,00,000/-	**<u>Plus</u>** Loss of consortium = Rs.40,000/-
(vii)	Funeral expenses: Rs.25,000/-	Funeral expenses: Rs.15,000/-
(viii)	Loss to the estate : Rs.15,000/-	Loss to estate : Rs.15,000/-
(ix)	**Total Award: Rs.12,53,200/- plus interest**	**Total Modified Award: Rs.11,26,000/- plus interest**

32. Now, the last and most crucial question as to what deduction should be made towards contributory negligence in such type of cases.

33. In ***United India Insurance Co. Ltd vs. Mahima Singh and Ors, 2019 ACJ 697***, a learned Single Judge of the Delhi High Court in similar circumstances where the vehicle in question was being driven in violation of Rule 23, held the

driver to be contributory negligent for the accident to the extent of 16.58% and I really see no reason for taking contrary view and, therefore, a sum of Rs. 1,86,690/- is deducted towards contributory negligence and in this manner the claimants are held entitled to a total compensation of Rs. 9,39,310/- with interest at the rate of 9% per annum.

34. In view of the aforesaid discussion, the appeal is partly allowed in the aforesaid terms and instead of an amount of Rs.12,53,200/- as awarded by the learned Tribunal below, the claimants shall now entitle to a sum of Rs. 9,39,310/- plus interest @ 9% per annum till the date of actual payment, leaving the parties to bear their own costs. Pending application, if any, stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Urvashi Fakay and others …Petitioners.

Versus

State of Himachal Pradesh …Respondent

Cr.MMO No.130/2016
Date of decision : 26th July, 2019

Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 -Section 20 – **Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1994** – Rule 13 – Transportation of ultrasound machines – Held, clinic of petitioners was duly registered at Delhi – Ultrasound machines were transported from Delhi to Kullu under this registrations certificate – Metropolitan Magistrate had permitted release of these machines on spurdari to one of petitioner – There is no violation of Rule 13. (Para 19)

Cases referred:

M/s Pepsi Foods Ltd vs. Special Judicial Magistrate, (1998) 5 SCC 749
Madhavrao Jiwaji Rao Scindia vs. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692
Mahant Narayana Dessjivaru vs. State of Andhra, Hyderabad and others, AIR 1959 Andhra Pradesh 471
R.P. Kapur vs. State of Punjab, AIR 1960 SC 866

For the Petitioners : Mr. B.C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate.

For the Respondent : Mr. Ashwani K. Sharma and Mr. Nand Lal Thakur, Advocate Generals for the State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

A pygmy proposition has swelled to a monstrous proportion, and the only way to consume a monster is limb by limb.

2. The accused have invoked the inherent powers of this Court, challenging the refusal of Sessions Judge to quash the issuance of process, in a complaint filed for violation of Rules 13, 6(6) of Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

3. This petition under Section 482 of the Code of Criminal Procedure, after now called as CrPC, is directed against the order dated 19.3.2016, passed by learned Sessions Judge, Kullu, District Kullu, HP, in Case Code No.0000017/2015 (Registration No.8/2015), titled as *Urvashi Fakay versus State of Himachal Pradesh*, whereby the learned Sessions Judge, had dismissed the petition against the order of summoning, dated 24.3.2015, passed by the learned Chief Judicial Magistrate, in the file of Complaint No.41-1/15, wherein he held that sufficient grounds exist to proceed against the accused persons under Rule 13, 6 Clause 6 of PC of Rules framed under Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (from now onwards referred to as "PNDT Act").

4. The accused are members of a family. Petitioner no. 1 is the wife of Petitioner no. 2 Dr. Sunil Fakey, who is a Radiologist and Petitioner no. 3 Dr. Y.C Fakey, is the father-in-law of Petitioner no. 1, and he retired as Chief Medical officer, from the Government of H.P. (Ref: Annexures to the complaint).

5. The State of Himachal Pradesh, through District Appropriate Authority-cum-Chief Medical Officer, Kullu, filed a complaint in the file of Chief Judicial Magistrate, Kullu, against the present petitioners, for the violation Rule 13 and Rule 6 (6) of the PNDT Act. The complainant alleged that Urvashi Fakay, who is petitioner No.1 herein, had applied to District Appropriate Authority, Kullu (After now called DAA), for the registration of Ultrasound Clinic, in the name of "FOURTH DIMENSION-An Ultrasound Clinic" at Kullu, H.P. The application was accompanied with the requisite fee and documents. Accordingly, the Chief Medical Officer proposed to inspect the ultrasound machines. On 15.12.2012, the Chief Medical Officer checked the proposed site for ultrasound clinic and observed that two machines that are being intended to be installed were purchased on 25.4.2006 and 21.9.2009 and further noticed that petitioner No.1 Urvashi Fakay had sought permission to transport these machines from Delhi to Kullu. It was observed in this letter that these machines were already in use in Delhi and petitioner No.1 was directed to place on record the registration of the previous installation along with N.O.C.s of Appropriate Authority at Delhi regarding the transportation of machines out of Delhi. It was further mentioned that once these formalities are completed, then the Chief Medical Officer be intimated for the inspection of the machines.

6. Vide letter dated 20.12.2012, petitioner No.1 forwarded the registration certificate of Delhi, to the Chief Medical Officer, stating that the NOC will be handed over within three months. Subsequently vide communication dated 3.1.2013 (Annexure P-5), the Chief Medical Officer informed the petitioner No.1 that in the meeting of the committee, held under the PNDT Act, it was unanimously opined that the NOC be brought from the Appropriate Authority. Vide another letter dated 19.3.2013 (Annexure P-6), petitioner No.1 was reminded to submit NOC as stated before. The complaint also contained the minutes of the meeting of the District Advisory Committee, under the Act, held on 7.5.2013, in which the issue of registration of the clinic was considered. The minutes contained all the transactions at Delhi, including the mode and manner, in which the machines were involved in a criminal matter at Delhi. After considering all the factual position, the committee advised the Appropriate Authority, Kullu to grant the registration of the said clinic. It was

further noticed that on 24.4.2013, the machines were inspected and it was found to be sealed. Accordingly, vide communication dated 13.5.2013 issued by the Chief Medical Officer, Kullu, the clinic was registered. The registration certificate was annexed as in the complaint as Annexure-4. Later on, the requisite declarations were made by petitioner No.1, Urvashi Fakay, vide communications, annexed as Annexure-13 and Annexure-14, with the complaint.

7. On 12.7.2013, the Chief Medical Officer, Kullu, who was the District Appropriate Authority under the Act, sent a notice to petitioner No.1, Urvashi Fakay, in which he stated that the orders of the Court of Metropolitan Magistrate, Rohini are computer-generated documents and these do not bear any signatures or seal of the Court and asked them to supply the certified copies of the order passed by the Delhi Court.

8. The background of this letter was that these ultrasound machines were taken into custody in FIR No.228/10, registered in Police Station, Ashok Vihar, Delhi. It appears that Petitioner No. 2, Dr. Sunil Fakey, is an accused in this FIR, registered in Delhi. During the pendency of the matter, the owner of the ultrasound machines, Dr. Sunil Fakay, had sought the release of the machines on Supurdari, with an undertaking that he shall not use these machines without the permission of the Appropriate Authority under the Act. On 23.8.2012, Dr. Y.C. Fakay, who is petitioner No.3, had requested the Chief Medical Officer-cum-Appropriate Authority under the Act, seeking his permission to transfer the Ultrasound machines from Delhi to Kullu, in this new Center opened by petitioner No.1, Urvashi Fakay.

9. Consequently, vide Communication dated 31.8.2012 (Annexure-16), the District Appropriate Authority-cum-Chief Medical Officer, Kullu, informed petitioner No3, Dr. Y.C. Fakay, to intimate his Office, within one week from the date of delivery of the machines at the said address. Consequently, vide letter dated 6.11.2012 (Annexure-17), petitioner No.3, Dr. Y.C. Fakay informed the Chief Medical Officer that machines have arrived at the above premises on 1.11.2013 and that were lying in packed condition at his garage (Annexure-17). Vide another letter dated 4.5.2013 (Annexure-18), petitioner No.3, Dr. Y.C. Fakay informed the Deputy Commissioner (Revenue), who was the Appropriate Authority under the Act, that the machines had been transported to Kullu. Letter dated 20.8.2013 (Annexure-20), written to petitioner No.1, Urvashi Fakay by the Chief Medical Officer, Kullu, stated that the letters sent by the department to LMM (Metropolitan Magistrate) Rohini, Delhi- 85, was received back and it indicates that the orders of the Court dated 8.4.2012, are still doubtful. Thus, she was directed to supply the original documents under Sub Clause (b) of Section 17 (A) of the Act. It was also indicated that action would be taken if the documents are found to be fraudulent.

10. Vide letter dated 24.8.2013 (Annexure-21), the District Appropriate Authority-cum-Chief Medical Officer, Kullu directed petitioner No.1, Urvashi Fakay to clarify, whether any case for violation of any provisions of the Act, is pending at Delhi or not. Vide a detailed reply dated 30.8.2013, petitioner No.1, Urvashi Fakay informed the District Appropriate Authority/complainant that the Court of Shri Dharmander Singh passed the order in question, Metropolitan Magistrate, Rohini, Delhi on 8.4.2013 and not on 8.4.2012 in case FIR No.228/10 at Police Station, Ashok Vihar and because of the wrong year, the complainant did not receive any intimation. She further informed the complainant that the case relating to the FIR as mentioned earlier was still subjudice in Rohini Court, Delhi. It was also suggested that the Magistrate vide its order dated 8.4.2013, was pleased to grant the NOC for registration of Ultrasound machine No.A96508300003369 in her favor. Certified copy of the order was also annexed as Annexure-22. Notice dated 11.10.2013, was sent by the complainant to petitioner No.1, Urvashi Fakay under section 20 of the Act. After this clarification, the DAA Kullu closed this aspect of the matter.

11. Vide an office communication dated 5.10.2013 Annexure-23 (P-2), issued by the Directorate of Health Safety and Regulation Himachal Pradesh to the Chief Medical Officer, Kullu, he was reminded that he has been directed to take action against Petitioner No. 1 Urvashi Fakey, under Section 20 of the Act for violation of Rule 13 of the Rules framed under the Act. Petitioner No.1, Urvashi Fakay, sent a reply to this notice vide Annexure-24, clarifying her position. The complainant vide his letter dated 14.11.2013 (Annexure -25) (P-1), addressed to petitioner No.1, Urvashi Fakay, informed her that she is given an opportunity of being heard and consequently, directed her to attend the meeting on 21.11.2013 at 4:00 pm in his Office. Vide letter dated 2.11.2013 (Annexure 25), the Director, Health Safety & Regulation, Shimla, informed the District Appropriate Authority of violation of Rules while granting registration of the clinic. After that, various communications were exchanged between the complainant and the petitioner No.1, which finally ended up in filing of the complaint in question.

12. The Complainant, District Appropriate Authority-cum-Chief Medical Officer, Kullu sought prosecution of three accused, namely Urvashi Fakay, Dr. Sunil Fakay, and Dr. Y.C. Fakay, for violation of Rule 13 of Rules framed under the Act.

13. Before, proceeding further, it will be useful to extract Section 20 of the Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994:-

> "20. Cancellation or suspension of registration.-
>
> 1. The Appropriate Authority may suo moto, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.
>
> 2. If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be. PNDT Act, 1994 & Amendments 3. Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is, of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1)."

14. The primarily, a violation is mentioned in Paragraph-6 of the complaint, in which it was stated that on the suspension of registration, the accused was directed to deposit the Registration Certificate with the District Appropriate Authority, Kullu, when the registration was canceled on 14.10.2014 vide Annexure-43 and machines were sealed by the Appropriate Authority. However, the accused failed to do so.

15. This complaint was registered as Complaint No.41-1/15 in the Court of The Chief Judicial Magistrate, Kullu. Vide order dated 24.3.2015, the learned Chief Judicial Magistrate, passed the following order:-

> "Office report seen. Complaint be registered. I have perused the complaint and heard complainant. There are sufficient grounds to proceed against the

> accused persons under Rule 13, 6 Clause 6 of PC and PNDT Act 1994. Let notices be issued to accused persons on 04.05.2015."

16. The accused, who are petitioners herein, challenged this order by filing a criminal revision petition under Section 397 of the Code of Criminal Procedure in the Court of learned Sessions Judge, Kullu. Vide order dated 19.3.2016, the learned Sessions Judge, Kullu, dismissed the revision petition. Now, the petitioners have come up before this Court, seeking quashing of summoning orders as well as an order issued by the Sessions Judge, whereby the revision petition was dismissed.

17. I have heard Mr. B.C. Negi, learned Senior Advocate, for the petitioners and Mr. Ashwani K. Sharma and Mr. Nand Lal Thakur, learned Additional Advocate General, for the State. I have also gone through the complete record as well as the judgment dated 6.8.2014, passed by a Division Bench of this Court in CWP no. 2477 of 2014, titled as Dr. Sunil Fakey v. State of Himachal Pradesh and others.

18. The Chief Medical Officer, the complainant is alleging violation of Rules 13, Rule 6 (6) of the Act. It would be appropriate to deal firstly with Rule 13 of the Rules framed under PNDT Act, which reads as follows:

> Rule 13. Intimation of changes in employees, place or equipment. – Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall intimate every change of employee, place, address and equipment installed, to the Appropriate Authority [at least thirty days in advance of the expected date of such change, and seek reissuance certificate of registration from the Appropriate Authority, with the changes duly incorporated].

19. A perusal of the complaint and its annexures would reveal that the complainant is aggrieved that the transportation of the Ultrasound machines from Delhi to Kullu was in violation of Rule 13 of the Act. However, in the complaint itself, the Certificate of Registration was annexed as Annexure-11, vide which, on 13.5.2013, under Registration No.38, the Clinic was registered. Now, the petitioners had transported the machines under this Certificate. The complainant admits that prior to the transfer of the machines; these US-Made machines were lying ceased in Delhi and were owned by petitioner No2, Dr. Sunil Fakay. The order of Metropolitan Magistrate, permitting the handing over of the machines on Supurdari, was placed by petitioner No.1, Urvashi Fakay in the file of complainant and consequently it formed part of the present complaint as Annexure-22. In view of this, it cannot be said that there is any violation of Rule 13 of the Act. The law is well settled that if two views are possible on the set of evidence, then the view in favour of the accused has to be preferred over the view favouring the prosecution/complainant.

20. Coming to the violation of Rule 6(6) of PNDT Act, would reveal that the rule deals with the procedure, certificate of registration and its procedures regarding application, cancellation and change of ownership etc.

> Rule 6 (6) of PNDT Rules, reads as follows:-
>
> (Certificate of Registration)
>
> "The certificate of registration shall be non-transferable. In the event of change of ownership or change of management or on ceasing to function as a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic,

> Ultrasound Clinic or Imaging Centre, both copies, of the certificate of registration shall be surrendered to the Appropriate Authority."

21. The notice issued by the complainant was for suspension, and the complainant appears to have wrongly construed it and treated its effect as ceasing to function. The language of rule 6(6) of PNDT Rules, "ceasing to function," is crystal clear. Vide communication dated 13.5.2013 (Annexure-11), the petitioner No.1 was granted registration by the complainant to run an Ultrasound Clinic. Rule 6 (6) of the PNDT Act states that the Certificate of Registration shall be non-transferable. In the present case, the complaint is that despite the suspension of registration, the Clinic continued to work. However, there is no evidence even to this effect. Be that as it may, the language of Rule 6 (6) of the Act is unambiguous that Registration Certificate has to be surrendered in case of Ultrasound clinic ceases to function. The most crucial document in the entire matter is the notice of suspension of Ultrasound Clinic Registration (Annexure-31), which is dated 6.3.2014, issued by the Chief Medical Officer, complainant, to the Petitioner No.1, Urvashi Fakay. The subject of this notice reads as under:-

> "Notice of Suspension of Ultrasound Clinic Registration"

> The later part of this order reads as follows:-

> "Now keeping in view the above circumstances DAC is of the view that since the applicant has violated the mandatory provisions of the Act and has also misled the DAA Kullu, as such all members of committee, are of the opinion that the registration of the clinic granted to the applicant vide registration Certificate No.38 from 13/5/2013 to 12/5/2018 be <u>suspended</u> temporarily till the required provisions are not complied with."

22. Now, the literal meaning of this notice is the suspension of registration, whereas the complaint has been filed for "<u>suspension of registration</u>" and "<u>cease to function</u>." The word 'suspension' has an altogether different meaning from the word 'seizure/ceasing.'

23. The Black Law Dictionary defines 'suspension' and 'cease' as follows:-

> "Suspension: the method by which something is suspended, the device by which something is suspended, an imposed temporary withdrawal of a right or privilege, the stoppage of payment of debts because of financial failure.
>
> Cease: to stop, bring to an end, to come to an end, stop."

24. The Andhra Pradesh High Court, in *Mahant Narayana Dessjivaru vs. State of Andhra, Hyderabad and others,* AIR 1959 Andhra Pradesh 471, also had an occasion to deal with the difference between the suspension and seizure, and the Court went on to say as follows:-

> "Sri Subramanyam, learned counsel for the petitioners, invites us to construe the expression "shall cease to be operative" as "shall be suspended". We do not think we can give weight to it. The word "cease" means

discontinue or "put an end to." It means that the scheme and the sanad were no longer operative and the rights, if any, accruing therefrom are extinguished. There is no scope for importing any notion of suspension into that expression. Its only import is that they are discontinued once and for all."

25. Thus, the notice was for Suspension of Ultrasound Clinic Registration. By no stretch of the imagination, the said notice can be read to interpret as 'Cease to exist.' Thus this notice did not violate the rule 6(6) of PNDT Rules. Therefore no offence is made out.

26. The penal clauses of PNDT Act are extracted as follows,

S. 23. Offences and penalties.-

(1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made there under shall be punishable with Act, 1994 & Amendments imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

2. The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

3. Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre- natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.

4. For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

S. 25. Penalty for contravention of the provisions of the Act or rules for which no specific punishment is provided.-

Whoever contravenes any of the provisions of this Act or any rules made thereunder, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which

may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

27. Even apart from missing ingredients in the complaint, there is no *mensrea* or guilty mind of the accused persons. The statues and objects of the Act read as follows:-

"Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994 is an Act of the Parliament of Indiaenacted to stop female foeticides and arrest the declining sex ratio in India. The act banned prenatal sex determination. Every genetic counselling centre, genetic laboratory or genetic clinic engaged in counselling or conducting pre-natal diagnostics techniques, like In vitro fertilisation (IVF) with the potential of sex selection (Preimplantation genetic diagnosis) before and after conception comes under purview of the PCPNDT Act and are banned.

An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of prenatal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto."

28. There are no allegations or averments that the petitioners had misused this Clinic in violation of the objects and purposes of the Act. There is no complaint to that effect. There cannot be said to be any *mensrea* or guilty mind or culpable mental state of mind of any of the petitioners to violate the object or purpose of the Act.

29. All these allegations in the complaint were directed against the Petitioner no. 1 Urvashi Fakey. The accusations against Petitioner no. 3, Dr. Y.C Fakey, are only to the effect that he had sought transportation of ultrasound machines. But that was before the inspection of such machines. Once the registration certificate had been granted, then there was no role of Petitioner no. 3, Dr. Y.C Fakey. Coming to Dr. Sunil Fakey, the Petitioner no. 2, the only allegations against him are before the transportation, that too because he was the owner of the machines. Admittedly, the registration in Kullu is not in his name. He is not a signatory to any of the documents for registration, except that he had consented to the transportation of ultrasound machines from Delhi to Kullu. There is no criminality in any of his acts.

30. There is another aspect of the matter which is obligatory for this Court to mention. Petitioner No.2, Dr. Sunil Fakay, had filed a writ petition, which was registered as CWP No.2477/2014. Vide judgment dated 6.8.2014, a Division Bench of this Court, had dismissed such petition and had made the following observations:-

"11. Petitioner has violated various provisions of the Act. As is evident from the records, his licence was not renewed by the competent authority at Delhi to run the Clinic. He has in very stealthily and clandestine manner transferred the machinery from Delhi to Kullu. A case has been registered against him, which is still pending in the Court of Metropolitan Magistrate,

Rohini, Delhi. Merely, that the petitioner's name has been registered with the Delhi Medical Council, will not absolve him from the criminal consequences under the Act. The Act is social welfare legislation. Its provisions are to be enforced strictly and there cannot be any compromise on the same by the individual or any competent authority. It is reiterated that the action of the Chief Medical Officer, Kullu, District Kullu, H.P., to allow the transferring of machinery from Delhi to Kullu on 31.08.2012 and registration of clinic was wholly without authority of law. The Chief Medical Officer, Kullu, District Kullu, H.P. has unduly favoured the petitioner's family by permitting the registration of the Clinic and thereafter permitting to transfer of the machinery from Delhi to Kullu. He was remiss in taking the action of his own. It is only after intervention of Director, Health Safety & Regulation, H.P., Shimla that he was forced to take action against these persons. He discharges very important duties under the Act and could not oblivious to the implications of non-enforcement of the Act. He must have known that there is a procedure, the manner in which the machinery could be transferred from Delhi to Kullu. He was supposed to be aware of the provisions of the Act and action warranted. The decision taken by the Chief Medical Officer, Kullu, District Kullu, Himachal Pradesh are very casual. The competent authorities have not in any manner contravened the provisions of the Himachal Pradesh Medical Council Act, 2003 and Delhi, Medical Council Act, 1997 and for that matter the Medical Council Act, 1956. The action has been taken strictly as per the Act.

12. Accordingly, there is no merit in this petition and the same is dismissed. The Principal Secretary (Health), Government of Himachal Pradesh, is directed to hold a disciplinary proceedings into the entire episode, the manner in which the Clinic of petitioner's wife, i.e., 'Fourth Dimension-An Ultrasound Clinic' was granted permission in violation of the mandatory provisions of the Act, including the manner in which the permission was granted by the Chief Medical Officer, Kullu, H.P. to transfer the machinery from Delhi to Kullu vide oder, dated 31.08.2012. The disciplinary proceedings shall be concluded within a period of four months from today. The petition stands disposed of, so also the pending application(s), if any. No costs."

31. Aggrieved by this judgment, the petitioner had approached Hon'ble Supreme Court of India in SLP (C) No(s).14856-14857/2015 and vide order dated 11.7.2018, the Hon'ble Supreme Court of India, passed the following order:-

"Learned senior counsel appearing on behalf of the petitioners has stated that he wants to agitate the matter in accordance with law. Statement is placed on record.

> However, we find no ground to interfere with the impugned order. The Special Leave Petitions are accordingly dismissed. Pending applications, if any, stand disposed of."

32. So far as first and third petitioners are concerned, they were not parties in the above-said writ petition. Therefore, this judgment passed in the writ petition shall not come in their way.

33. Mr. B.C. Negi, learned Senior Counsel, appearing for the petitioners, state that the prayer in the said Writ petition, filed by Petitioner no. 2 Dr. Sunil Fakey, was for violation of Article 21 of the Constitution of India and it was not against the present complaint. To corroborate his averment, he has drawn the attention of this Court to Paragraph-9 of the judgment passed in CWP No.2477 of 2014, titled as *Dr. Sunil Fakay vs. State of Himachal Pradesh and others*, the relevant portion of which, is extracted as below:-

> "9. The District Advisory Committee has accorded the permission in its meeting held on 07.05.2013 without due application of mind. It has not ascertained the true position before permitting the petitioner's wife to run the Clinic. There was absolute dereliction of duties by all the functionaries, who attended the District Advisory Committee held on 07.05.2013. The State Government was informed vide letter dated 17.06.2013. It led to holding of meeting of State Appropriate Authority with State Advisory Committee on 27.06.2013. The Director, Health Safety & Regulation, H.P., Shimla, has taken a serious view of the matter and was construed to call upon the Chief Medical Officer, Kullu, District Kullu, H.P. to explain the position under which the machinery has been permitted to be transported out of Delhi and also the granting of permission to run the Clinic at Kullu by the wife of the petitioner. The conduct of the Chief Medical Officer, Kullu, District Kullu, H.P, Shimla in right spirit, which resulted in running of the illegal Clinic of the petitioner's wife in utter violation of the mandatory provisions of the Act. The Director, Health Safety & Regulation, H.P., Shimla has sent an intimation to the Chief Medical Officer, Kullu, District Kullu on 02.07.2013, followed by reminders, dated 14.08.2013, 05.09.2013 and 05.10.2013. It is only after the intervention of the Director, Heal Safety & Regulation, Himachal Pradesh, Shimla that notices were issued to petitioner's wife on 20.08.2013 and 24.08.2013. Ultimately, the notice was issued to petitioner's wife under Section 20 of the Act on 11.10.2013. She was also issued notice on 14.11.2013, including notice suspension of Ultrasound Clinic Registration, dated 06.03.2014 and ultimate suspension on 11.03.2014. It is only after the intervention of the Director, Health Safety & Regulation, H.P., Shimla that notices were issued to the petitioner's wife for violation of mandatory provision of the Act on 27.08.2013 and 14.09.2013. It is only due to the sincere efforts made by the Director, Health Safety & Regulations, H.P., Shimla, which led to the issuance of letter, dated 11.03.2014, whereby

the licence of Harihar Hospitals Pvt. Ltd., Hathithan, Bhuntar, District Kullu, was suspended temporarily and the petitioner was terminated from the post of Consultant Radiologist w.e.f. 11.03.2014, vide letter, dated 11.03.2014. There is no illegality in the impugned orders, whereby the licence of respondent No.4-Hospital, is temporarily suspended and the petitioner has been restrained from working as Consultant Radiologist w.e.f. 11.03.2014. It is not the petitioner alone, who has violated the mandatory provisions of the Act, but the same have been violated with impunity by his father and wife."

34. Mr. B.C.Negi, Sr. Advocate, appearing for the second Petitioner, Dr. Sunil Fakey, stated that the prayer in the writ petition was with respect to the temporary suspension of the licence of Harihar Hospitals Pvt. Ltd., Hathithan, Bhuntar, District Kullu, which was arraigned as respondent No.4 in the writ petition and the termination of the accused/petitioner was from the post of Consultant Radiologist w.e.f. 11.3.2014 with respondent No.4 hospital. As is also apparent from Paragraph-10 of the writ petition so filed under Article 226 of the Constitution of India, that the right to livelihood was being affected by those orders.

35. After going through the entire judgment passed in the writ as mentioned earlier, coupled with the complaint as the whole and its annexures, the findings in the writ petition shall not apply in the present petition, which is against the summoning of Petitioner no. 2, Dr. Sunil Fakey and other accused.

36. Regarding Dr. Sunil Fakay, petitioner No.2, he had not applied for the licence to run a Clinic at Kullu. He was not signatory to any of the documents. It was his wife, petitioner No.1, who sought registration to run the Ultrasound Clinic at Kullu. The permission to transfer the machines was given to his father, Dr. Y.C. Fakay, petitioner No.3. The role of Dr. Sunil Fakay, petitioner No.2 was that he was the owner of U.S.A made Ultrasound machines.

37. As already mentioned above, there is no role of the second petitioner, Dr. Sunil Fakey, as far as application and proceedings in Himachal Pradesh, are concerned. Therefore, the prosecution failed to fasten any criminal liability upon him. I am of the considered opinion that the judgment passed in CWP No.2477/2014, shall not come in the way of this Court to quash the order of summoning against the petitioner.

<u>JUDICIAL PRECEDENTS ON JURISPRUDENCE OF QUASHING</u>:

38. In M/s Pepsi Foods Ltd v. Special Judicial Magistrate, (1998) 5 SCC 749, a Division Bench of Hon'ble Supreme Court observed as under -

"26. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence

both oral and documentary in support thereof and that would be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused.

27. No doubt the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial…"

39. In *R.P. Kapur v. State of Punjab*, AIR 1960 SC 866, a three Judges Bench of Hon'ble Supreme Court observed as under:-

"6. …. … ...It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, the High Court would be justified in quashing the proceedings on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such case, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is

evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S. 561-A, the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under S. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide : In Re: Shripad G. Chandavarkar, AIR 1928 Bom 184, Jagat Chandra Mozumdar v. Queen Empress, ILR 26 Cal 786, Dr. Shankar Singh v. State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193), Nripendra Bhusan Roy v. Gobina Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. Sivarama Subramania, ILR 47 Mad 722 : (AIR 1925 Mad 39)."

40. In *Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre*, 1988 (1) SCC 692, a three judges bench of the Hon'ble Supreme Court holds:-

"7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

41. In *Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Ors. vs.* State of Gujarat & anr., Criminal Appeal No. 1723 of 2017, decided on 4.10.2017, a Three Judges Bench of Hon'ble Supreme Court, laid down the broad principles for quashing of FIR, which are reproduced as follows:

"15. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

42. Given the above analysis, the complaint is based on assumptions and lacks substance. Thus the accused must get the benefit of the doubt.

43. The issuance of the process, in this case, is an abuse of the process of the law. This Court cannot shy away in exercising its jurisdiction under section 482 CrPC, which is devised to advance the substantive justice.

44. Consequently, this petition is allowed and the order dated 19.3.2016, passed by learned Sessions Judge, Kullu, District Kullu, H.P., in Case Code No.0000017/2015

(Registration No.8/2015), titled as *Urvashi Fakay and others versus State of Himachal Pradesh*, is quashed and set aside. Consequently, the order of summoning, dated 24.03.2015, passed by the learned Chief Judicial Magistrate, in Complaint No.41-1/15, as well as the complaint is quashed. All consequential proceedings are also quashed.

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

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

Sat Dev Singh ...petitioner
Versus
State of H.P. & Ors. ...Respondents

CWP No. 2646 of 2015
Reserved on: 24.07.2019
Date of decision: 30.07.2019.

Land Acquisition Act 1894 – Section 23 – Payment of enhanced compensation – Writ Jurisdiction – Corporation acquiring land of petitioner through private negotiations– Corporation also executing an undertaking in favour of petitioner to pay more compensation for said land, if negotiated rates of lands are enhanced – Land Acquisition Collector (LAC) enhancing rates of similar lands vide his award – Petitioner praying for enhanced compensation in terms of undertaking as per award of LAC – Denial by Corporation – Writ jurisdiction – Held, in terms of undertaking given by Corporation itself, petitioner is entitled for enhanced compensation as per award of LAC – Plea of Corporation that petitioner was entitled to enhanced compensation only if negotiated rates of land were increased through negotiations by Corporation itself, is bogus and frivolous for pursuing of which public money was squandered and petitioner harassed- Corporation grossly misused and abused process of court by adopting litigious attitude –Petition allowed - Petitioner entitled for enhanced amount of compensation with statutory benefits as per award of LAC – Costs of Rs. 1,00000/- imposed on Corporation. (Paras 8, 31, 42 & 47)

Cases referred:

Bhusawal Municipal Council vs. Nivrutti Ramchandra Phalak and others, (2015) 14 SCC 327
Dilbagh Rai Jerry vs. Union of India, AIR 1974 SC 130
Gurgaon Gramin Bank vs. Khazani and another, (2012) 8 SCC 781
Indian Council for Enviro-Legal Action vs. Union of India and others, (2011) 8 SCC 161
Mahanadi Coalfields Ltd. and another vs. Mathias Oram and others, (2010) 11 SCC 269
National Textile Corporation vs. Kunj Behari Lal, (2011) 167 Comp Cas 29 (Delhi)
Noida Entrepreneurs Association vs. Noida and others, (2011) 6 SCC 508
Punjab State Power Corporation Ltd., Patiala and others vs. Atma Singh Grewal, (2014) 13 SCC 666
Rajendra Shankar Shukla and others vs. State of Chhattisgarh and others, (2015) 10 SCC 400
Renusagar Power Co. Ltd. vs. General Electric Co., 1994 Supp (1) SCC 644
Secretary, Jaipur Development Authority, Jaipur vs. Daulat Mal Jain & Ors., (1997) Vol. 1 SCC 35

Subrata Roy Sahara vs. Union of India and others, (2014) 8 SCC 470
Sunder vs. Union of India, 2001 (7) SCC 211
Urban Improvement Trust, Bikaner vs. Mohan Lal, (2010) 1 SCC 512

For the petitioner: Mr. Ashok K. Tyagi, Advocate.
For the Respondents: Mr. Vinod Thakur, Additional Advocate General with Mr. Bhupinder Thakur, Ms. Svaneel Jaswal, Deputy Advocate Generals and Mr. Ram Lal Thakur, Assistant Advocate General, for respondent No. 1.
Mr. Sunil Mohan Goel, Advocate, for respondents No. 2 to 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

I would preface this judgment by referring to the observations made by the Hon'ble Supreme Court in ***Noida Entrepreneurs Association vs. Noida and others, (2011) 6 SCC 508***, wherein the Hon'ble Supreme Court observed as under:-

> *"Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in large public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons." It must be exercised bona fide for the purpose and for none other.*

2. Similar sentiments have been expressed earlier and later to this decision and some of which shall be referred to during the course of this judgment.

3. Adverting to the facts, it would be noticed that the land of the petitioner was acquired by the Himachal Pradesh Power Corporation Ltd. (for short 'HPPCL) by way of negotiation vide sale deed dated 24.09.2009. The purpose of acquisition was for the construction of Renukaji Dam Project. Immediately after the execution of the sale deed the respondent-HPPCL issued a certificate of assurance in favour of the petitioner agreeing therein that in case the negotiated rates for the land being acquired for dam and reservoir area (sub mergence area) are enhanced the same rate would be paid to him. It was further stated in the assurance certificate that this undertaking was being given to ensure that those persons who come forward for sale of land voluntarily are not disadvantaged.

4. It is not in dispute that subsequently the respondents No. 2 to 5 acquired the land of other persons/land owners of the same area for same purpose wherein such persons were granted enhanced amount of compensation. As per award dated 23.08.2012, the petitioner called upon the respondents to pay the enhanced amount vide notice dated 27.10.2014 but the said notice was not replied constraining the petitioner to file the instant petition, wherein he has claimed the following substantive reliefs:-

> *1. That the respondents No. 1 to 3 may kindly be directed to comply the undertaking Annexure P-1, direction P-3 and pay the amount of enhanced*

compensation with up to date interest, having become due to be paid to the petitioner by the respondents on the basis of award No. 658, dated 23.08.2012 and supplementary award in main award No. 658, dated 06.03.2013 passed by respondent No. 4 in the interest of justice.

2. That the respondents No. 1 to 3 may kindly be directed to pay the amount of enhanced compensation alongwith 30% solatium and additional amount under Section 23 (1A) of the Land Acquisition Act at the rate of 12% from 30.07.2009 till realization of the same.

5. In the reply filed by the respondents No. 2 to 5, it was averred that the land owned by the petitioner was purchased by the replying respondents in the year 2009 through negotiated rate of Rs.50,000/- per bigha for Nakabil, Gair Mumkin & Nakabil Charand types of land. Subsequently on 30.09.2009, the negotiated rates for the above mentioned types of land was enhanced to Rs.75,000/- per bigha and in order to honour the assurance given by the replying respondents, the differential amount of negotiated rate was paid to the petitioner vide cheque No. 675434, dated 01.12.2009, which was duly received by the petitioner. Lastly, it was stated that petitioner himself willingly sold the land to the replying-respondents and having thus received consideration for the sold land in the year 2009 as per negotiated rates approved by the Board of Directors based on classification of land, therefore his claim for payment of compensation as per the land acquisition award pronounced by the Land Acquisition Collector in the year, 2012 is not tenable.

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

6. It needs to be mentioned that the case was initially heard on 03.07.2019, when this Court came to a *prima facie* conclusion that the defence as raised by the respondents was not tenable in law and directed the counsel for respondents No. 2 to 5 to seek instructions and the matter was adjourned to 17.07.2019. On 17.07.2019, learned counsel for respondents No. 2 to 5 prayed for adjournment and on his request it was ordered to be listed on 18.07.2019. Even on the said date, this Court directed the learned counsel for respondents No. 2 to 5 to seek instructions in terms of the last order and at his request the case was adjourned to 23.07.2019, on which date Shri Ajay Kumar Jasta, Dy. G. M., Sh. Manjeet Sharma, LAO, HPPCL, Sh. Anoop Kumar Sharma, Sr. M. (Law) and Sh. Prem Chand Naib Tehsildar were present in person. The officials of the respondents were specifically informed that their defence was not tenable and therefore, they should obtain clear cut instructions, as to whether they would like to pursue the instant *lis* or not. Even on 24.07.2019 in the pre lunch session, the respondents were again directed to seek instructions in terms of the previous order and when the matter was thereafter taken up in the post lunch session, the learned counsel for respondents No. 2 to 5 stated that he had specific instructions to argue the matter. The Court then heard the arguments and reserved the judgment.

7. In order to appreciate the controversy in issue, it would be necessary to refer to the assurance given by respondents No. 2 to 5, which is in writing and has been annexed as Annexure P-1. It would be apposite to reproduce the said assurance in its entirety and the same reads as under:-

"ASSURANCE FOR NEGOTIATED RATES FOR LAND ACQUISITION IN RENUKAJI HP

HPPCL has offered rates for land to be acquired through negotiations vide its orders No. HPPCL/MD/Rev.-1/08-1696-99 dated 06.12.08. HPPCL

agrees that in case the negotiated rates for land being acquired for dam and reservoir area (sub mergence area) are enhanced the same rates will be paid to Shri Sat Dev Singh son of Sh. Shiv Dev Singh R/o Naya Bazar Nahan, Distt. Sirmour H.P. for his land measuring 17-15 bighas comprised in Kh. No. 402/3016, 404/316/2, 320 321, 322, 416/368, 369, 370 total Kita 8, measuring 17-15 bighas vide Sale Deed No. 227 dt. 24.09.09 situated in Village Sium Sub Teh. Nahan, Distt. Sirmour, H.P.

This undertaking is being given to ensure that those persons who come forward for sale of land voluntarily are not disadvantaged.

Sd/-

For and on behalf of HPPCL"

8. It is argued by Shri Sunil Mohan Goel, learned Advocate that the assurance given by respondents No. 2 to 5 to the petitioner was only to the effect that in case the negotiated rates of land being acquired for dam and reservoir area are enhanced through negotiation by the respondents themselves, only then the petitioner would be paid the enhanced amount and not when the enhancement is made by the Collector/Court under the Land Acquisition Act.

9. To say the least, the submission is absolutely fallacious and contrary to what is stated in Annexure P-1. The language of the assurance is clear and brooksno other interpretation, wherein the respondents have clearly assured the petitioner that in case the negotiated rates that forms the basis of the sale deed dated 24.09.2009 are enhanced the same will be paid to the petitioner. The assurance has to be interpreted in the light of the words employed in it and not on any other basis.

10. Not only this, there is a specific undertaking in the assurance to the effect that the undertaking was being given to ensure that those persons who come forward to sale of land voluntarily are not disadvantaged. Therefore, it does not lie in the mouth of the respondents to contend otherwise.

11. Moreover, in case the plea of respondents is accepted then this in itself would amount to a case of invidious discrimination, which obviously is not permissible under law.

12. It is not a case of the respondents that the rates of similar land are being enhanced as per award No. 658, dated 23.08.2012. Therefore, there is no reason as to why the enhanced amount be not paid to the petitioner rather the Collector while passing the award (Annexure P-3) has made a specific note of the fact that since the land owners have transferred their share in favour of the HPPCL through private negotiation and there are also fruit and non-fruit bearing trees standing over such land then HPPCL, who has given undertaking at the time of sale transaction will give the enhanced rate of compensation to the other interest holders.

13. This is clearly evident from the following observations:-

Some of the land owners have transferred their share in the land comprised in Kh. Nos. 325, 326, 409/327, 336, 357, 361, 362, 363, 364, 365, ¼, 104/1, 402/316, 452/404/316, 320, 321, 322, 416/368, 369, 370, 372, 374 in favour of HPPCL through private negotiation and there are also fruit and non-fruit bearing trees standing over such land. Since the HPPCL has given undertaking at the time of sale transactions that they will give enhanced

amount of compensation if given to the other interest holders, value of trees which has not been paid and assessment of which has now been done, is payable to the interest holders who have sold the land by way of private negotiation as well. Hence the compensation on account of trees falling to the share of such interest holders too has been included in this award. This amount will be paid as per the share recorded in the revenue record before the sale of the land in favour of HPPCL.

14. To say the least, respondent No.2, which is 'State' within the meaning of Article 12 of the Constitution of India and is a public institution has conducted itself of untrustworthiness out of its own mouth by resorting to litigation like a cantankerous litigants by raising technical plea.

15. Respondents No. 2 to 5 have acted irresponsibly though they were expected to litigate within expected judicial norms. Respondents No. 2 to 5 like belligerent litigants could not resist the temptation of litigation and have fought their legal battle as if it was a war. The battle otherwise is "uneven" as on one side is a public institution whereas on the other side is a private individual.

16. In such a case, one is bound to recall to mind the observations made by Hon'ble Supreme Court in ***Dilbagh Rai Jerry vs. Union of India, AIR 1974 SC 130***, wherein it was observed as under:-

"25. I feel impelled to make a few observations not on the merits but on governmental disposition to litigation, the present case being symptomatic of a serious deficiency. In this country the State is the largest litigant to-day and the huge expenditure involved make a big draft on the public exchequer. In the contest of expanding dimensions of State activity and responsibility, is it unfair to expect finer sense and sensibility in its litigation policy, the absence of which, in the present case, has led the Railway callously and cantankerously to resist an action by its own employee a small man, by urging a mere technical plea which has been pursued right up to the summit court here and has been negatived in the judgment just pronounced. Instances of this type are legion as is evidenced by the fact that the Law Commission of India in a recent report on amendments to the Civil Procedure Code has suggested the deletion of Section 80, finding that wholesome provision hardly ever utilised by Government, and has gone further to provide a special procedure for government litigation to highlight the need for an activist policy of just settlement of claims where the State is a party. It is not right for a welfare State like ours to be Janus-faced, and while formulating the humanist project of legal aid to the poor, contest the claims of poor employees under it pleading limitation and the like. That the tendency is chronic flows from certain observations I had made in a Kerala High Court decision, P.P. Abubacker v. Union of India, AIR 1972 Ker 103, 107: para 5 which I may usefully excerpt here:

" The State under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably get involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook ; for, the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or

> *secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to right in court. The lay-out on litigation costs and executive time by the State and the agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf. I am not indulging in any judicial homily but only echoing the dynamic national policy on State litigation evolved at a Conference of Law Minister of India way back in 1957. Tis second appeal strikes me as an instance of disregard of that policy."*

17. It must be remembered that the State defined within the ambit of State under Article 12 of the Constitution of India, is not an ordinary party trying to win a case against one of its own citizens by hook or by crook. The State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity.

18. This Court has no hesitation to conclude that public money has been wasted because of the adamant behaviour of the officers of respondent No. 2 due to litigious attitude adopted by those officers in pursuing the instant litigation before this Court.

19. In ***Urban Improvement Trust, Bikaner vs. Mohan Lal (2010) 1 SCC 512***, the Hon'ble Supreme Court observed that it is a matter of concern that such frivolous and unjust litigations by Governments and statutory authorities are on the increase. It was further observed that statutory authorities which existed for to discharge statutory functions in public interest should be responsible litigants and cannot raise frivolous and unjust objections nor act in a callous and high-handed manner. It would be apposite to refer to the relevant observations, which reads thus:

> *"5. It is a matter of concern that such frivolous and unjust litigation by governments and statutory authorities are on the increase. Statutory Authorities exist to discharge statutory functions in public interest. They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a callous and highhanded manner. They can not behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment. They are expected to show remorse or regret when their officers act negligently or in an overbearing manner. When glaring wrong acts by their officers is brought to their notice, for which there is no explanation or excuse, the least that is expected is restitution/restoration to the extent possible with appropriate compensation. Their harsh attitude in regard to genuine grievances of the public and their indulgence in unwarranted litigation requires to be corrected.*

6. This Court has repeatedly expressed the view that the governments and statutory authorities should be model or ideal litigants and should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice. We may refer to some of the decisions in this behalf.

7. In Dilbagh Rai Jarry vs. Union of India [1974 (3) SCC 554] where the Hon'ble Supreme Court extracted with approval, the following statement (from an earlier decision of the Kerala High Court (P.P. Abubacker vs. Union of India, AIR 1972 Ker 103, AIR pp. 107-08, para 5)]:(SCC p.562, para 25)

> *"25…….'5. ….."The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The lay-out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf. I am not indulging in any judicial homily but only echoing the dynamic national policy on State litigation evolved at a Conference of Law Ministers of India way back in 1957.' "*

8. In Madras Port Trust v. Hymanshu International, (1979) 4 SCC 176 the Hon'ble Supreme Court held: (SCC p. 177, para 2):

> *"2. …. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and*

by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable...."

9. In a three Judge Bench judgment of Bhag Singh & Ors. v. Union Territory of Chandigarh through LAC, Chandigarh [(1985) 3 SCC 737]: the Hon'ble Supreme Court held: (SCC p. 741, para 3)

"3... The State Government must do what is fair and just to the citizen and should not, as far as possible, except in cases where tax or revenue is received or recovered without protest or where the State Government would otherwise be irretrievably be prejudiced, take up a technical plea to defeat the legitimate and just claim of the citizen."

10. Unwarranted litigation by governments and statutory authorities basically stem from the two general baseless assumptions by their officers. They are:

(i) All claims against the government/ statutory authorities should be viewed as illegal and should be resisted and fought up to the highest court of the land.

(ii) If taking a decision on an issue could be avoided, then it is prudent not to decide the issue and let the aggrieved party approach the Court and secures a decision.

The reluctance to take decisions, or tendency to challenge all orders against them, is not the policy of the governments or statutory authorities, but is attributable to some officers who are responsible for taking decisions and/or officers in charge of litigation. Their reluctance arises from an instinctive tendency to protect themselves against any future accusations of wrong decision making, or worse, of improper motives for any decision making. Unless their insecurity and fear is addressed, officers will continue to pass on the responsibility of decision making to courts and Tribunals."

20. In ***Mahanadi Coalfields Ltd. and another vs. Mathias Oram and others (2010) 11 SCC 269***, the Hon'ble Supreme Court observed as under:-

10. The counter argument goes like this. It is very often the process of development that most starkly confirms the fears ex pressed by Dr. Ambedkar about our democracy. A blinkered vision of development, complete apathy towards those who are highly adversely affected by the development process and a cynical unconcern for the enforcement of the laws lead to a situation where the rights and benefits promised and guaranteed under the constitution hardly ever reach the most marginalized citizens.

11. This is not to say that the relevant laws are perfect and very sympathetic towards the dispossessed. There are various studies that detail the impact of dispossession from their lands on tribal people. It is pointed out that even when laws relating to land acquisition and resettlement are implemented perfectly and comprehensively (and that happens rarely!), uncomfortable questions remain. For a people whose lives and livelihoods are intrinsically connected to the land, the economic and cultural shift to a market economy can be traumatic.

21. In ***Gurgaon Gramin Bank vs. Khazani and another (2012) 8 SCC 781***, the Hon'ble Supreme Court considered the approach of the Government to litigate and observed as under:-

> *2. Number of litigations in our country is on the rise, for small and trivial matters, people and sometimes Central and State Governments and their instrumentalities Banks, nationalized or private, come to courts may be due to ego clash or to save the Officers' skin. Judicial system is over- burdened, naturally causes delay in adjudication of disputes. Mediation centers opened in various parts of our country have, to some extent, eased the burden of the courts but we are still in the tunnel and the light is far away. On more than one occasion, this court has reminded the Central Government, State Governments and other instrumentalities as well as to the various banking institutions to take earnest efforts to resolve the disputes at their end. At times, some give and take attitude should be adopted or both will sink. Unless, serious questions of law of general importance arise for consideration or a question which affects large number of persons or the stakes are very high, courts jurisdiction cannot be invoked for resolution of small and trivial matters. We are really disturbed by the manner in which those types of matters are being brought to courts even at the level of Supreme Court of India and this case falls in that category.*

22. In ***Punjab State Power Corporation Ltd., Patiala and others vs. Atma Singh Grewal (2014) 13 SCC 666***, the Hon'ble Supreme Court noted the facts that Courts are burdened with unnecessary litigation primary for the reason that the Government or Public Sector Undertakings etc. decide to litigate even when there is no merit in the claim. It would be apposite to refer to the relevant observations, which read thus:-

> *8. It is not the first time that the Court had to express its anguish. We would like to observe that the mindset of the Government agencies/undertakings in filing unnecessarily appeals was taken note of by the Law Commission of India way back in 1973, in its 54th report. Taking cognizance of the aforesaid report of the Law Commission as well as National Litigation Policy for the States which was evolved at an All India Law Ministers Conference in the year 1972, this Court had to emphasize that there should not be unnecessary litigation or appeals. It was so done in the case of Mundrika Prasad Singh v. State of Bihar, 1979 4 SCC 701. We would also like to reproduce the following words of wisdom expressed by Justice V.R. Krishna Iyer, who spoke for the Bench, in Dilbagh Rai Jarry v. Union of India and Ors., 1974 3 SCC 554.*
>
> > *25……..5…... But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The lay out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being*

> *tempted into forensic show downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf.*

9. In its 126th Report (1988), the Law Commission of India adversely commented upon the reckless manner in which appeals are filed routinely. We quote hereunder the relevant passage therefrom:

> *2.5. The litigation is thus sometimes engendered by failing to perform duty as if discharging a trust. Power inheres a kind of trust. The State enjoys the power to deal with public property. That power has to be discharged like a trust keeping in view the interests of the cesti que trust. Failure on this front has been more often commented upon by the court which, if it was taken in the spirit in which it was made, would have long back energised the Government and the public sector to draw up its litigation policy. When entirely frivolous litigation reaches the doorsteps of the Supreme Court, one feels exasperated by the inaction and the policy to do nothingness evidenced by blindly following litigation from court to court. Dismissing a Special Leave Petition by the State of Punjab, the Court observed that the deserved defeat of the State in the courts below demonstrates the gross indifference of the administration towards litigative diligence. The court then suggested effective remedial measures. It may be extracted:*

> *4. We would like to emphasize that Government must be made accountable by parliamentary Social audit for wasteful litigative expenditure inflicted on thecommunity by inaction. A statutory notice of the proposed action under Section 80 Code of Civil Procedure is intended to alert the state to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now Section 80 has become a ritual because the administration is often unresponsive and hardly lives up to the parliament's expectation in continuing Section 80 in the Code despite the Central Law Commission's recommendations for its deletion. An opportunity for setting the dispute through arbitration was thrown away by sheer inaction. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in court. We are constrained to make these observations because much of the litigation in which governments are involved adds to the case load accumulation in courts for which there is public criticism. We hope that a more responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditious work in courts of cases which deserve to be attended to.*

Nearly a decade has passed since the observations but not a leaf has turned, not a step has been taken, and the Law Commission is asked to deal with the problem.

> *2.6. A little care, a touch of humanism, a dossier of constitutional philosophy and awareness of futility of public litigation would considerably improve the situation which today is distressing. More*

often it is found that utterly unsustainable contentions are taken on behalf of Government and public sector undertakings.

10. Even when Courts have, time and again, lamented about the frivolous appeals filed by the Government authorities, it has no effect on the bureaucratic psyche. It is not that there is no realisation at the level of policy makers to curtail unwanted Government litigation and there are deliberations in this behalf from time to time. Few years ago only, the Central Government formulated National Litigation Policy, 2010 with the "vision/mission" to transform the Government into an efficient and responsible litigant. This policy formulated by the Central Government is based on the recognition that it was its primary responsibility to protect the rights of citizens, and to respect their fundamental rights and in the process it should become "responsible litigant". The policy even defines the expression 'responsible litigant' as under:

Responsible litigant" means-

(i) That litigation will not be resorted to for the sake of litigating.

(ii) That false pleas and technical points will not be taken and shall be discouraged.

(iii) Ensuring that the correct facts and all relevant documents will be placed before the Court.

(iv) That nothing will be suppressed from the Court and there will not attempt to mislead any court or tribunal.

2. That Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the Court decide", must be eschewed and condemned.

3. The purpose underlying this policy is also to reduce government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the national legal mission to reduce average pendency time from 15 years to 3 years. Litigators on behalf of the Government have to keep in mind the principles incorporated in the national mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary government cases. Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens andother categories requiring assistance must be given utmost priority.

11. This policy recognises the fact that its success will depend upon its strict implementation. Pertinently there is even a provision of accountability on the part of the officers who have to take requisite steps in this behalf. The policy also contains the provision for filing of appeals indicating as to under what circumstances appeal should be filed. In so far as service matters are concerned, this provision lays down that further proceedings will not be filed in service matters merely because the order of the Administrative Tribunal affects a number of employees. Also, appeals will not be filed to espouse the cause of one section of employees against another.

12. The aforesaid litigation policy was seen as a silver living to club unnecessary and uncalled for litigation by this Court in the matter of Urban

Improvement Trust, Bikaner v. Mohan Lal, 2010 1 SCC 512in the following manner:

> *11. The Central Government is now attempting to deal with this issue by formulating realistic and practical norms for defending cases filed against the Government and for filing appeals and revisions against adverse decisions, thereby eliminating unnecessary litigation. But it is not sufficient if the Central Government alone undertakes such an exercise. The State Governments and the statutory authorities, who have more litigations than the Central Government, should also make genuine efforts to eliminate unnecessary litigations. Vexatious and unnecessary litigations have been clogging the wheels of justice for too long, making it difficult for courts and tribunals to provide easy and speedy access to justice to bona fide and needy litigants.*

13. Alas, inspite of the Government's own policy and reprimand from this Court, on numerous occasions, there is no significant positive effect on various Government officials who continue to take decision to file frivolous and vexatious appeals. It imposes unnecessary burden on the Courts. The opposite party which has succeeded in the Court below is also made to incur avoidable expenditure. Further, it causes delay in allowing the successful litigant to reap the fruits of the judgment rendered by the Court below.

14. No doubt, when a case is decided in favour of a party, the Court can award cost as well in his favour. It is stressed by this Court that such cost should be in real and compensatory terms and not merely symbolic. There can be exemplary costs as well when the appeal is completely devoid of any merit. [See Rameshwari Devi and Ors. v. Nirmala Devi and Ors., 2011 8 SCC 249]. However, the moot question is as to whether imposition of costs alone will prove deterrent? We don't think so. We are of the firm opinion that imposition of cost on the State/PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals. We clarify that such an order of recovery of cost from the concerned officer be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for.

23. In ***Subrata Roy Sahara vs. Union of India and others (2014) 8 SCC 470***, it was observed by the Hon'ble Supreme Court that State and its agencies litigate endlessly just because lack of responsibility to take decision. It was observed as under:-

This abuse of the judicial process is not limited to any particular class of litigants. The State and its agencies litigate endlessly up to the highest Court just because of the lack of responsibility to take decisions. So much so that we have started to entertain the impression that all administrative and executive decision-making are being left to courts just for that reason. In private litigation as well, the litigant concerned would continue to approach the higher Court, despite the fact that he had lost in every court hithertobefore. The effort is not to discourage a litigant in whose perception his cause is fair and legitimate. The effort is only to introduce consequences if the litigant's perception was incorrect

and if his cause is found to be not fair and legitimate, he must pay for the same. In the present setting of the adjudicatory process, a litigant no matter how irresponsible he is suffers no consequences. Every litigant, therefore, likes to take a chance even when counsel's advice is otherwise.

24. Similar reiteration of law can be found in a fairly recent judgment of the Hon'ble Supreme Court in ***Rajendra Shankar Shukla and others vs. State of Chhattisgarh and others (2015) 10 SCC 400***, wherein again while referring to the earlier decision in *Hymanshu's* case (supra)*, the Hon'ble Supreme Court held in para 32 as under:*

> *"32. Further, this Court has frowned upon the practice of the Government to raise technical pleas to defeat the rights of the citizens in Madras Port Trust vs. Hymanshu International (1979) 4 SCC 176, wherein it was opined that it is about time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Para 2 from the said case reads thus :- (SCC p.177)*
>
> > *"2. We do not think that this is a fit case where we should proceed to determine whether the claim of the respondent was barred by Section 110 of the Madras Port Trust Act (2 of 1905). The plea of limitation based on this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well-founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the. purpose of resisting such a claim has become unavailable. Here, it js obvious that the claim of the respondent was a just claim supported as it was by the recommendation of the Assistant Collector of Customs and hence in the exercise of our discretion under Article 136 of the Constitution, we do not see any reason why we should proceed to hear this appeal and adjudicate upon the plea of the appellant based on Section 110 of the Madras Port Trust Act (2 of 1905)."*

25. In ***Bhusawal Municipal Council vs. Nivrutti Ramchandra Phalak and others (2015) 14 SCC 327***, the Hon'ble Supreme Court considered the plight of farmers effected by land acquisition and creation of compulsive situation to avoid luxurious litigation instituted or the circumstances created by the State. It shall be apposite to refer to the relevant observations as contained in paras 16 to 18 of the judgment, which read as under:-

> *16. The judicial process of the court cannot subvert justice for the reason that the court exercises its jurisdiction only in furtherance of justice. The State/authority often drags poor uprooted claimants even for payment of a paltry amount upto this Court, wasting the public money in such luxury litigation without realising that poor citizens cannot afford the exorbitant costs of litigation and, unfortunately, no superior officer of the State is accountable*

for such unreasonable conduct. It would be apt to quote the well known words of Justice Brennan:

> *"Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."*

17. The fundamental right of a farmer to cultivate his land is a part of right to livelihood "Agricultural land is the foundation for a sense of security and freedom from fear. Assured possession is a lasting source for peace and prosperity." India being predominantly an agricultural society, there is a "strong linkage between the land and the person's status in the social system."

> *"10…..A blinkered vision of development, complete apathy towards those who are highly adversely affected by the development process and a cynical unconcern for the enforcement or the laws lead to a situation where the rights and benefits promised and guaranteed under the Constitution hardly ever reach the most marginalised citizens. For people whose lives and livelihoods are intrinsically connected to the land. the economic and cultural shift to a market economy can be traumatic."*
>
> *(Vide: Mahanadi Coal Fields Ltd. & Anr. v. Mathias Oram & Ors., 2010 11 SCC 269; and Narmada Bachao Andolan v. State of Madhya Pradesh & Anr., 2011 AIR(SC) 1989)*

18. A farmer's life is a tale of continuous experimentation and struggle for existence. Mere words or a visual can never convey what it means to live a life as an Indian farmer. Unless one experiences their struggle, that headache he will never know how it feels. The risks faced by the farming community are many; they relate to natural calamities such as drought and floods; high fluctuation in the prices of input as well as output, over which he has no control whatsoever; a credit system which never extends a helping hand to the neediest; domination by middlemen who enjoy the fruits of a farmer's hard work; spurious inputs, and the recent phenomenon of labour shortages, which can be conveniently added to his tale of woes. Of late, there have been many cases of desperate farmers ending their lives in different parts of the country. The Principles of Economics provides for the producer of a commodity to determine his prices but an Indian farmer perhaps is the only exception to this principle of economics, for even getting a decent price for their produce is difficult for them.

26. The observations of the Hon'ble Supreme Court in the judicial precedent noted above squarely apply to this litigation generated because of and by respondent No. 2.

27. If this was not enough, the respondents, more particularly, respondent No. 2 did not even care to reply to the legal notice issued by the petitioner through his counsel.

28. It is more than settled that the object of the notice is to give the opposite party, be the government or the public officer or even an individual, an opportunity to reconsider the legal position and to make amends or settle the claim, if so advised without

litigation. When statutory notice is issued to public authority, they must take the notice in all seriousness and they should not sit over it and force the citizens to the vagaries of litigation. They are expected to let the petitioner (who has given notice), know what stand they take, within the statutory period, or, in any case before plaintiff embarks upon litigation. The whole object of serving a notice is to give opposite party sufficient warning of the case proposed to be instituted so that the opposite party can settle the claim without litigation or afford restitution without recourse of law.

29. The giving of notice to the government or any public officer in respect of any act purporting to be done by such public officeris mandatory as per Section 80 of the CPC even though the said provision does not apply to a writ petition but nonetheless once a notice had been issued to respondents, who admittedly are covered under Section 80 of the CPC then it was incumbent upon the respondents to have taken the notice in all seriousness and not sit over it and force the petitioner to the vagaries of litigation.

30. Issuance a notice under Section 80 is a measure of public policy with the object of ensuring that before a suit is instituted against the government or public officer, the government or the officer concerned is afforded an opportunity to scrutinize the claim and if it be found a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person who has issued the notice to resort to litigation involving considerable expenditure and delay.

31. The defence raised by the respondents is most bogus and frivolous one, where public money has been squandered and the petitioner harassed. It is a well known fact that the courts across the country are saddled with large number of cases and respondent No. 2 unfortunately has indulged in further burdening the court.

32. Time and again, the courts have been expressing their displeasure at the Governments'/public sector undertakings' compulsive litigation habit but a solution to this alarming trend is a distant dream. The judiciary is now imposing costs upon the Government/public sector undertakings not only when it pursue cases which can be avoided but also when it forces the public to do so. The precise time, effort and other resources go down the drain in vain.

33. This situation is best described by the Hon'ble Delhi High Court in ***National Textile Corporation vs. Kunj Behari Lal (2011) 167 Comp Cas 29 (Delhi)***, wherein it was observed as under:-

> *18. Present petition is most bogus and frivolous one and has been filed just to squander public money and to harass a common man who committed blunder by giving his property on rent to the mighty public undertaking. It is a well known fact that courts across the country are saddled with large number of cases. Public Sector undertakings indulgences further burden them. Time and again, courts have been expressing their displeasure at the Governments/Public Sector undertakings compulsive litigation habit but a solution to this alarming trend is a distant dream. The judiciary is now imposing costs upon Government/Public Sector undertakings not only when it pursue cases which can be avoided but also when it forces the public to do so.*
>
> *19. Public Sector undertakings spent more money on contesting cases than the amount they might have to pay with regard to the premises which have been taken on rent by them. In addition there to, precious time, effort and other resources go down the drain in vain. Public Sector undertakings are possibly*

an apt example of being penny wise, pound foolish. Rise in friviolous litigation is also due to the fact that Public Sector undertakings though having large number of legal personnel under their employment, do not examine the cases properly and force poor litigants to approach the court.

20. Frivolous litigation clogs the wheels of justice making it difficult for courts to provide easy and speedy justice to the genuine litigants. Public Sector undertakings should not indulge in mindless litigation and unnecessary waste the time and public exchequer's money. A strong message is required to be sent to those litigants (whether Government or Private) who are in the habit of challenging each and every order of the trial court even if the same is based on sound reasoning and also to those litigants who go on filling frivolous applications one after another.

The aforesaid case was then dismissed with costs of Rs.50,000/-.

34. Not only is the stand taken frivolous and untenable but even otherwise if such stand is accepted it would only result in the undue enrichment of the respondents by not paying the compensation as per the market value to the petitioner.

35. As per sale deed entered into between the parties, the petitioner has been paid a sum of Rs. 16,27,500/- whereas as per the rates determined by the Land Acquisition Collector vide his award dated 23.08.2012, the amount now works out to more than three times at Rs. 51,19,432/-.

36. Even after deducting the amount already received by the petitioner the petitioner would still be entitled to a sum of Rs. 34,91,932/- and in addition thereto the other statutory benefits flowing out of the act when calculated works out to Rs.47,50,175/- as would be evident from the following details:-

S. No.	**Nature of Land**	**Rate per bigha**
1.	For 0-19 bighas Obad Abal at the rate of Rs.3,60,000/-	3,42,000/-
2.	For 6-13 bighas Obad Doam at the rate of Rs.3,60,000/-	23,94,000/-
3.	For 0-7 bighas Banjar jaded at the rate of Rs.2,60,000/-	91,000/-
4.	For 2-8 bighas Banjar Kadeem at the rate of Rs.2,60,000/-	6,24,000/-
5.	For 7-6 bighas Ghasni at the rate of Rs.60,500/-	4,41,650/-
6.	For 0-15 bighas gair mumkin at the rate of Rs.60,500/-	43,375/-
	Total	**39,38,025/-**
7.	+30% Solatium	11,81,407/-
	Total	**51,19,432/-**
8.	Less already paid to the petitioner through negotiation	51,19,432/- - 16,27,500/- **=34,91,932/-**
9.	+ additional amount under section 23(a) at the rate of 12%	34,91,932/-

	per annum w.e.f. 3.7.2009 to 20.8.2018 total 3 years 23 days (1118 days) on rupees 34,91,932/-	+12,58,243/-
		47,50,175/-

37. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. This was so held by the Hon'ble Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644***:-

> *"98. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. It provides the theoretical foundation for the law governing restitution. The principle has, however, its critics as well as its supporters. In the words of Lord Diplok: "…there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system that is based upon civil law." (See: Orakpo V. Manson Investments Ltd. 1978 AC, 104). In The Law of Restitution by Goff and Jones, it has, however, been stated "that the case-law is now sufficiently mature for the courts to recognize a generalized right of restitution" (3rd Edn., P. 15). In Chitty on Contracts, 26th Edn., Vol. I, p. 1313, para 2037, it has been stated that "the principle of unjust enrichment is not yet clearly established in English law". The learned editors have, however, expressed the view:*
>
> > *"Even if the law has not yet developed to that extent, it does not follow from the absence of a general doctrine of unjust enrichment that the specific remedies provided are not justifiable by reference to the principle of unjust enrichment even if they were originally found without primary reference to it." (pp. 1313-1314, para 2037)."*

38. The issue regarding undue enrichment thereafter came up before the Hon'ble Supreme Court in ***Indian Council for Enviro-Legal Action Vs. Union of India and others (2011) 8 SCC 161***and it was held as follows:-

> *"**UNJUST ENRICHMENT***
>
> ***151**. Unjust enrichment has been defined as:*
>
> > *"Unjust enrichment.---A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."*
>
> *See Black's Law Dictionary, 8th Edition (Bryan A. Garner) at page 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."*
>
> ***152**. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*

153. *Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A.2d 217, 232-33 (Delaware. 1999). USA)*

154. *Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of Fibrosa v. Fairbairn, [1942] 2 All ER 122, Lord Wright stated the principle thus :*

> *"... .Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."*

155. *Lord Denning also stated in Nelson v. Larholt, [1947] 2 All ER 751 as under:-*

> *"…. It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."*

156. *The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.*

39. In a system governed by the rule of law there is nothing like absolute or unbriddled power exercisable at the whims and fancies of the repositories of such powers. There is nothing like a power without any limit or constraint. The officers of respondent No. 2 while riding high on the fuel of power failed to realize that public offices both big and small are sacrosanct. Such offices are meant for use and not for abuse and in case the repositories of such offices spoils the rule, then the law is not that powerless and would step in.

40. Respondent No. 2 being a creation of statute, is admittedly a State within the meaning of Article 12 of the Constitution of India and cannot, therefore, act like a private individual, who is free to act in a manner whatsoever he likes., unless it is interdicted or prohibited by law. It is settled that the State and its instrumentalities have to act strictly within the four corners of law and all its activities are governed by Rules, regulations and instructions.

41. In ***Secretary, Jaipur Development Authority, Jaipur vs. Daulat Mal Jain & Ors. (1997) Vol. 1 SCC 35***, the Hon'ble Supreme Court observed as under:-

> *"13. All purposes or actions for which moral responsibility can be attached are actions performed by individual persons composing the Department. All Government actions, therefore, means actions performed by individual person*

> *to further the objectives set down in the Constitution, the laws and the administrative policies to develop democratic traditions. Social and economic democracy are set down in the Preamble, Part III of H.P. 9 and Part IV of the Constitution. The intention behind the Government actions and purposes is to further the public welfare and the national interest. Public good is synonymous to protection of the interests of the citizens as a territorial unit or nation as a whole.*

42. The respondents have grossly misused and abused the process of the Court by adopting litigious attitude. The respondents have wasted the precious time of this Court.

43. It is shocking that respondent No.2, which is a public sector undertaking and a State within the meaning of the Article 12 of the Constitution has tried to illegally appropriate an amount of nearly a half crore rupees i.e. more than Rs. Forty seven lacs due and payable to the petitioner.

44. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court.

45. Faith of the people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win they would turn out to be a fool as the wrongdoer is the real gainer. Thus, it becomes the duty of the Court to see that such wrongdoer are discouraged at every step and one such way to curb this is by imposing real and punitive costs.

46. As noticed above, the respondents have indulged in vexatious, frivolous and speculative litigation and has thereby driven the petitioner to unnecessary and otherwise avoidable ligation. Moreover, even the precious time of the Court has been wasted, therefore, this is a fit case where the petition deserves to be allowed with heavy and special cost.

47. In view of the aforesaid discussion, the petition is allowed by directing the respondents to pay the enhanced amount of compensation alongwith upto date interest as per the Award No. 658, dated 23.08.2012 and Supplementary Award dated 06.03.2013.

48. In addition thereto, the respondents are directed to pay the statutory benefits in terms of the Constitutional Bench judgment of the Hon'ble Supreme Court in ***Sunder vs. Union of India 2001 (7) SCC 211***.

49. Accordingly, the present petition is allowed in the aforesaid terms with costs of Rs.1,00,000/-, out of which Rs.50,000/- shall be paid to the petitioner and remaining Rs.50,000/- shall be paid to the President, Red Cross Society, Account No. 790210100010759, Bank of India, The Mall, Shimla on or before 31.08.2019. The cost at the first instance will be paid by respondent No. 2 from its own coffers and thereafter shall be recovered from the erring officials irrespective of whether they are still serving or not. The inquiry against the erring officials shall be personally conducted by the Chief Secretary-cum-Chairman, HPPCL. Compliance report, thereof be submitted to this Court on or before 31.10.2019.

List for compliance on **31.10.2019**.

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

Himachal Pradesh Housing and Urban Development Authority .....Petitioner
Versus
Dr. K. K. Parmar .....Respondent

CWP No. 2818 of 2008
Date of decision: 01.08.2019.

Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 – Sections 4 & 5 – Removal of unauthorized construction – Held, Collector disposed of application of HIMUDA seeking removal of unauthorized construction of respondent on ground that matter was of complex nature and required adjudication by civil court – Collector and Commissioner, who upheld Collector's order not giving any reason as to how matter was complex nor indicating the complex questions involved in the case- Collector could not have shrieked away from his responsibility in deciding case – Matter before him and District Consumer Forum / State Consumer Commission entirely different – Orders of Collector and Commissioner set aside – Matter remanded to Collector to decide it afresh. (Paras 4 to 6 & 15)

For the Petitioner: Mr. C. N. Singh, Advocate.
For the Respondent: Mr. Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The petitioner sought eviction of the respondent by taking recourse to proceedings under Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (for short the 'Public Premises Act'). It was averred that the respondent had encroached upon the land of the petitioner by raising two toilets marked as "ABOQ' & 'EFGH' and unauthorised construction marked as 'IJKL' in the land of the petitioner and, therefore, has sought eviction.

2. The Respondent contested the petition by filing reply wherein it was averred that the respondent was given defective plot with various problems, therefore, he had filed a complaint before the District Consumer Forum, Dharamshala, Kangra at Dharamshala wherein his claim was allowed and the petitioner was directed to pay Rs. 1,50,000/- as damages due to defective plot. In the original plan, the respondent has purchased a corner plot open from all sides and on the nalla side there was an open sewerage line of the whole colony and this necessitated the construction of '*chajja*' to cover the sewerage line and this was done with the intention to protect the house of the respondent. It was further contended that the respondent purchased plot No. 52 as per original site plan of 1981 and in the year 1995 the petitioner carved out plot No. 52-A by changing original site plan without taking the respondent into confidence and the said plot was not purchased directly from the Housing Board and, therefore, terms and conditions of the Board were not applicable to the respondent. The respondent lastly challenged the jurisdiction of the Collector on the ground that the petitioner itself had admitted before the State Consumer Forum and the National Consumer Forum by filing reply that the matter was of complex nature, therefore, the same could only be adjudicated before the Civil Court.

3. When the petition came up for consideration before the adjudicatory authority, the same was disposed of by observing as under:-

> *"From the perusal of the claim and counter claim as above, I am of the opinion that the matter is of complex nature, and premature to pass any order under the Public Premises Act.*
>
> *Since the situation of the case is such that when the plan was originally advertised in 1981, the plot No. 52 was corner plot for which higher cost was paid and subsequently the other new plot No. 52-A was carved out in 1995, thereby reducing the open space of the respondent, and this matter is beyond the adjudication of this Court. Again the petitioner has itself admitted before the District Consumer Forum vide (Annexure R-XVI) and State Consumer Commission vide (Annexure RXIX) that all the questions involved in the case are of complex nature, and making the dispute to be of a civil nature and it has further been brought to the notice of this Court by the respondent that about in 10 cases the Housing Board has filed encroachment cases in the Civil Courts where the actual jurisdiction lies, and adduced the copy of Housing Board versus Prittam Singh and Housing Board vs. R.P. Nagapal for perusal which support the contention of the respondent.*
>
> *Since in the present case, matter being complex are to be adjudicated by the competent court of jurisdiction, and as per the direction of National Consumer Forum the respondent has filed the suit for declaration to the effect of allotment of plot No. 52-A in the Court of Sub Judge 1st Class Palampur, dated 03.05.2003, fact also admitted by the petitioner, hence outcome of the Civil Court will be automatically binding on both the parties, and the present petition being premature and complex one is not tenable to be maintained and is accordingly dismissed without any cost.*

4. It would be evidently clear from the aforesaid that the Collector has failed to give any detailed reasons regarding question(s) involved in the present case which were of a complex nature. He simply stated that "*it was a case where the plan was originally advertised in 1981, the plot No. 52 was corner plot for which higher cost was paid and subsequently the other new plot No. 52-A was carved out in 1995 thereby reducing the open space of the respondent (petitioner herein) and therefore the matter was beyond the adjudication of this Court"*.

5. The Collector seems to have been unnecessary influenced by the fact that the petitioner itself had admitted before the District Consumer Forum and the State Consumer Commission that the questions involved in the case were of complex nature making the dispute of civil nature, little realising that the dispute before the District Consumer Forum and the State Consumer Commission was altogether different whereas the plain and simple case before the Collector was that the respondent had encroached upon the land belonging to the petitioner by raising two toilets and further raising unauthorised construction over its land.

6. As observed above, in absence of any specific reason or justification that there were indeed disputed questions of fact and law that could not be gone into by the Collector, he could not have shrieked away from his responsibility in deciding the case.

7. Now adverting to the suit, which was stated to be pending in the Court of Sub Judge, Ist Class, Palampur, the copy of the plaint has filed alongwith CMP No. 5503 of

2017, discloses that the same, in fact, had been filed by the respondent and not the petitioner for the following relief(s):-

> *Prayer-A*
>
> *Suit for grant of decree of declaration to the effect that creation of Plot No. 52-A in Holta Colony Palampur of HIMUDA by the defendant No. 1 is wrong, illegal, null and void and against the original site plan and the allotment of Plot No. 52-A of Holta Colony Palampur of HIMUDA and Plot No. 5 of HIMUDA Colony at Lohna, Palampur, District Kangra H.P. to the defendant No. 2 by the defendant No. 1 is wrong, illegal, null and void, against the Rules, Policy and Act of the HIMUDA, with consequential relief of permanent and prohibitory injunction restraining the defendants from changing the nature of the Plot No. 52-A of Holta Colony Palampur of HIMUDA and Plot No. 5 of HIMUDA Colony at Lohna, Palampur, District Kangra, H.P. by way of raising structure and alienating and encumbering the same by way of sale, gift, transfer, mortgage etc.*
>
> *Prayer-B*
>
> *Suit for the grant of decree of mandatory injunction directing the defendant No.1 to cancel the creation and allotment of Plot No. 52-A of Holta Colony, Palampur of HIMUDA and Plot No. 5 of HIMUDA Colony at Lohna, Palampur, District Kangra, H.P. in favour of defendant No. 2 and allot the land of Plot No. 52-A of Holta Colony, Palampur of HIMUDA in favour of plaintiff.*

8. A perusal of the relief clause reproduced above would reveal that the prayer made in the suit had nothing to do with the petition filed by the petitioner for eviction on the ground of encroachment made by the respondent which was exclusively triable by the Collector.

9. Coming to the order passed by the Divisional Commissioner in the appeal filed by the petitioner, it would be noticed that the same has been dismissed by according the following reasons:-

> *As per provisions of the Public Premises Act, if the Collector is of opinion that any persons are in unauthorized occupation of any public premises, he shall issue notice calling upon all persons concerned to show cause why an order of eviction should not be made. As per section 5, if after considering the reply of the notice under section 4 of the Collector is satisfied then the premises are in unauthorized occupation, he may make an order of eviction. In this case after considering the reply, the Collector has reached to the conclusion that the matter is of complex nature and therefore no order should be passed under the Public Premises Act. Thus, he has not passed any order under Section 5 in this case. As per section 9, an appeal lies from the order made under Section 5 by the Collector. In this case, no order under Section 5 has been made and the Collector has simply dropped the proceedings due to the reason mentioned in the order. Thus, an appeal from the impugned order does not lie in this Court. The Public Premises Act is a mechanism to ensure eviction of unauthorized occupant from the public premises and is not a mechanism to decide civil dispute between the parties. This is an alternative proceeding for eviction of unauthorized occupant from the public premises and can be taken up only when unauthorized occupation is very obvious and circumstances justify a summary procedure provided under this Act. Thus, by not passing an order under Section 5 of the Public Premises Act, the rights of the parties have not been affected which they can enforce through appropriate civil proceedings.*

The Collector has just refused to pass an order under Section 5 because he did not find sufficient reasons to do so. As has been mentioned above, no appeal under Section 9 has been provided against such an order. Therefore, the appeal is dismissed."

10. To say the least, the reasoning accorded by the appellate authority is totally flawed merely because the Collector had refused to entertain the petition on the ground that the matter was of complex nature, therefore, no order should be passed under the Public Premises Act, did not mean that an appeal against the said order was not maintainable. The appellate authority was essentially required to go into the question whether the reasoning given by the Collector was sustainable in the eyes of law and only then and alone then could he have refused to interfere in the appeal but under no circumstances could it have been held that the appeal from the impugned order did not lie before the Divisional Commissioner. The Divisional Commissioner further erred in concluding that since no order had been passed under Section 5 of the Act, therefore, the rights of the parties had not been effected and could be enforced through appropriate civil proceedings.

11. As per Section 9, the appeal lies against an order made by the Collector under Section 5 of the Act, therefore, even the order passed by the Collector refusing to entertain the petition is an order which is appealable under Section 9 of the Act, which reads thus:-

"Appeals-(1) An appeal shall lie from every order of the Collector made in respect of any public premises under Section 5 or Section 7 to the Commissioner.

(2) An appeal under sub-section (1) shall be preferred-

(a) in the case of an appeal from an order under Section 5, within thirty days from the date of publication of the order under sub-section (1) of that section; and

(b) in the case of an appeal from an order under section 7, within thirty days from the date on which the order is communicated to the appellant.

Provided that the Commissioner may entertain the appeal after the expiry of the period of thirty days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(3) Where an appeal is preferred from an order of the Collector, the Commissioner may stay the enforcement of that order for such period and on such conditions as he deems fit.

(4) Every appeal under this section shall be disposed of by the Commissioner as expeditiously as possible.

(5) The costs of any appeal under this section shall be in the discretion of the Commissioner.

12. Strangely enough, even the Divisional Commissioner has not gone into the question as to why and how the jurisdiction of the Collector to entertain the eviction petition was barred and further has simply dittoed the order passed by the Collector.

13. Above all, both the authorities have failed to take note of Section 15 of the Act which specifically bars the jurisdiction of the Civil Court to entertain any suit or proceedings in respect of eviction of any person who is in unauthorised occupation of any public premises.

14. In view of the aforesaid discussion, I find merit in this petition and the same is accordingly allowed. The order passed by Collector, Palampur Sub Division Palampur as affirmed by the learned Divisional Commissioner, Kangra Division, is set aside.

15. The parties through their counsel are directed to appear before the Collector, Palampur Sub Division Palampur on 19.08.2019. Since, this eviction petition was instituted as far back more than two decades back i.e. on 18.11.1996, the Collector shall decide the same as expeditiously as possible and in no event later than 31st December, 2019. The petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

16. For compliance of the judgment to come up on **01.01.2020**.

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

Sh. Hiramani .....Petitioner.
Versus
State Bank of India & Ors. .....Respondents.

CWP No. 307 of 2018
Reserved on: 06.08.2019
Date of decision: 09.08.2019.

Constitution of India, 1950– Articles 14 & 226 - Absorption on regular basis– Claim of - Petitioner seeking absorption on regular basis and consequential benefits on principle of parity vis a vis one 'LD' – Held, petitioner was engaged as a care –taker purely on contract basis – Contract period already over– No representation by respondents that services of petitioner though contractual, would be regularized– Regularization of one 'LD' on basis of which, plea of parity is being raised by petitioner , was engaged on daily wage basis– As a policy decision, services of all daily wagers were decided to be regularized by department– Principle of parity not applicable– Petition dismissed. (Paras 2 to 4 , 12 & 14)

Cases referred:
Director, Institute of Management Development, U.P. vs. Smt. Pushpa Srivastava, AIR 1992 SC 2070
State of Haryana and others vs. Piara Singh and others, AIR 1992 SC 2130
State of Himachal Pradesh vs. Suresh Kumar Verma and another, AIR 1996 SC 1565
State of U.P. and another vs. Kaushal Kishore Shukla, 1991 (1) SCC 691

For the Petitioner: Mr. C. N. Singh, Advocate.
For the Respondents: Mr. Arvind Sharma, Advocate.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge</u>

The petitioner has filed the instant petition for grant of the following substantive prayers:-

(i) Issue writ of Mandamus or other appropriate writ or direction as this Hon'ble court deems fit in considering the case of the petitioner for absorption in regular bases as have been done in cases of similarly situated persons on their completion of ten years of part time, contractual service in a time bound manner.

(ii) Issue writ of Mandamus or other appropriate writ or direction to the respondents to release the undisputed due and admissible monthly salary of Rs.10,000/- for the last six months period immediately in a time bound manner.

(iii) That the respondent may be directed to pay interest @ 12% on the due and admissible amount of salary, which has not yet been released in his favour for the last 6 months.

2. It is not in dispute that the petitioner vide letter dated 14.06.2012 was appointed as a Care Taker purely on contract basis and when his services were sought to be dispensed with, he approached this Court and is now working by virtue of interim order passed by this Court.

3. The sole basis of this petition is the plea of parity raised by the petitioner based upon the regularization of the services of one Leela Dhar, however, this plea is not tenable as Leela Dhar was working with the respondents on daily wage basis and as per policy decision the services of all the daily wagers were decided to be regularised whereas the petitioner was appointed on contract basis and admittedly the contract period has come to an end.

4. It would be relevant to reproduce the order of appointment in its entirety, which reads as under:-

"Our Ref. No.:AGM/SM/STAFF/

Date: 14/06/2012

Sh. Hiramani
S/o Sh. Anant Ram
Vill-Batar
P.O.-Hadaboi,
Teh-Sundernagar (H.P.)

APPOINTMENT AS CARETAKER FOR BANK'S GUEST HOUSE AT MALL SHIMLA PURELY ON CONTRACT BASIS.

With reference to your Application regarding the captioned subject, we inform that Bank has decided to engage you for the services of Care Taker at the VIP Guest House situated at Shimla (Mall) Branch on the following terms & conditions:-

The engagement will be on purely contract basis w.e.f. 15/06/2012 for a period of 12 months at a lump sum payment of Rs.5000/- per month.

You will have to make your own arrangements for boarding and lodging.

You will have to discharge your duties of cleansing, dusting etc. of Bank's Guest House & will prepare food for Guests. Disinfectant material etc. will be provided to you by the Bank.

You will have to take care of assets, equipments, Gadgets etc. lying in Guest House.

Bank reserves the right to terminate this contract at any time without giving any notice.

Your engagement as Care Taker is purely on contractual basis only and it does not create any employer-employee relationship. You will have no right to claim any employment whatsoever from the Bank.

Sd/-

Asstt. General Manager-II

Shimla

5. It is next contended by learned Counsel for the petitioner that the services of the number of daily wagers like Inderdev, Chhavi Ram and Leela Dhar have been regularized.

6. On instructions, Shri Arvind Sharma, learned counsel for the respondents, submits that there is no person by the names of Inderdev or Chhavi Ram, even though there is one Inder Dutt, but he is working with the respondents for the last more than 20 years and there is Chabi Lal who is in employment since 23.01.1986 on regular basis. Therefore, even this contention of the petitioner is without merit.

7. As observed above, the petitioner is working by virtue of interim order, which as per the settled law does not confer any right on the petitioner.

8. Admittedly, the respondent is a State within the meaning of Article 12 of the Constitution of India and while granting employment, it requires to scrupulously ensure that the constitution mandate is followed. It is more than settled that all eligible persons who are aspiring to secure public employment must be considered for employment to such posts through open competitive process or else the person appointed will have to be treated as a back door entrant.

9. In ***State of Haryana and others vs. Piara Singh and others, AIR 1992 SC 2130***, the Hon'ble Supreme Court has deprecated back door entry into service.

10. In case of ***State of Himachal Pradesh vs. Suresh Kumar Verma and another, AIR 1996 SC 1565***, the Hon'ble Supreme Court has held that judicial process cannot be utilised to support the mode of recruitment *de hors* the rules.

11. In ***State of U.P. and another vs. Kaushal Kishore Shukla, 1991 (1) SCC 691*** and ***Director, Institute of Management Development, U.P. vs. Smt. Pushpa Srivastava, AIR 1992 SC 2070***, the Hon'ble Supreme Court held that appointment limited by time does not confer any right to the post and on expiry of time limit, the appointment ceased automatically.

12. Adverting to the facts of the case, it would be noticed that the letter of appointment, which has been reproduced above, leaves no manner of doubt that the appointment of petitioner was a limited one. The respondents at the given time had never offered to the petitioner that he would continue in service or that his services would be regularized. Here also, it is not the case of the petitioner that there is any uncertainty or ambiguity in the appointment made by the respondents as to the tenure on the post on which he had been appointed. The petitioner had voluntarily accepted the appointment granted to him subject to the condition stipulated in the appointment letter. The appointment subject to the conditions has been accepted with his eyes wide open, therefore, now he cannot turn around claiming higher rights ignoring the conditions subject to which the appointment had been accepted.

13. Similar issue has been considered in detail by me in a recent judgment bearing ***CWP No. 2680 of 2015, titled Kunal Brahma vs. The Board of Trustees of IRMT & others, decided on 09.07.2019***, the petitioner therein was appointed as Administrator with the respondents trust purely on contract basis and thereafter his services were ordered to be terminated. It was then the petitioner approached this Court complaining that the termination of his services was illegal, violative of the principles of the Constitution of India, more particularly, Articles 14, 16, 19 and 21. While rejecting the said contention, this Court observed as under:-

> ***7.*** *A careful reading of the letter of appointment leaves no manner of doubt that the appointment offered to the petitioner was a limited one. The respondents at the given time had never offered to the petitioner that he would continue in service or that his services would be regularized. It is not even the case of the petitioner that there was any uncertainty or ambiguity in the appointment made by the respondents as to the tenure on the post on which he had been appointed.*
>
> ***8.*** *There is a clear distinction between public employment governed by the statutory rules and private employment governed purely by contract. No doubt with the development of law, there has been a paradigm shift with regard to judicial review of administrative action whereby the writ court can examine the validity of termination order passed by the public authority and it is no longer open to the authority passing the order to argue that the action in the realm of contract is not open to judicial review. However, the scope of interference of judicial review is confined and limited in its scope. The writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract.*
>
> ***9.*** *However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the administrator to decide whether more reasonable decision or course of action could have been taken in the circumstances. (Refer Gridco Ltd. & Another vs. Sadananda Doloi & Ors, AIR 2012 SC 729).*
>
> ***10.*** *The petitioner has failed to place before this Court any material to show that the action of the respondents is either unreasonable or unfair or perverse or irrational. As observed earlier, the service conditions of the petitioner makes it abundantly clear that petitioner had been appointed on contractual basis, that too, on a non-statutory scheme.*
>
> ***11.*** *It may be noticed that the petitioner had voluntarily accepted the appointment granted to him subject to the conditions clearly stipulated in the scheme. The appointment subject to the conditions has been accepted with his eyes wide open, therefore, now the petitioner cannot turn around claiming higher rights ignoring the conditions subject to which the appointment had been accepted.*

14. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed. Interim order is vacated. Pending application(s), if any, also stands disposed of.

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

State of Himachal Pradesh .....Appellant.
Versus
Surinder Singh ......Respondent.

Cr. Appeal No. 527 of 2009
Reserved on: 08.08.2019
Decided on: 14.08.2019

Indian Penal Code, 1860–Sections 279, 337 & 338– Rash and negligent driving– Prosecution alleging accused being negligent in driving bus as a result of which one 'N' fell down while boarding into bus and sustained grievous injuries – Trial court acquitted accused – Appeal against – On facts, held, bus was at halt in order to make passengers alight or board into it – Duty of driver was to concentrate on the road and not on passengers boarding into or alighting from bus – Primary duty of vigil in this regard was of conductor – He was required to be watchful about safety of such passengers – Conductor not made accused in this case- No case of negligent driving on part of accused made out – Appeal dismissed. (Paras 12 & 13)

Cases referred:
Arun vs. State, (2008) 15 SCC 501
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
T. Subramanian vs. State of Tamil Nadu, (2006) 1 SCC 401

For the appellant: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General.
For the respondent: Mr. Rupinder Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/State, laying challenge to judgment dated 01.07.2009, passed by learned Sub Divisional Judicial Magistrate, Rampur, District Shimla, H.P., in Case No. 169-2 of 2003, whereby the accused/respondent (hereinafter referred to as "the accused") was acquitted for the commission of the offences punishable under Sections 279, 337 and 338 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The key facts necessary for adjudication of this appeal can tersely be summarized as under:

As per the prosecution story, on 12.06.2003, at about 07:15 a.m., Shri Kehar Singh (complainant) was standing at Jeori Chowk and when bus, having registration No. HP02-1525, came passengers started boarding the same. During boarding, a girl, namely Neelam, who was also trying to board the bus, fell down and was crushed under the rear tire of the vehicle. She was rushed to the hospital. It is alleged that due to the rash and negligent act of the accused the injured was crushed under the rear tire of the vehicle and she sustained injury. Complainant, Shri Kehar Singh, got his statement recorded under

Section 154 Cr.P.C. and thereafter the police investigation ensued. Police prepared the site plan and recorded the statements of the witnesses. The vehicle was taken into possession and got mechanically examined. The injured was medically examined. Spot was photographed and after completion of investigation *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as nine witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he pleaded not guilty. The accused did not lead any evidence in his defence.

4. The learned Trial Court, vide its judgment dated 01.07.2009 acquitted the accused under Sections 279, 337 and 338 IPC, hence the present appeal is preferred by the appellant/State.

5. I have heard the learned Additional Advocate General for the State, learned counsel for the respondent and carefully gone through the records in detail.

6. Learned Additional Advocate General, has argued that the learned Trial Court acquitted the accused without appreciating the evidence and law correctly and just on the basis of surmises and conjectures. He has further argued that the learned Trial Court did not appreciate evidence in its right and true perspective. He has argued that due to the rash and negligent act of the accused the accident occurred and the injured was crushed under the rear tire of the vehicle. He has further argued that after re-appreciating the evidence and law, the present appeal be allowed and the accused be convicted. Conversely, the learned Counsel for the respondent has argued that the learned Trial Court has rightly acquitted the respondent, as there is nothing on record which could cogently and convincingly establish the fault of the respondent. He has further argued that the learned Trial Court has appreciated the material, which has come on record, correctly and properly, so the judgment of the learned Trial Court needs no interference, so the appeal, which sans merits, be dismissed.

7. In rebuttal, the learned Additional Advocate General, has argued that the evidence, which has come on record, clearly show that due to the rash and negligent act of the accused the accident occurred and the injured sustained injury. He has argued that after re-appreciating the evidence, which has come on record, the appeal be allowed and the accused be convicted.

8. In the instant case, the police registered the case against the accused on the basis of the statement of the complainant, Shri Kehar Singh, which was recorded under Section 154 Cr.P.C. Thus, the statement of the complainant is very important. The complainant deposed in the Court as PW-1 and as per his version in the month of June, 2013, at about 07:15 a.m., when he was standing at Jeori Chowk, a bus, having registration No. HP02-1525 came and passengers started boarding it. He has further deposed that Ms. Neelu (injured Neelam) also tried to board the bus and when she put her right feet in the bus, the bus started moving forward. The injured fell and the rear tire of the bus touched the left leg of the injured. Consequently, the injured raised hue and cry, so the driver reversed the vehicle. He has further deposed that they dragged the injured from under the vehicle. The injured disclosed to him that she sustained injury in her knee, so he took her to Rampur Hospital in his vehicle and was accompanied by Shri Sudershan Sehgal, a boy and the sister of the injured. The injured was administered first aid and referred to Shimla. He has further deposed that police came in the hospital and he got his statement recorded. As per this witness, the accident took place due to the rash and negligent act of the driver and conductor of the bus. He has further deposed that he came to know that accused was driving the vehicle. This witness, in his cross-examination, deposed that he is acquainted

with the injured and they are neighbours. As per this witness, a tire fully came on the leg of the injured. He has further deposed that bus was stopped there for 2-3 minutes and passengers boarded the bus.

9. Another vital witness in the array of prosecution witnesses is PW-2, Ms. Neelam (injured). She has deposed that on 12.06.2003, at about 07.15 a.m., she was going to Rampur College for her examination of Master of Arts. At Jeori Chowk there was a private bus and she was boarding the bus, the driver drove the bus, so she fell down and the rear tire of the bus struck against her left leg. Resultantly, she sustained injuries on her left leg and was shifted by Shri Sudershan, Shri Kehar etc. to Rampur, Hospital. From Rampur Hospital she was referred to IGMC, Shimla. As per this witness, the accident occurred due to the negligence of the driver. This witness, in her cross-examination, has deposed that she was at the Chowk and the bus was also there for 2-3 minutes.

10. PW-3, Shri Sudershan Sehgal, is also important witness. As per this witness, in the month of June, 2003, in between 07:00 to 07:30 a.m., he heard the noise that an accident took place. He has further deposed that bus, having registration No. HP02-1525, was there at Jeori Chowk and leg of girl was crushed under its tire. Shri Kehar Singh and other shifted the injured to Rampur hospital. Later on, he came to know that driver of the said bus was the accused. The rear tire of the bus was stained with blood. He also came to know that the accident occurred when the girl tried to board the bus. This witness, in his cross-examination, deposed that the accident did not take place in his presence.

11. Rest of the prosecution witnesses are the official witnesses, who performed their duties and deposed accordingly, so their testimonies do not have any effect qua the fact that due to whose fault the accident occurred, as firstly, the prosecution has to establish the fact that due to the rash and negligent act of the accused, the accident occurred and the injured sustained injury. So, in the wake of the above, the testimonies of official prosecution witnesses are deliberately left.

12. Principally, a rash act is an over-hasty act and is thus opposed to a conscious act, but it also includes an act which, though it may be said to be conscious, is yet done without due care and caution. In rashness the criminality lies in running the risk of doing an act with recklessness or indifference to consequences. The prosecution has to prove in the instant case that due to rash or negligent act of the accused the alleged accident took place, but what emerges from the material on record is that on 12.06.2003 the accused was driving bus, having registration No. HP02-1525, and when the said bus reached at Jeori Chowk the driver stopped the bus for the passengers to alight and board the bus. The victim tried to board the bus from the front door and in the meanwhile the accused drove the bus without caring about the safety of the injured, and the injured fell down and sustained injuries. Avowedly, the injured sustained simple as well as grievous injuries and those injuries were caused to her from the rear tire of the bus. Later on, she was shifted for medical treatment to MGMHC, Khaneri and subsequently referred for further treatment to IGMC, Shimla. In the instant case, the rash and negligent act, as alleged by the prosecution, is to be seen from different angles, viz., the bus was stopped and passengers were alighting and boarding the bus, the duty of the driver is to concentrate on the road and not on the passengers, who are alighting and boarding the bus and it is not possible to keep an eye on the passengers who are boarding and alighting the vehicle, especially when the vehicle is long and big. Indisputably, the primary duty to keep an eye on the passengers, who are boarding and alighting the vehicle, is of the conductor of the bus, but surprisingly he has not been indicted in the instant case for the reasons best known to the prosecution. It is discernible from the testimonies of the prosecution witnesses that bus stopped at Jeori Chowk for 2-3 minutes and many passengers lighted

and boarded the vehicle and in the process of boarding the moving bus the injured fell down from the front door and sustained injuries from the rear tire. In this backdrop, it is highly improbable that the driver could have kept an eye on the injured right from the front door upto the rear tire.

13. After carefully analyzing the evidence, which has come on record, it is clear that it was not possible for the accused to keep a vigil on each and every part of the bus, in fact, it was the duty of the conductor whether the all the passengers have alighted and boarded the vehicle safely. The prosecution did not make the conductor as accused and no reason has been assigned for this. The prosecution's case is not of high speed driving and the only allegation against the accused that the he was not watchful about the safety of the injured, but, as held above, it was the duty of the conductor to be watchful about the safety of the passengers. Thus, after meticulously examining the evidence, the prosecution has failed to prove the rash and negligent act of the accused. No doubt, the injured sustained injury in the accident with the bus in question, but for that accident it would be unfair to hold the accused guilty, as the accident could have been averted if the conductor of the bus was vigilant about his duty and the safety of the passengers.

14. It is safe to hold that prosecution has failed to prove the rash and negligent act of the accused, so there cannot be any other view, except the view that the accused cannot be held liable for the alleged accident. Even if, by any stretch of imagination, there could be other view, then also this Court cannot adhere to that view, as the Hon'ble Supreme Court in ***Arun vs. State, (2008) 15 SCC 501,*** has held that if there are two reasonable views, then the view favouring the accused be adhered to.

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. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***1. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***2. The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
>
> ***3. Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***

5. ***An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.***

5. ***If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."***

17. In view of what has been discussed hereinabove, the prosecution has failed to prove the guilt of the accused cogently and convincingly. Thus, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Therefore, the findings of acquittal, as recorded by the learned Trial Court do not suffer from any infirmity. This Court sees no ground to overturn the findings of acquittal of the learned Trial Court.

18. The appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending miscellaneous application(s), if any, shall stand(s) disposed of.

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

Dev Raj	.....Appellant
Versus	
Nihal Singh & others	......Respondents.

RSA No. 320 of 2018
Reserved on 26.7.2019
Date of decision:13.8.2019

Specific Relief Act, 1963– Section 38- Permanent prohibitory injunction– Grant of- Held, co-sharer is not entitled for decree of permanent prohibitory injunction with respect to land recorded in exclusive possession of usufructuory mortgagee. (Para 10)

For the appellant:	Mr. Balwant Singh Thakur, Advocate.
For the respondents:	Mr. Dalip K. Sharma, Advocate, for respondents No. 1 to 3.
	Mr. Pawan Kumar Thakur, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal, stands, directed by the aggrieved plaintiff, against, the verdict recorded by the learned First Appellate Court, upon, Civil Appeal No.19ADJ-II/13 of 2018, wherethrough, the learned First Appellate Court, has, reversed the verdict, and,

decree, pronounced, vis-a-vis, suit khasra numbers, and, qua the plaintiff, and, wherethrough, the defendants were restrained, from, interfering with the suit khasra numbers, till, legal partition thereof occurs, through, metes, and, bounds. The plaintiff being aggrieved therefrom, hence through, casting the instant Regular Second Appeal, before this Court, prays for reversal of the verdict, rendered, by the learned First Appellate Court, upon, the afore civil appeal.

3. Briefly stated the facts of the case are that the plaintiff, defendants and other co-owners are in possession of the land comprised in khewat/khatauni No. 30/49, khasra Nos. 3, 16, 17, 22, 24, 270, 271, 272, 273, 276, 278, 279, 280, 282, 283, 284, 285, 286, 287, 290, 291, 292, 294, 295, 296, 678/409, 436, total kita-29, measuring 84-12bighas, situated at mauza Banjani, Tehsil Kandaghat, District Solan, H.P. The suit land is joint between the parties, as such no co-owners have right, title and interest to raise any kind of construction over any portion of the suit land without the permission and consent of the others till it is partitioned in accordance with law. That the defendants are quarrelsome persons and have no regard for the law and hence they have started digging the suit land to raise the construction over the best portion of the land and also started to cut and remove the valuable trees without the consent of the other co-owners. Plaintiff tried his level best to stop them not to do so but proved in vain. Hence the plaintiff filed suit for permanent prohibitory injunction against the defendants.

4. The defendants contested the suit by filing written statement, taking preliminary objections inter-alia, that, the plaintiff has no locus standi to file the present suit, the plaintiff is estopped to file the present suit, owing to his own act, conduct, and, acquiescence, and, that the plaintiff, is not, in possession of the suit land, as such, he is not entitled, for, the espoused decree, of, permanent prohibitory injunction.

5. The plaintiff filed replication(s), to, the written statement(s) of the defendant(s), wherein, he denied, the, contents, of, the written statement(s) and re-affirmed and re-asserted, the, averments, made in the plaint.

6. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled for the decree of permanent prohibitory injunction restraining defendants from interfering, digging, cutting and removing valuable trees, raising construction or changing the nature of the suit land in the manner, as alleged? OPP
2. Whether the plaintiff has no locus-standi nor cause of action to file the present suit, as alleged? OPD
3. Whether the plaintiff is estopped by his own act and conduct to file the present suit, as alleged? OPD
4. Whether the plaintiff is not in possession of the land, as alleged? OPD
5. Relief.

7. On an appraisal of evidence, adduced before learned trial Court, the learned trial Court, decreed the plaintiffs' suit. In an appeal, preferred therefrom, by, the defendants/ respondents herein, before the learned First Appellate Court, the latter Court allowed, the, appeal, and, set aside, the findings recorded by the learned trial Court.

8. Obviously, through, the instant Regular Second Appeal, cast, before this Court, by the plaintiff, he seeks reversal of the pronouncement, made, against him, by the learned first Appellate Court.

9. The learned trial Court, in, decreeing the plaintiff's suit, for rendition, of, a decree, of, permanent prohibitory injunction, vis-a-vis, the suit khasra numbers, and, against the defendants, had, hence made dependences, upon, (a) the apt jamabandi, appertaining to, the, suit khasra numbers, and, it making depiction(s), vis-a-vis, the, suit land, being recorded, to, be jointly owned, and, possessed by the recorded co-owners, and, thereupon, hence concluded, that, till a valid partition thereof, hence occurs, through metes and bounds, (b) rather thereupto, the, principle of 'unity of title, and, community of possession,' hence, remaining intact, and, thereafter proceeded to conclude, (c) especially, when no pleadings, stand, set forth by the plaintiff, qua his completely ousting, the, defendants, from, the, apt enjoyment(s), of, the jointly recorded suit land, nor any evidence in concurrence therewith, stood, adduced, qua, till occurrence, of, dismemberment, of, the joint estate, through, metes and bounds, no co-owner being entitled to, appropriate any portion of the jointly recorded land, vis-a-vis, his exclusive user. However, the afore recorded conclusion, by the learned trial Court, does, unfold qua rather it grossly ousting the necessity, of, meteings, of, appropriate, and, apt deferences, vis-a-vis, the, nature of, the, lis engaging the parties, at contest, and, also vis-a-vis, the, depictions, made in the apt entries, borne in the apposite jamabandi, and, appertaining to the suit khasra numbers. Since Ext. PW-1/B, comprises, the, apposite jamabandi, and, appertains, to, the suit khasra numbers, and, it makes graphic reflections, vis-a-vis, the defendants, hence holding exclusive possession, of, the suit khasra numbers, as, mortgage(e) thereof, and, when a presumption of truth, is, attached, vis-a-vis, the afore reflections, occurring, in the column, of, possession, in, the apposite jamabandi, (i) and, when the afore presumption, of, truth attached thereto, hence, has remained unrebutted (ii) thereupon obviously, the afore reflections acquire conclusivity, and, the apt legal tenacities. The further effect thereof, is qua, when otherwise, and, reiteratedly when rather, not, in the aforestated manner, a joint interest, or a joint ownership, in the undivided suit property hence accrues or hence is, acquired, inasmuch, as, it being acquired, vis-a-vis, rather ancestral coparcenary property, hence through apt respective predecessors-in-interests, (iii) thereupon alone, the afore reflection(s), of, joint ownership, carried, in, the revenue record, hold absolute sway, (iv) and, concomitantly, till, dismemberment, of, joint suit land, hence occurs, through, metes and bounds, obviously thereupto, no co-owners, are, entitled, to, appropriate, vis-a-vis, his/their exclusive user, any, portion of, the undivided suit property, even if they hold, exclusive possession thereof, unless pleadings are cast, and, concomitant therewith evidence stands adduced, vis-a-vis, apposite complete ouster(s).

10. Be that as it may, the defendants, did not prior, to creation of a mortgage, vis-a-vis, them, hence hold, in, the afore manner, any joint ownership, in the suit property, and, when rather there through, as, mortgagees along with possession, they hence acquired co-ownership, in the undivided suit khasra numbers, (i) besides also qua the apposite specific portion, of the, suit property qua wherewith, they are mortgagee(s), hence, they also hence hold possession thereof. Furthermore, when the validity, of, induction, of, the defendants, as mortgagee(s), with, possession upon the suit khasra numbers, hence remains unchallenged, (ii) thereupon the afore entries, vis-a-vis, the defendants, in as much as, qua theirs being mortgagee(s), with, possession, vis-a-vis, suit khasra numbers, is/are, readable (a) given it/theirs being construable, being a usufructory mortgage, being created, vis-a-vis, the defendants, and hence, the defendants being entitled, to, appropriate, the apt portion, of, the suit property, vis-a-vis, their exclusive user, for hence enabling them, to therefrom, settle the mortgage sums, of, money, (b) thereupon, for, facilitating the afore enablement(s)

their afore possession, is, to be revered. Secondarily, unless vis-a-vis, the afore nature of mortgage created, qua, the suit khasra numbers, rather, the afore construction, is, meted, thereupon, the afore enablements would stand, hence baulked, (i) whereupon, the holistic purpose enshrined, in the concept, of, usufructary mortgage rather would stand negated, (ii) in aftermath, all the, concomitant ill-effect(s) thereof, being visited, qua, a, usufructory mortgage inasmuch, as, his being disabled to utilize the mortgaged property, (b) further corollary thereof, would be qua, the mortgagee being also perennially disabled, to, institute a suit for foreclosure, and, also the mortgagor being barred, to, recourse the apt reliefs, of, redemption, unless, the, liquidation, of, the mortgaged money vis-a-vis, mortgagor, is facilitated, hence in the requisite contemplated manner. For avoiding, all, the afore ill consequences, and, also when, the, plaintiff, does not seek, the requisite declaration, for setting aside, the entry occurring, in the apposite jamabandi, and, appertaining, to the suit khasra numbers, and, its casting reflections, vis-a-vis, a usufructary mortgage, being created, qua the suit khasra numbers, vis-a-vis, the defendants, (c) and rather his only canvassing for, rendition of a decree of permanent prohibitory injunction, (d) thereupon with the plaintiff rather acquiescing, vis-a-vis the validity, of, creation, of, a usufructary mortgage, vis-a-vis, the defendants, and, appertaining to the suit khasra numbers, and, nor his filing a suit for, foreclosure, arising, from despite, the, prescribed time for settling, the, mortgage money, the latter remaining unliquidated, and, unrealized, (e) thereupon the conclusivity of the, defendants exclusivity of possession, on, a part of the suit property, also, concomitantly hence, dehors, the dismemberment of the joint suit property, by metes and bounds, (f) rather entitles the defendants, to, resist, the, plaintiff's suit, for rendition of a decree, of, permanent prohibitory injunction, and, also hence, the, verdict of the learned First Appellate Court, is enjoined to be validated, and, the verdict of the learned trial Court concerned, hence decreeing the suit, of, the plaintiff, enjoins its being reversed.

11. In aftermath, the impugned judgment and decree, is, validly recorded, and, does not suffer, from any infirmity or perversity, and, as a corollary thereof, no substantial question of law, much less a substantial question of law, arises for determination in this appeal.

12. In view of the above discussion, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the judgment and decree impugned before this Court is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

National Insurance Co. Ltd. .....Appellant

Versus

Sanjay Kumar & another .....Respondents.

FAO No. 277 of 2018
Reserved on : 24.7.2019
Date of decision: 13.8.2019

Employees Compensation Act, 1923– Section 4– Compensation qua injuries received during course of employment– Commissioner fastening liability on insurer and directing it to satisfy award– Appeal against – Insurer contending that contract of insurance covered 19

employees against premium of Rs. 4,53,500/- And insurer is liable proportionately only to extent wages were payable to disabled employee – Held, insurer not led any evidence that premium paid by insured was not adequate or sufficient to cover the aforesaid risk of employee or for fully covering risk, a higher premium was chargeable- Appeal dismissed. (Para 4)

For the appellant: Ms. Shilpa Sood, Advocate.
For the respondents: Mr. S. K. Banyal, Advocate, for respondent No.1.
Mr. Navlesh Verma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The disabled workman, while, rendering, his, employment, under his employer, arrayed as co-respondent No.1, in Case No. 06/2 of 2015, sustained disabling injuries, upon, his person, as find reflection, in disability certificate borne, in, Ext. PW-1/B, and, thereupon compensation amount, borne in a sum, of, Rs. 9,76,095/- along with simple interest, at the rate of 12% per annum, till realization, stood assessed, vis-a-vis, the disabled workman, and, the, idemnificatory liability thereof, stood burdened, upon the insurer.

2. During the course of hearing(s) being made, upon, the instant appeal, the following substantial questions of law, arise, for determination:-

i) Whether on the proper application of the provisions of the Employees's compensation Act, the income of the claimant has been correctly determined at Rs. 7,500/- per month and the relevant factor properly applied in working out the compensation of Rs. 9,76,095/-?

ii) Whether the findings of the Commissioner are perverse, based on misreading of oral and documentary evidence and the inference that the deceased was 25 years of age and his monthly wages were Rs. 7,500/- per month, are sustainable in law?

3. Since the disabling injuries, entailed, upon, the workman, stand, during the course of his rendering his deposition, contained, in, his examination-in-chief, testified to be rather encumbered, during, the course, of, his rendering employment under his employer (i) and, when, thereafter the learned counsel concerned, upon, subjecting him to cross-examination, rather also meted an appropriate suggestion, to him, qua, the injuries being entailed, during, the course of his rendering employment, under his employer, and, whereafter, he, purveyed an, answer thereto, hence in the affirmative, (ii) thereupon it is formidably concluded, qua, the disabling injuries, befalling, hence upon, the workman, obviously standing entailed, upon him, during the course, of, his rendering employment, under his employer, arrayed in the claim petition, as, corespondent No.1.

4. However, the learned counsel appearing, for the aggrieved insurer, has, contended with much vigor, before this Court, that, though Ext. PW-1/B, casts depictions therein, vis-a-vis, (a), a, progressive, hence 100% permanent disability, standing entailed, upon, the workman, (b) yet, he submits that, since, the contract, of, insurance executed inter-se the insurer, and, insured, and, as borne in Ext. RW-1/B, and, appertaining, to, the covering of risks, of, employees, rather casts reflections, vis-a-vis, 19 therein insured employees, being depicted therein, to, stand liquidated, wages, borne, in, Rs. 4,53,500, (c) thereupon only, vis-a-vis, the proportionate therewith wages defrayable, to the disabled

workman by his employer, constitutes, hence the, pecuniary risk(s) covered thereunder, and, also whereon the requisite factor is enjoined, to, be applied. However, the afore submission(s) cannot be accepted, it being untenable, and, also being bereft, of, apt tenacities, (a) given, the uneroded testification, rendered by co-respondent No.1, the employer of the disabled workman, rathermaking aplomb, and, categorical echoings, conspicuously in his affidavit, borne in Ext. PW-1/A, as, stood tendered into evidence, during, the course of his examination-in-chief, qua, the, per mensem salary, of, the disabled workman, being borne in a sum of Rs. 7,500/-, (d) importantly, also when his employer arrayed, as co-respondent No.1, did not, contest the afore echoings, either by meteing suggestions to him, during, the course of PW-1, being subjected, to, cross-examination, nor adduced any best documentary evidence hence comprised, in, the apposite salary register, casting therein reflections, rather carrying echoings contrary, to, one(s) echoed, by the claimant, in, Ext. PW-1/B, (b) the salutary purpose, behind the execution of the relevant contract, inter-se the insurer, and, the insured rather being jettisoned hence by reducing the risk coverage, bestowed, thereunder, vis-a-vis, the, admitted per mensem salary liquidated, to, the disabled workman, (c) rather for ensuring qua the highest esteem being meted, vis-a-vis, the holistic purpose, behind the contract, of, insurance executed, inter-se the insurer, and, the insured, and, its covering, the, risk, of, employees', (d) thereupon it appears, that, the afore reflection, borne in Ext. PW-1/B, and, in Ext. PW-1/A, rather occurring through sheer inadvertence, and, also with the insured being unmindful, vis-a-vis, the requisite ill-effects, qua upon the workman, suffering disabling injuries, during, the course of his performing employment, the, apposite risk rather being not fully covered, (c) more emphatically, when, the insurer, has not, led any evidence, that, the premium amount liquidated, vis-a-vis, it, by the insured, being not adequate or sufficient, to, hence cover the afore risk, nor, any evidence being adduced, qua rather for fully covering, the, apposite risk, thereupon, a, premium higher than one, as charged by the insurer, from, the insured, being hence chargeable. The substantial questions of law, are, answered accordingly.

5. Be that as it may, the relevant mishap occurred, in, the year 2011, and, the computation, of, compensation is enjoined, to, be made, in, concurrence, with, the the provisions, of, Section 4 of the Workman Compensation Act, the, relevant apt provisions are extracted hereinafter:-

"**4. Amount of compensation.-**(1) subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

(a)	Where death results from the injury	An amount equal to monthly wages of the deceased (employee) multiplied by the relevant factor; or an amount of (one lakh and twenty thousand rupees), whichever is more;
(b)	where permanent total disablement results from the injury	an amount equal to (sixty per cent) of the monthly wages of the injured (employee) multiplied by the relevant factor; or an amount of (one lakh and forty thousand rupees) whichever is more:

[Provided that the Central Government may, by notification in the Official Gazette, from time to time, enhance the amount of compensation mentioned in clauses (a) and (b).]

(i) since a permanent disablement, stands entailed, upon, the workman, in sequel to the injuries befalling, upon him, during the course of his rendering employment, under his employer, thereupon in consonance, with, Clause (b) of Section 4, of, the Act, only 60%, of, 7,500/- comprises the relevant per mensem salary, whereon, hence the apt statutory factor was enjoined to be applied, and, with the learned Commissioner, hence, making determination of compensation, in the afore statutorily enjoined manner, thereupon he has not committed hence any gross fallacy.

6. For the foregoing reasons, there is no merit in the appeal filed, by the Insurance Company, and, is hence dismissed and, the impugned award, is, maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Pawan Kumar .....Petitioner.
Versus
State of H.P. ......Respondent.

Cr. Revision No. 64 of 2009 along with
Cr. Revision No. 65 of 2009.
Reserved on: 31st July, 2019.
Date of Decision: 13th August, 2019.

Indian Penal Code, 1860– Sections 279, 337 & 338– Rash and negligent driving/act– Proof– Held, victim was in process of alighting from bus– Its driver and conductor were required to adhere to standards of due care and caution qua passengers alighting from bus– Evidence reveals that driver had steered vehicle ahead only on signal of conductor– So he goaded driver to depart without ensuring that victim had safely alighted– He did not take standard of care and caution he was required to observe in such a situation– No negligence was there on part of driver as he drove vehicle on signal of conductor– Conviction of conductor of bus upheld whereas that of driver set aside and he is acquitted of all offences. (Paras 10 to 14)

For the Appellant(s): Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate, in Cr. R. No.64 of 2009, and, Mr. Vinay Thakur, Advocate in Cr. R. No. 65 of 2009.
For the Respondent(s): Mr. Hemant Vaid, Addl. Advocate General with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Since, Cr. Revision No. 64 of 2009, and, Cr. Revision No. 65 of 2009, arise from a common charge(s), put to both the revisionists, and, whereon, on, conclusion of trial, the, petitioner Pawan Kumar, was, concurrently convicted, and, sentenced hence for his committing offences, punishable under Sections 279, 337, and, under Section 338 of the IPC, whereas, petitioner Guman Singh, stood convicted, and, sentenced, hence for his committing offences punishable, under Section 337, and, under Section 338 of the IPC, thereupon, both the afore criminal revision petitions, are amenable, for, a, common verdict being rendered thereon.

2. In brief, the prosecution case is that Pawan Kumar was driver of bus No. HP-07-5537, whereas, accused Guman Singh was conductor. On 9.2.2001, victim Meena Chauhan had boarded the afore bus at about 4.30 P.M.. along with her daughter, and, had been coming to their house at Khalini. When the aforesaid bus, reached near Khalini in between 4.30 to 5.00 p.m., one more bus bearing No. HP-07-3376 was already standing there. Accused Pawan Kumar, therefore, overtook the afore stationary bus No. HP-07-3376 and placed his bus in front of said bus No. HP-07-3376 and started alighting the passengers. When Victim Meena Chauhan had been alighting accused Guman Singh, all of a sudden blew the whistle and accused Pawan Kumar Started driving the bus without ensuring that all the passengers had alighted. Resultantly, victim Meena Chauhan fell down and sustained injuries on her back and other parts. ASI Amin Chand along with constable Sanjeet Kumar had been patrolling the area and on reaching Khalini, Mangal Singh who was present near a spop at the spot, made statement under Section 154, Cr.P.C., Ex.PW3/A, which was sent to Police Station, and, on the basis of the afore statement, FIR was registered. Thereafter the police carried out the investigations in the case.

3. On conclusion of the investigations, into, the offences, allegedly committed by the accused, a report, under Section 173 of the Code of Criminal Procedure, was prepared, and, filed before the learned trial Court.

4. The accused/convicts/petitioners, stood charged, by the learned trial Court, for, theirs committing, offences punishable under Sections 279, 337, and, under Section 338 of the IPC. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording, of, the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication, in, the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, upon, the accused/convict/petitioner Pawan Kumar herein, for, his committing, offences, punishable under Sections, 279, 337, and, 338 of the IPC, whereas, accused/convict/petitioner Guman Singh, stood convicted, for, his committing offences punishable under Section 337, and, under Section 338 of the IPC. In appeals preferred therefrom, by the accused/petitioners herein, before, the learned Addl. Sessions Judge concerned, the latter affirmed, the, apposite findings of conviction, and, the, consequent therewith imposition, of, sentence(s), upon, them, as borne, in the judgment, pronounced, by the learned trial Court.

6. The convicts/accused/petitioners herein, stand aggrieved, by the concurrent findings of conviction, recorded, against them, by the learned Courts below. The learned counsel(s), appearing for the accused/petitioners herein, have, concertedly and vigorously contended, qua the findings of conviction, recorded by both the learned Courts below, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by them, of the material on record. Hence, they contend qua the concurrent findings, of conviction hence warranting reversal by this

Court, in the exercise of its revisional jurisdiction, and, theirs being replaced, by, findings of acquittal.

7. On the other hand, the learned Additional Advocate General appearing for the respondent/State, has, with considerable force and vigour, contended qua the findings of conviction, recorded, by both the learned Courts below, rather standing based, on a mature and balanced appreciation, by them, of the evidence on record, and, theirs not necessitating any 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. Both the learned courts below, had meted, credence, vis-a-vis, the credible eye witness account, rendered, qua, the relevant occurrence. Moreover, both the learned courts below, had meted an appropriate deference, to the medico legal certificate, embodied in Ex.PW7/A, wherein, the injuries sustained, by the victim, in the relevant mishap are borne, and, are also proven by PW-7, to be entailed, upon, her person, in a road side mishap.

10. The eye witnesses to occurrence, are obviously, the, victim Meena Chauhan (PW-1), and, her daughter Kumud (PW-4), and, one Mangal Singh (PW-1). All the afore in their respectively recorded testifications, borne in their examinations-in-chief, make echoings therein hence bereft of any stark or blatant embellishments, and, improvements, vis-a-vis, their previously recorded statements in writing, nor their respective depositions, suffer from any vice of any inter se contradictions. Consequently, the afore rendered umblemished, and, unstained testifications, vis-a-vis, the genesis of the occurrence, rather enjoin, this Court, to, alike both the learned courts below, mete apt defence thereto. However, the learned counsel appearing for the revisionist, make a serious contention, before this Court, that with intra se contradictions, emanating inter se the testifications rendered by the victim, who stepped into the witness box as PW-1, and, her daughter, who stepped into the witness box, as, PW-4, (a) inasmuch as the former in her testification making an articulation, qua hers, at the relevant stage, being in the process of alighting from the rear window of the bus, (b) yet in contradiction thereto, her daughter, who, stepped into the witness box as PW-4, making articulation, vis-a-vis, her mother, at the relevant time, being in the process, of, alighting from the front window of the bus, hence, thereupon, their respective testification being incredible. However, the afore submission falters, as, (c) both concur, vis-a-vis, in the afore process, the driver/convict, one Pawan Kumar, wanting to adhere, vis-a-vis, the standards of due care, and, caution, comprised in his, without ensuring qua PW-1 hence safely egressing from the bus, (d) his yet speeding the bus, and, hence, PW-1, falling onto the road, from the window of the bus, (e) thereupon, also both obviously concur, vis-a-vis, the convict/revisionist Pawan Kumar, being negligent in driving the offending vehicle. Furthermore, the effect of the afore minimal contradictions intra se, the, depositions rendered by PW-1, and, by PW-4, rather stands subsided, given each ascribing an incriminatory role, to convict/petitioner Pawan Kumar, and, to co-convict Guman Singh, inasmuch, as, both being negligent in ensuring, the, victim rather safely egressing from the bus, and, also given the afore inter se contradiction rather being obviously minimal.

11. Be that as it may, one of the eye witness, to, the occurrence, PW-2 turned hostile, and, the afore factum, is, strived to be capitalized, by the learned counsel appearing for the convicts/petitioners, (a) for theirs, making a submission qua hence the depositions, of, the other eye witness to the occurrence, who rendered, an, unblemished account, vis-a-vis, the occurrence, also coming to engulfed with an aura, of, doubt. However, the mere fact,

vis-a-vis, PW-2, reneging from his previous statement, recorded in writing, would not, either undermine, the, efficacy, of, the uneroded testifications, vis-a-vis, the genesis of the occurrence, rather rendered with intra se corroboration, by PW-1, and, PW-4, (b) and, also given upon his reneging, from, his previous statement recorded in writing, and, his thereafter being declared hostile, by the learned trial Court, on, a, request made qua therewith, by the learned APP, and, whereafter, on his being, cross-examined by the learned APP, his acquiescing, to suggestions, vis-a-vis, the investigating Officer, recording his statement, under, Section 161 of the Cr.P.C., (c) and, qua the conductor of the bus blowing the whistle in, a, hurry, (d) the accused being nabbed, on the spot, by the police officials, (e) and, both being escorted to the police station, (f) and, thereafter his further admitting, that, the road, at, the relevant site, of, occurrence, rather being extremely wide, and, the victim falling onto the road, during, the process of hers alighting from the rear window, of, the bus. The afore affirmative answers meted by PW-2, during, the process of his being cross-examined, by the learned APP, do capitalize, an inference qua his therethrough making acquiescences, vis-a-vis, both the convicts/petitioners, at the relevant time, being respectively, the, driver, and, conductor of the offending bus, and, also his ascribing tort, of, negligence, vis-a-vis, the conductor of the bus, besides his ascribing tort, of, negligence, vis-a-vis, the driver of the bus, given his rendering, an, echoing qua the road, at, the relevant site of occurrence, being extremely wide. The effect of the acquiescences rendered by PW-2, during, the course of his being subjected, to, the ordeal, of, a scathing cross-examination, by the learned APP, do reiteratedly, undermine the effects, if any, of, his in his examination-in-chief, reneging, from his previous statement recorded in writing, (a)and, also the afore acquiescences, corroborate, the testifications, rendered, hence with intra se corroborations, by both PW-1, and, PW-4. In aftermath, the testification of PW-2, cannot, in its entirety, be, rid of its sanctity, and, nor merely on anvil, of, his in his examination-in-chief, hence reneging from his previous statement recorded in writing, can bestow any leverage, vis-a-vis, the defence.

12. Moreover, the learned counsel appearing, for the petitioners/accused, contended with ultra vehemence, before this Court, qua, with the recitals occurring in the reverse, of, the apposite MLC, embodied in Ex.PW7/A, and, recitals whereof, are, embossed exhibition mark, Ex.PW1/A, and, theirs making a candid articulation, vis-a-vis, the victim not intending, to, initiate any prosecution, against, the accused/petitioners, (a) and, thereupon, the afore echoings, being readable, qua the entire genesis of the prosecution case, rather obviously foundering. However, the afore submission, is, scuttled by the afore uneroded testifications, rendered by PW-1, and, PW-4, vis-a-vis, the occurrence, and, also a profound reading of the afore signatured recitals hence, by the victim, do not convey, as contended before this Court, vis-a-vis, her acquiescing, vis-a-vis, hers falling onto the road, being a sequel of her negligence, nor any unfoldings emanate therefrom qua hers exculpating, the, incriminatory role, if any, of the accused in the relevant occurrence. In sequel, no capitalization, can be derived, therefrom by the defence.

13. In addition, the learned counsel appearing, for, the convicts/petitioners, proceeded to also contend, before this Court, that, (a) despite the identity of the convicts/ accused remaining unestablished, and, also with the registered owner of the offending vehicle neither being cited as a prosecution witness, nor his stepping into the witness box, (b) for, his rendering, a, testification, vis-a-vis, his engaging the convicts, respectively as driver, and, conductor, upon, the offending bus, (c) thereupon, when no valid test identification parade, was carried, by the investigating officer concerned, and, hence, the ascriptions of incriminatory role, vis-a-vis, the convicts in the relevant occurrence, being construable, to be, a mis-ascription, arising reiteratedly from the prosecution rather failing to prove, the, identity of both the accused. However, the afore submission also staggers, (d)

given, during, the course of cross-examination, PW-6, the learned defence counsel meteing, to him, an affirmative suggestion, with candid echoings borne therein, vis-a-vis, his being previously aware, vis-a-vis, the identity of the accused, and, when thereto, an, affirmative answer, stood meted by PW-6, (e) hence the derivative inference therefrom, is, qua the defence acquiescing, vis-a-vis, the identity, and, also the participation of the convicts/petitioners in the relevant occurrence, (f) and, reiteratedly, hence neither there being any necessity for holding any test identification parade nor there being any necessity, for, the owner of the bus, being cited as a prosecution witness, nor there being any necessity qua his rendering a deposition, vis-a-vis, the accused/petitioners, being employed by him, upon, the offending bus, as driver, and, conductor.

14. The convict/petitioner Pawan Kumar, was, at the relevant time, hence, manning the steering wheel, of, the offending vehicle, and, vis-a-vis, him unflinching evidence exists, on record, qua his after being sounded an apt signal, by the conductor/co-convict Guman Singh, comprised, in the latter blowing, the, whistle, and, his thereafter proceeding, to, speed the bus. However, the afore evident proven established factum, does generate, an invincible inference, vis-a-vis, the conductor/convict Guman Singh, hence, deviating, from the standards of due care, and, caution, comprised in his making, a, mis-signal to the driver/convict Pawan Kumar, and, thereupon goading the latter, to depart, from, adherence(s), vis-a-vis, the standards of due care, and, caution, (i) comprised in, despite, the victim PW-1, not safely egressing from the bus, his yet making a false signal, to the convict/petitioner Pawan Kumar, (ii) and, further sequel therefrom, is, qua the convict Pawan Kumar, who was manning the steering wheel, of, the offending bus, rather not deviating from the standards of due care, and, caution, (iii) and, hence both the learned courts below, in convicting, and, sentencing him, appear to irrevere the afore evident proven factum, (iv) unless evidence stood adduced, vis-a-vis, co-accused/petitioner Pawan Kumar, at the relevant site, also from, the mirrors occurring near the driver's seat, despite hence standing facilitated, to sight the happenings, at the rear, of, the bus, and, yet his only meteing deference, to, the mis-signal purveyed, to him, by co-convict, Guman Singh. (v) However, even if the afore facilitation, may be purveyed, to co-convict Pawan Kumar, yet the afore facilitation, cannot spark, any inference, vis-a-vis, his intentionally not deriving, the, apt benefit thereof, and, hence his being penally liable, (vi) unless, evidence stood adduced, vis-a-vis, co-convict/conductor of the bus, one Guman Singh earlier also making false signals, to, him, for the relevant purpose, and, hence there being, a, further onerous injunction, cast upon the co-convict/driver Pawan Kumar, to ensure, the veracity, of, his signals rather by his recoursing, the, afore facilitation. However, the afore evidence, is, amiss, and, when the afore manner of signaling, is, the norm, for, adherence, by, the driver, hence to either stop the bus or to speed it, thereupon, in the driver/convict Pawan Kumar meteing deference thereto, hence, has not committed any penally inculpable offence.

15. For the foregoing reasons, Cr. R. No. 64 of 2009 is allowed, whereas, Cr. R. No. 65 of 2009 is dismissed. Consequently, accused/petitioner Pawan Kumar, is, acquitted of the charged offences. Fine amount, if any, deposited by petitioner Pawan Kumar, be refunded to him.

16. However, in view, of, convict Guman Singh, facing, a, protracted trial, vis-a-vis, the charges, and, when the relevant occurrence, relates to the year 2001, and, since then, and, till date rather 18 years stand elapsed, and, during the said period, the, accused/petitioner Guman Singh, has suffered immense mental pain and agony, thereupon, the sentence as imposed, upon, him by the learned trial Court, for, his committing offences punishable under Section 337 , and, 338 of the IPC is modified, and, he is sentenced to pay a fine of Rs. 50,000/-(Rs. Fifty thousand only). The afore fine amount, be deposited, by

petitioner/convict Guman Singh, within two weeks, from, today, before the learned trial Court, and, the learned trial Court is directed, to, thereafter pay the afore deposited fine amount, as, compensation, to the victim, one Meena Chauhan. Consequently, the judgments impugned before this Court, are, modified in the afore manner. All pending applications also stand disposed of. Records be sent back forthwith.

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

Swati Sharma .....Appellant
Versus
Ashraf Khan & others .....Respondents.

FAO No. 135 of 2019 a/w FAO No. 138 of 2017 and
FAO No. 442 of 2017
Reserved on : 2.8.2019
Date of decision: 13.8.2019

Motor Vehicles Act, 1988–Section 166 – Motor accident– Contributory negligence of deceased – Proof – While relying upon statement of investigating officer and site plan, Tribunal holding that accident had taken place also on account of contributory negligence of deceased, a driver of motor cycle and fastening indemnificatory liability on the insurer of truck to extent of 50% only – Appeal by claimants – Held, informant specifically stating before Tribunal that accident was result of rash driving of driver of truck – Truck being a larger vehicle vis-a-vis motor cycle, it was for driver of offending truck to ensure steering on to abundant vacant space available on road – His maneuvering of truck resulted into head on collision at middle of road – He alone was rash and negligent in driving – Tribunal misappreciated evidence qua contributory negligence of deceased – Appeal allowed – Insurer of truck liable to indemnify entire award. (Para 3)

Case referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the appellant: Mr. R.S. Gautam, Advocate, for the appellant in FAO No. 135 of 2019 and for respondent No.1 in FAO No. 442 of 201 and for respondent No.3 in FAO No. 138 of 2018

For the respondents: Mr. P.S. Goverdhan, Advocate, for respondent No.1 in FAO No. 135 of 2019 and FAO No. 138 of 2018 and for respondent No.3 in FAO No. 442 of 2017.
Mr. J. L. Bhardwaj, Advocate, for the appellant in FAO No. 138 of 2018 and for respondent No. 3 in FAO No. 135 of 2019 and for respondent No.2 in FAO No. 442 of 2017.
Mr. Jagdish Thakur, Advocate, for respondent No.2 in FAO No. 135 of 2019 and FAO No. 138 of 2018 and for the appellant in FAO No. 442 of 2017.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

All these appeals, bearing FAO No. 135 of 2019, FAO No. 138 of 2018, and, FAO No. 442 of 2017, arise, from a common verdict, rendered, by the learned Motor Accident Claims Tribunal-III, Solan, District Solan, H.P. in MACT petition No. 15ADJ-11/2 of 2014, titled, Swati Sharma & another vs. Ashraf Khan & another, (i) wherethrough, the learned MACT concerned, on, 15.6.2017, assessed, compensation amount, borne in a sum of Rs. 61,36,440/-, along with interest, levied thereon at the rate of 7% per mensem, and, commencing, from, the date of filing the petition, till, realization. The compensation amount was apportioned amongst the co-claimants, in the manner, comprised in the operative part, of, the impugned verdict, and, the apposite 50% idemnificatory liability, stood fastened, upon, the insurer of the offending vehicle.

2. The claimants, contest, the validity of findings, returned, in the impugned award, upon, issues No. 1 and 3. The findings returned, upon, the issues No. 1 and 3, unfold, vis-a-vis, the learned Tribunal, on, an analysis of the evidence on record, proceeding to make a conclusion, vis-a-vis, the deceased, while atop his motorcycle, being along with respondent No.1, also hence negligent rather in driving it or his being a co-tortfeaser, (i) and thereafter, though, proceeded to, in paragraph-31, of, the impugned award, compute a total compensation amount, of Rs. 1,22,72,880/-, yet, from, the afore awarded amount, it, proceeded to make a 50%, deduction and, proceeded, to, saddle the apposite thereto, 50 per centum, indemnificatory liability qua therewith, vis-a-vis, the insurer, of, the offending truck. Since the effect, of, the afore inference, of, contributory negligence, drawn, by the learned Tribunal, visits, rather apposite ill-effects, upon, the quantum, of, compensation, (ii) thereupon the counsel appearing for the claimants, has, contended with much vigor, before this Court qua the findings returned thereon, hence warranting interference by this Court. Obviously, the counsel appearing, for the insurer, of, the offending truck, has made submissions, before this Court rather for sustaining the findings, recorded thereon, hence by the learned Tribunal.

3. For determining the validity, of, the findings, returned upon issues No. 1 and 3, it is imperative to bear in mind, the factum (i) qua the learned Tribunal proceeding to irrevere, the deposition, of, an eye witness to the occurrence, who, stepped into witness box, as PW-5, and, who during the course of his examination-in-chief, had tendered into evidence, his affidavit, borne in Ext. PW-5/A, (i) and, wherein, he had ascribed commission, of, tort of negligence, vis-a-vis, respondent No.1, hence in the latter, driving the offending truck, (ii) also the learned Tribunal, not meteing apt deference, vis-a-vis, PW-5, during, the course of his cross-examination, conducted, by the counsel for the insurer, wherein, rather he meted dis-affirmative answers, vis-a-vis, the thereto, put suggestion to him, by the afore counsel, (iii) qua their being, a, headon collision, inter-se, the offending truck, and, the motorcycle, driven by the deceased. (iv) Since obviously, PW-5 meted hence an affirmative answer, qua, the, afore facet, hence obviously rather absolute deference, was, enjoined to be meted thereto. However, the learned Tribunal, despite, PW-5, besides his being, an ocular witness qua the occurrence, his also being the informant, of FIR, borne in Ext. PW-2/A, and, with candid echoings, borne therein, vis-a-vis, commission, of, tort, of, negligence rather by respondent No.1, it, contrarily proceeded to mete deference, vis-a-vis, the echoings made, by the Investigating Officer concerned, who, stepped into the witness box, as RW-3, (iii) and, who in his examination-in-chief, rendered articulations, therein, vis-a-vis, apt contributory negligence, being ascribable, vis-a-vis, respondent No.1, and, the deceased, in, the latter driving the motorcycle. Also, it proceeded, to, from the reflections cast in the site plan, and, embodied in Ext. R-1, hence, recorded, a, suo moto conclusion, qua given the width of the road, at the relevant site, being 23 feet, (iv) qua hence given their being evident

contributory negligence, ascribable, vis-a-vis, respondent No.1, in driving the offending truck, and, also, vis-a-vis, the deceased, in, the latter driving his motorcycle. However the effect of the afore conclusion, warrants interference, (i) as there, is, palpable gross over looking(s), by the learned Tribunal, vis-a-vis, the afore uneroded ocular echoings, rendered by PW-5, and, who also as aforestated, is also the informant, (ii) and, thereupon, in, rather the learned Tribunal, proceeding to untenably mete deference, to, the afore solitary echoing, borne, in examination-in-chief of RW-3, who, was neither, the, informant nor an ocular witness, vis-a-vis, the occurrence, (iii) also though in his examination-in-chief, he has echoed, vis-a-vis, the relevant mishap being attributable, vis-a-vis, bothrespondent No.1, and, the deceased, both being negligent, in, driving the respective vehicle(s), (iv) nonethless, upon making a commulative reading of, the echoings, occurring in the cross-examination, of RW-3, and, the echoings borne in PW-5/A, conspicously, whenRW-3 makes echoings, vis-a-vis, in respondent No.1, hence driving the offending truck, at the relevant site of occurrence, his driving the truck, rather negligently, visibly has committed an error, of, mis appreciation, of, the afore evidence, (iv) thereupon even when the width, of, the mettled portion of the road, existing at the site, is, 23 feet, yet, the afore width, is, rendered inconsequential, (v) given, the site plan, embodied in Ext. R-1, making trite echoings, vis-a-vis, the relevant collision, occurring in the middle of the road, and, it, occurring hence trite at the apposite divider, rather separating, the, two portions of the road, (vi) thereupon besides when the offending truck is larger in seize, vis-a-vis, the motorcycle, and, when hence respondent No.1, could easily sight, the motorcycle concerned, to, arrive from the opposite direction, (vii) thereupon it was enjoined, upon, respondent No.1 to ensure his steering, the, truck onto, the, abundant space, available, for, stationing the offending truck. Contrarily, respondent No.1, despite, hence abundant space, existing, on, the apposite appropriate site rather, for, the offending truck, being stationed thereat, hismaneuvering, it, onto the divider, hence separating the two portions, of, the road, and, whereat, a, headon collision inter-se, it, and, the motorcycle, driven at the relevant site, by the deceased, hence occurred, rather makes, open bespeakings qua commission of, tort, of, negligence by respondent No.1, (ix) thereupon the findings recorded upon issues No. 1 and 3 warrant interference, and, it is concluded qua the compensation amount, borne in a sum, of, Rs. 1,22,72,880/-, determined, vis-a-vis, the claimants, being in totality disbursable qua the claimant, and, the apposite absolute indemnificatory liability, being fastenable, upon, the insurer, of, the offending vehicle.

4. The learned counsel, appearing for the claimants contend, (i) that, the salary certificates of the deceased, are, embodied in Ext. PW-4/A, in Ext. PW-4/B, and, in Ext. PW-4/C. The gross salary depicted thereon, is Rs. 1,57,850. The components of the afore gross salary, are, the basic salary drawn, in the sum of Rs. 63,140/-, House Rent Allowance 31,570/-, special Allowance of Rs. 61,090/-, Conveyance Allowance of Rs. 800/- along with Medical Allowance of Rs. 1,250/-. However, the learned Tribunal, has untenably, deducted therefrom, the, components of house rent allowance, special allowance and medical allowance, whereas, the afore benefits, even on the demise of the deceased are accruable, vis-a-vis, the deceased, except, conveyance allowance, borne in the sum of Rs. 800/-, (ii) thereupon, hence the deductions', made, by the learned Tribunal, from, the apposite components, appertaining, to, House Rent Allowance of Rs. 31,570/-, Special Allowance of Rs. 61,090/-, along with Medical Allowance of Rs. 1,250/-. are set, aside, (iii) and, after adding the afore sums, of, money, vis-a-vis, the basic salary of Rs. 63,140/- the total per mensem salary, is, computed, in, the sum of Rs.1,57,050/-. However, as reflected in Ext. PW-4/C, the deductions, of, Rs. 26,964/-, towards, the, per mensem income tax liability, are necessitated and, after deducting, the, afore per mensem amount, of, income tax, from, the afore assessed monthly salary, of, the deceased, the, apposite per mensem salary, of, the deceased, is, computed, in, a sum of Rs.1,30,086/-.

5. Furthermore, the learned tribunal, in not granting the requisite hikes or accretions towards future prospects, vis-a-vis, the per mensem income, of, the deceased, in a 50% per centum, rather has committed, a, gross legal fallacy, given the law laid down by the Hon'ble Apex Court, and, encapsulated in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.61, extracted hereinafter, hence, permitting, the, meteings, of, afore hikes:-

> "61. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.
>
> (v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.
>
> (vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.
>
> (vii) The age of the deceased should be the basis for applying the multiplier.
>
> (viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. "

thereupon, and, in consonance therewith the afore deceased, is entitled for meteing(s), of, 50% increase(s), in his apposite per mensem income, as, borne in a sum of Rs. 1,30,086/-, increases whereof, are, computed to stand borne, in a sum of Rs.65,043/-, hence, the total per mensem salary of the deceased is computed in a sum of Rs.1,95,129/-. Significantly, the number of dependents, of, the deceased, are, 2, hence, 1/3rd deduction, is, to be visited, upon, a sum of Rs.1,95,129/-, hence, after making, the, aforesaid apt deduction, vis-a-vis, the afore sum, the per mensem dependency, hence comes to Rs. 1,30,086/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs. 1,30,086/- x 12=Rs.15,61,032/-. After applying thereto, the apposite

multiplier of 16, thereupon, the total compensation amount, is assessed in a sum of Rs.15,61,032/- x 16= Rs.2,49,76,512/- (Rs. Two crore, forty nine lakh, seventy six thousand, five hundred twelve only).

6. In addition to the afore, and, in consonance with the mandate of the Hon'ble Apex Court in Pranay Sethi's case (supra), the claimants are also entitled for quantification, of, compensation under conventional heads, namely, loss to estate, loss of consortium, vis-a-vis the widow of the deceased, and, funeral expenses, in, a sum of Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively, whereupon, the total compensation wheretowhich, the claimants, are, entitled to, comes to Rs.1, 2,49,76,512/-+ Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.2,50,46,512/- (Rs. two crore, fifty lakh, forty six thousand five hundred twelve only).

7. For the foregoing reasons, FAO No.442 of 2017, is dismissed, whereas, FAO No.135 of 2019, and, FAO 138, of, 2018, are allowed. In sequel, the impugned award, is, in the aforesaid manner, hence modified. Consequently, the claimants are held entitled to a compensation borne in a sum of Rs.2,50,46,512/- (Rs. two crore, fifty lakh, forty six thousand five hundred twelve only) along with interest, at the rate of 7% per annum, from, the date of petition till the date, of, deposit or realization, of, the compensation amount.

8. The indemnificatory liability, vis-a-vis, the afore compensation amounts, shall be saddled, vis-a-vis, the, insurer of the offending vehicle. The amount of interim compensation, if already awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation, be apportioned, in the manner as ordered by the learned tribunal. All pending applications also stand disposed of. Records be sent back forthwith.

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

The New India Assurance Company Ltd. .....Appellant.

Versus

Parameshwari Dass and others .....Respondents.

FAO No. 268 of 2018 along with
FAO No. 269 of 2018.
Reserved on : 1st August, 2019.
Decided on : 13th August, 2019.

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Rash and negligent driving – Proof – Insurer of offending vehicle disputing factum of accident having taken place because of rash driving by its driver and attributing negligence on part of deceased driver of motor cycle – Held –In FIR registered against deceased driver of motor cycle, a cancellation report was filed after investigation of case – Report was accepted by Judicial Magistrate – Eye witness to occurrence of accident attributing rash and negligent driving on part of driver of offending vehicle – Witness genuine and credible – Accident had taken place because of rash driving of driver of offending vehicle. (Para 5)

For the Appellant: Mr. B.M. Chauhan, Senior Advocate with Mr. Amit Himalvi, Advocate.

All the respondents are ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, FAO No. 268 of 2018, and, FAO No. 269 of 2018, both arise from a common ill-fated mishap, hence, involving the offending vehicle, bearing No. HP-72-0187, and, also when the grounds of appeal, reared by the aggrieved insurer, rather are also common in both the afore FAOs, thereupon, both the afore FAOs, are, amenable, for a common verdict being recorded thereon.

2. In MACT Petition No. 10 of 2015, wherefrom, FAO No. 268 of 2018 has arisen, the learned tribunal concerned hence assessed, vis-a-vis, the claimants concerned, compensation amount borne, in a sum of Rs.17,43, 600/-, and, thereon levied interest, at the rate of 9% per annum, (i) and, it was ordered to commence, from, the date of filing of the petition, till its realization, and, the apposite indemnificatory liability thereof, was, fastened, upon, the insurer/appellant herein.

3. In MACT Petition No. 11 of 2015, wherefrom, FAO No. 369 of 2018 has arisen, the learned tribunal concerned hence assessed, vis-a-vis, the claimants concerned, compensation amount, borne in a sum of Rs.17, 43, 600/-, and, thereon levied interest, at the rate of 9% per annum, (i) and, it was ordered to commence, from, the date of filing of the petition till its realization, and, the apposite indemnificatory liability thereof, was, fastened, upon, the insurer/appellant herein.

4. The learned counsel appearing for the insurer, seriously contests, the, validity of rendition, of, affirmative findings, by learned tribunal, upon, the issue appertaining, to the relevant mishap, being a sequel, of, rash, and, negligent manner, of, driving, of, the offending vehicle, by respondent No.4 herein, one Pawan Kumar. His contest is focused, upon, the testification rendered, by RW-2, who through his deposition comprised, in his examination-in-chief, has lent assured proof qua the rider, of, the motor cycle, hence, driving it in a rash, and, negligent manner, and, as a sequel whereof FIR, borne in Ex.RW1/A, stood registered against him, (ii) and, therefrom he contends qua with the contents existing therein, ascribing negligence, vis-a-vis, the rider of the motor cycle, hence, the learned tribunal committing, a, gross legal fallacy, in, fastening the apposite liability, upon, the appellant herein. However, the afore submission is per se flimsy, frail, and, pretextual, as, the afore echoings borne, in Ex.RW1/A are fully blunted, vis-a-vis, their apt vigour, (a) given RW-1 making a testification qua after conclusion of investigations, into the offences, borne in Ex.RW1/A, the investigating officer concerned, rather filing a cancellation report, before the judicial Magistrate concerned, and, it being also accepted.

5. Be that as it may, the learned counsel, for the insurer has also contended (i) that even if the afore testification, may be of no avail, to succor the afore contest, vis-a-vis, the affirmative findings, returned by the learned tribunal, upon, the issue appertaining to the relevant mishap, being a sequel of rash, and, negligent manner, of, driving of the offending vehicle, by respondent No.4 herein, (a) yet , the reliance, if any, meted by the learned tribunal, upon, the testimony of an ocular witnesses, vis-a-vis, the relevant occurrence, and, who stepped into the witness box as PW-5, rather being, a, mis-reliance, (b) as, the afore witness, in his cross-examination, has made an admission, qua his holding, extremely cordial relations, with, one Parmeshwari Dass, and, also his further testifying, vis-a-vis, his, on the day, whereat he rendered, his testification, hence being accompanied,to,

the courts, by, the afore Parmeshwari Dass, and, thereupon, his rendering an interested version qua the occurrence. However, the afore admission, does not, render his testimony, borne in his examination-in-chief, wherein he ascribes, commission, of, tort of negligence, vis-a-vis, respondent No.4 herein, rather to suffer any negation, (c) as during his cross-examination, by the counsel, for respondent No.4, upon, a affirmative suggestion being purveyed to him, vis-a-vis, his remaining, at the site of occurrence for ½ hour, and, whereto he meted an affirmative suggestion, rather enhancing an firm inference qua his being, not a concocted or an invented eye witness to the occurrence, rather his being, a, genuine, and, a credible eye witness thereto, (d) and, merely, upon, his holding, the, afore purported interestedness, vis-a-vis, the claimant Parmeshwar Dass, thereupon, his testimony, borne in his examination-in-chief, wherein he ascribes, an incriminatory role, vis-a-vis, respondent No.4 herein, reiteratedly hence not being amenable, for, any apt rejection. Also the factum, vis-a-vis, his not being associated in the relevant investigations, by the investigating officer, being also likewise irrelevant.

6. The learned counsel appearing, for the insurer has contended, qua, the computation, in, a sum of Rs.12,000/- per mensem, by the learned tribunal rather the salary of each deceased, being, a, mis-computation, as there exists no evidence on record, qua the deceased, during, their life time, being employed in a foreign country, nor there exists any evidence, on record, qua therefrom, theirs transferring, in the account of their parents, hence, respectively sums of Rs.40,000/- per mensem each. However, the afore contention, suffers outright rejection, as, the learned tribunal, irrespective of the factum, vis-a-vis, the deceased, during. their life time rendering employment, in a foreign country, and, theirs therefrom transferring, into the accounts, of their family members, sums of Rs.40,000/- per mensem each, rather had only, on anvil of both the deceased being skilled persons, hence concluded, qua theirs hence earning salary, of, Rs.12,000/- per mensem each. Consequently, the afore computation, of, the per mensem salary, of, the deceased, does not suffer, from any perversity or absurdity, and, when thereafter the requisite hikes, towards future prospects, borne in 40 per centum also stood tenably added thereon, and, when thereafter, the, requisite multipliers, of, 17, hence, after deducting 50% from the apposite figure, of, annual dependency, given both the deceased being bachelors, rather stood applied thereon, thereupon, the compensation amount as adjudged, vis-a-vis, the claimants, is, creditworthy, and, does not suffer, from, any infirmity.

7. For the foregoing reasons, there is no merit in the instant appeals, and, both the afore appeals are dismissed. The awards impugned before this Court are maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

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

Cr. Appeal No. 793 of 2008.
Reserved on: 7th August, 2019.
Date of Decision: 13th August, 2019.

Indecent Representation of Women (Prohibition) Act, 1986 – Section 6– Obscene and prurient contents – Necessity of publication- Trial court convicting accused for preparing nude photographs and obscene CDs of victim and storing them in his computer– Appeal against– Held, on facts, CDs carrying obscene and prurient contents got generated by investigating agency from hard disc of CPU of accused – No evidence that such CDs were televised or screened for public view by accused– Inference can be drawn that such material was meant only for private viewing by accused – Mere storage of such CDs in CPU of accused will not constitute offence under Section 6 of Act – Appeal allowed – Conviction set aside – Accused acquitted. (Paras 9 to 11)

For the Appellant: Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

For the Respondent: Mr. Hemant Vaid, Additional A.G. with Mr. Y.S. Thakur, Dy. Adv. General and Mr. Vikrant Chandel, Dy. A. G

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The learned Additional Sessions Judge, Fast Track Court, Shimla, H.P., though, acquitted the accused for the charges framed under Section 376 of the IPC, and, vis-a-vis, the charge framed, under, Section 67 of the Information Technology Act, 2000. However, he convicted the accused/appellant herein, for, commission, of, an offence punishable, under, Section 6 of the Indecent Representation of Women (Prohibition) Act, 1986, and, also sentenced him to undergo rigorous imprisonment, for, a period of one year,and, to pay a fine of Rs.1,000/-, and, in default of payment of fine amount, he was further sentenced, to, undergo rigorous imprisonment, for, a period of one month. Moreover, the accused/convict was also directed, to, pay a sum of Rs.1,00,000/-, as, compensation, to, the prosecutrix. The aggrieved convict/accused hence challenges the conviction pronounced, upon, him, vis-a-vis, the afore charge, and, also challenges, the, afore therewith consequential, order, of, sentence(s) imposed, upon, him.

2. On 20th June, 2005, the prosecutrix allegedly made a statement under Section 154, Cr.P.C., before the police that in the year, 1999 and 2000, she studied in S.D. School, Shimla in 10th and 10+1 class. She took the 10+2 examination as a private candidate. Her father left the land of dying anterior to her birth, whereafter her mother remarried. She has a younger sister. Their mother employed in the Industries Department. The accused, who runs a shop on the Mall Road, Shimla, is their family friend, and, used to visit their house since long. When her sister was married in the month of May, 2004, her "Kanyadan" was done by Sh. Vijay Kumar Sood, accused. As their financial condition was not good, in the year 2001, she while pursuing her studies joined the services of Goel Properties, Shimla. After some time, she left the said job as she wanted to learn the computer. One day, the accused came to her house and remarked as to why she should pay Rs.2,500/- as fees and join some computer center to learn the computer. The accused even remarked that there is a computer in his office and he will teach its operation to her on payment of Rs.500/- per mensem. She then started going to the office of the accused to undergo the computer training. She kept visiting the office of the accused for three months. During the said period, the accused several times touched her waist and back etc., to which she objected. When she learnt the computer, accused got her employed on the shop of one Sh. Amrit Singh above Sohan Studio, The Mall, Shimla. During those days, an advertisement appeared in the newspaper for modeling in Delhi. She sent her photograph

to Mr. Jitu of Delhi. She was selected for modeling at Delhi. For the last 1 ½ years, she is working as a model in Delhi. She visited, her house at Shimla twice, during the last 1 ½ years. In the year 2004, when she visited Shimla, the accused inquired from her about her boy friend. While learning the computer, she had told the accused about her boy friend stationed at Chandigarh as he used to ring her up. She had even divulged before the accused that she is having physical relations with her boy friend and wants to marry him. After the expiry of two months from the date of wedding of her sister, she came to Shimla. She telephoned the accused and told him that she has to leave for Delhi by the night bus. She even requested the accused to depute his servant so that he leaves her luggage at the bus-stand. On this, the accused asked her to come to his office and leave for Delhi after eating something. The accused also remarked that his servant will drop her at the bus stand. She accordingly reached the office of the accused in the evening. The accused served her the juice which she had. As she was in need of the money, she requested the accused to lend her the same. She even conveyed to the accused that as and when she visits Shimla again, she will refund the borrowed sum. While she was having the juice, the accused started talking to her regarding her boy friend and asked her to have the sexual intercourse with him. She refused to have the coitus with him. On this, the accused remarked that if she can enjoy the sex with her boy friend, she should have not hitch in having the sex with him. She told the accused time and again that she will not have the sex with him. Then the accused proclaimed that he will disclose about her physical relations with her boy friend in front of her mother. Under these circumstances, she was forced to have the sexual inter course with the accused so that he keeps mum regarding her physical relations with her boy friend. Some intoxicant was administered to her by the accused, after mixing it with the juice. On consumption of the juice, she became a bit tipsy. Thereafter, the accused took off her clothes and sexually abused her. The accused then gave Rs.500/- and left her on bus station, Shimla, so that she catches the bus which leaves for Delhi at 10 p.m. While the accused was having the sex with her, he never told her that he is making her blue film. Even she could not make out that the accused is making a video showing him having coitus with her. The lewd video/CD was prepared by the accused in a clandestine manner. Now the accused has been arrested by the police for preparing the obscene CD(s). She has come to know from her parents and the police that in the video/CD she and the accused feature having the sex. The accused took undue advantange of his familiarity with her family, her need for the money and helplessness. She has come to know that such CD(s) have also been sold in the market. Once, the accused had played an obscene CD on the computer when she was learning the same, spotting her, the accused stopped playing the CD, and, remarked that he was not knowing that she is about to come. As she was ashamed to her act, she did not disclose about the incident before anyone. On the basis of afore statement of the prosecutrix, FIR was registered against the accused, and, thereafter the police completed all the investigating formalities in the case.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report, under Section 173 of the Code of Criminal Procedure, was prepared, and, filed before the learned trial Court.

4. The accused/appellant herein stood charged, by the learned trial Court, for, his committing offences, punishable under Section 376 of the IPC, and, under Section 6 of the Indecent Representation of Women (Prohibition) Act, 1986, and, under Section 67 of the Information Technology Act, 2000. In proof of the prosecution case, the prosecution examined 21 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal, in, favour of the accused/appellant herein, vis-a-vis, the charges framed under Section 376 of the IPC, and, under Section 67 of the Information Technology Act, 200, whereas, it returned findings of conviction, against the accused/appellant herein, vis-a-vis, an offence punishable, under, Section 6 of the Indecent Representation of Women (Prohibition) Act, 1986.

6. The appellant herein/convict, stands aggrieved, by the afore findings of conviction, recorded, by the learned trial Court. The Senior Counsel appearing for the convict/appellant, has, concertedly and vigorously contended, qua the afore findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General appearing for the respondent/State, has, with considerable force, and, vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature, and, balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any 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. Apparently, neither the State of Himachal Pradesh, nor the aggrieved prosecutrix/victim, have, through instituting appeals, before this Court, hence cast any onslaught, vis-a-vis, the acquittal pronounced, by the learned trial Court, upon, the accused, vis-a-vis, the charges framed, under, Section 376 of the IPC, and, under Section 67 of the Information Technology Act, 2000. Consequently, the order of acquittal pronounced, upon, the accused/convict, vis-a-vis, the afore charges obviously acquire(s) conclusivity, and, binding effect. In aftermath, this Court is not enjoined, to, discern, from, the prosecution evidence, qua hence, its making any purported displays, vis-a-vis, the accused committing the afore charged offence, rather this Court, is, only enjoined, to, adjudicate, whether, the learned trial Court, meted an appropriate interpretation, vis-a-vis, the apt provisions, of, Section 4, of, the Indecent Representation of Women (Prohibition) Act, 1986 (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:-

> "**4. Prohibition of publication or sending by post of books, pamphlets, etc., containing indecent representation of women.-** No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form:"

10. Before proceeding to validate or invalidate, the, interpretation, meted, by the learned trial Court, qua the hereinabove extracted apt provisions of the Act, it is deemed fit to allude, to, the deposition, rendered by PW-10, (a) wherein, he has made, an, echoing qua his preparing/generating obscene CDs, from, the hard disc, of, the CPU of the accused. The making of the afore echoing by PW-10, in his deposition, does, assume significance, as, the CDs carrying obscene, and, prurient contents, remain undisplayed, by cogent prosecution evidence, to be hence televised or screened, for, hence facilitating apt public viewing(s) thereof. Since, the afore, evidence is amiss, and, when it hence, can be concomitantly

concluded, qua the CDs generated or prepared by PW-10, from, the hard disc of the CPU, of, the accused, and, theirs containing prurient, and, obscene contents, rather being meant, only, for the private viewing, of, the accused/'convict. However, the learned trial Court, upon, meteing, a, strict interpretation, to, the apt hereinabove extracted provisions, of, Section 4 of the Act, rather concluded, that, thereupon, also the accused "producing or causing, to, produce, sell, letting to hire, distributing, circulating, or sending by post, pamphlet, paper, sliding, film, writing, drawing, painting etc., hence, the afore CDs". The afore strict interpretation, meted, to the apt provisions of the Act, is, for the reasons assigned hereinafter hence engendered, from, a stark fallacy (a) as, the apt "words" borne in the apt statutory provisions, are borne in the statutory phrase "No person shall produce or cause to be produced", naturally, the afore, carry, the, lead or are the apt beckon, for, therefrom hence rendering, a, befitting interpretation, to, the subsequently occurring "words" therein. (b) Conspicuously, the, mere existence, of, CDs inside the CPU of the accused/convict, and, when the requisite afore evidence, vis-a-vis, it being disseminated for public viewing, is, grossly amiss, hence, thereupon, this Court forms, a, conclusion qua it being, meant only, for, the viewing of the accused, hence, also bearing in the mind the definition meted, to, "produce" by the "Lexicon",, definition whereof stands extracted hereinafter:-

> "**Produce**:- As a noun the words has no definite, exact, and, particular meaning; it may be used in a larger or more restricted sense. As a verb: To bring forward to show or exhibit, to bring into view or notice; as, to produce books or writings at a trial in obedience to a subpoena to bring forward; to offer to view or notice; to show; to manufacture, make."

(I) definition whereof enjoins exhibition or public dissemination, for hence production, being caused or the relevant incriminatory material, being construed to be produced, (ii) thereupon, the afore stricto sensu meteing, of, an interpretation,qua the afore lead parlance, occurring in the apt phrase, is grossly inapt. Moreover, with the afore evidence displaying, qua the relevant material, being not , publicly disseminated or publicly exhibited, thereupon, in consonance, with, the afore parlance, as, meted, to, the afore coinage, "no person shall produce or caused to be produced", (iii) this Court concludes that the conviction, of, the accused/convict/appellant herein, and, in consonance therewith imposition of sentence, vis-a-vis, the charge framed under Section 6 of the Indecent Representation of Women (Prohibition) Act, 1986 rather being not sustainable.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has not appraised the entire evidence, on record, in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, suffers, from, a gross perversity or absurdity of mis-appreciation, and, non appreciation, of, germane evidence, on record.

12. Consequently, the instant appeal is allowed, and, the impugned judgment, convicting, and, sentencing the accused/appellant herein, for his committing an offence punishable, under, Section 6 of the Indecent Representation of Women (Prohibition) Act, is, set aside. In sequel, he is acquitted for the afore offence. The fine amount, if any, deposited by him, be released to him, forthwith. All pending applications also stand disposed of. Records be sent back forthwith.

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

Dhanu (deceased) through LRs ….Appellants

Versus
State of H.P. & others ....Respondents

RFA Nos. 356 to 358 of 2009 along with RFA Nos. 382 to 384 of 2009
Date of Decision: 14th August, 2019

Land Acquisition Act, 1894 – Section 23 – Acquisition of land for public purpose – Market value – Determination – Held, sale deeds which are beyond 12 months from date of issuance of notification or last publication thereof and showing no equivalency of land mentioned therein with land acquired, have no relevance in determining market value of acquired land. (Para 10)

Land Acquisition Act, 1894 – Section 23 – Acquisition of land for public purpose – Market value – Previous award – Relevancy – Held, land involved in previous award similar to land acquired under Notification – Previous award can be considered for determining market value of acquired land. (Para 13)

Cases referred:

Balwant Singh and others vs. Land Acquisition Collector and another, (2016)13 SCC 412
Madishetti Bala Ramul vs. Land Acquisition Officer, (2007)9 SCC 650
R.L.Jain(D) by LRs vs. DDA, (2004)4 SCC 79
Tahera Khotoon vs. Land Acquisition Officer, (2014)13 SCC 613

For the Appellant(s): Mr. Virender Singh Chauhan, Sr.Advocate with Mr. Ajay Singh Kashyap, Advocate in RFA Nos. 356 to 358 of 2009.
Mr. R.P. Singh, learned Deputy Advocate General, in RFA Nos. 382 to 384 of 2009.

For the Respondent(s): Mr. R.P. Singh, learned Deputy Advocate General in RFA Nos. 356 to 358 of 2009.
Mr. Virender Singh Chauhan, Sr. Advocate with Mr.Ajay Singh Kashyap, Advocate, in RFA Nos. 382 of 2009 to 384 of 2009.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (oral)

All these appeals, preferred by the State of H.P. as well as land owners, arising out of common award passed by learned District Judge, Solan (hereinafter referred to as 'the Reference Court') in Land Reference Petitions No. 23-S/4 of 2008, titled Dhanu vs. State of H.P., 24-S/4 of 2008 titled Jodha Singh and others vs. State of H.P. and others and 6-S/4 of 2008 titled Tulsia and others vs. State of H.P. and others involving common question of facts and law, are being decided vide this common judgment.

2. Appeals bearing Nos. 356 of 2009 titled Dhanu (deceased) through LRs vs. State of H.P., 357 of 2009 titled Tulsia (deceased) through LRs vs. State of H.P. and 358 of 2009 titled Baldev Raj vs. State of H.P. have been preferred by land owners for further enhancement, whereas appeals bearing Nos. 382 of 2009 titled State of H.P. vs. Baldev Raj, 383 of 2009 titled State of H.P. vs. Dhanu (deceased) through LRs and 384 of 2009 titled

State of H.P. vs. Tulsia (deceased) through LRs have been preferred by the State being aggrieved by enhanced value determined by the Reference Court.

3. State of H.P. has acquired land situated in village Gather, Tehsil Arki, District Solan for construction of Namhol-Bahadurpur road by invoking the provisions of Land Acquisition Act (hereinafter referred to as 'the Act') after issuing notification dated 17.8.2006 under Section 4 of the Act, which was lastly published on 10.12.2006. The Land Acquisition Collector vide its award No. 34 of 2007 dated 10.12.2007 had determined the value of land on the basis of classification i.e. cultivable at the rate of Rs.29,947/- per bigha and uncultivated land at Rs.5757/- per bigha.

4. The land owners being aggrieved by value determined by the Land Acquisition Collector had preferred land reference petitions (referred supra) for enhancement of compensation. Land owners have examined as many as six witnesses to substantiate their claims, whereas State has examined one witness.

5. Land owners have proved on record sale deed Ext.PW1/A dated 25.8.2004 pertaining to village Thach whereby two biswas of land was sold for Rs.80,000/- which gives the value of land at Rs. 8 lac per bigha. Other sale deeds placed on record by land owners are Ext.PW2/A dated 20.4.2004, Ext.PW2/B dated 24.11.2004 whereby respectively two biswas and one biswa of land in village Tepra was sold at the rate of Rs.8 lac per bigha. Land owners have also proved on record sale deed Ext.PW2/C dated 24.11.2004 whereby one biswa of land in village Tepra was sold for Rs.50,000/- giving the value of land Rs.10 lacs per bigha. Land owners have also put reliance on award passed by the Reference Court Ext.PW2/D pertaining to land of village Ghayaal wherein value of acquired land for the same road in that village in the year 1995 was determined as Rs.1,20,000/- per bigha.

6. The State has also placed on record sale deed of village Chanaradi Ext.RW1/B, whereby four bighas/five biswas of land was sold for Rs.8,000/-.

7. Reference Court, on the basis of award Ext.PW2/D after adding 10% for each year from the date of passing of that award till issuance of Notification under Section 4 of the Act in present case, has determined value of land under acquisition as Rs.1,92,000/- per bigha.

8. The State has preferred the present appeals on the grounds that Reference Court has committed an error by ignoring sale deed Ext.RW1/B and relying upon the award Ext.RW2/D for determining the value of land under acquisition.

9. It is also claimed by land owners that their land was taken in possession prior to issuance of notification under Section 4 of the Act and therefore, they are entitled for use and occupation charges for the period from taking the possession of land till date of issuance of notification under Section 4 of the Act particularly in the light of law laid down by the Apex Court in ***Balwant Singh and others vs. Land Acquisition Collector and another*** reported in ***(2016)13 SCC 412,*** wherein after considering and relying upon judgment passed in cases ***R.L.Jain(D) by LRs Vs. DDA*** reported in ***(2004)4 SCC 79, Madishetti Bala Ramul vs. Land Acquisition Officer*** reported in ***(2007)9 SCC 650*** and ***Tahera Khotoon vs. Land Acquisition Officer, (2014)13 SCC 613,*** land owners in the similar circumstances were awarded an additional interest by way of damages @ 15% per annum from taking the actual possession till the date of Notification under Section 4 of the Act. On this count, land owners have also placed reliance on judgment dated 31.7.2017 passed by this Court in ***RFA No. 252 of 2011 titled State of HP vs. Dhani Ram and others.***

10. Claim for further enhancement has also been canvassed on the basis of sale deeds Ext.PW1/A, Ext.PW2/A, Ext.PW2/B and Ext.PW2/C. Admittedly, these sale deeds are of the period which is beyond 12 months from the date of issuance of notification or last publication thereof and further in these sale deeds land involved belongs to village Thach and Tapera. Neither in reference petitions nor in the statements of witnesses, examined by land owners, any evidence with respect to equivalency of land of village Gather with that of villages Thach and Tapera qua its nature, quality and potential has been brought on record. Therefore, for these two reasons, these sale deeds could not have been taken into consideration and Reference Court has rightly discarded these sale deeds at the time of determining the value of land.

11. Sale deed Ext.RW1/B pertains to village Chanardi. It is dated 31.1.2006. Further the State has also not produced any evidence of equivalency or proximity qua nature, quality and potential of land of Chanardi with that of village Gather and not only this, in case this sale deed is taken into consideration, the value of land will become lesser than the value as determined by the Land Acquisition Collector, which is not permissible under Section 25 of the Act. Therefore, Reference Court has rightly ignored this piece of evidence.

12. So far as the claim of land owners that the land was taken in possession prior to issuance of notification under Section 4 of the Act is concerned, the evidence on record on this point is not conclusive but self contradictory. In reference petitions in para 1(vi), land owners have claimed that land was taken into possession in the year 2000. The said averment has been denied by the State in their reply to the reference petitions. In evidence of PW1, in his examination-in-chief, the year of taking possession by the State has been mentioned as 1988, whereas suggestion has been put to RW1 Babu Ram Thakur that land in question was taken in possession by the State in the year 1998. In view of this contradictory evidence led by land owners themselves the exact date, of taking possession, has not been established on record. To the contrary, evidence on issue in RFA No. 252 of 2011, was consistent, cogent and reliable which was also not rebutted by the State. Therefore, there is no other alternate except to reject the claim of land owners on this count for cogent and reliable evidence with respect to date of taking possession of the land in question.

13. So far as the award Ext.PW2/D is concerned, it pertains to village Ghayaal. In para 2 of affidavit, filed in evidence as examination-in-chief of PW2 Rattan Lal and PW3 Lekh Ram, it has been categorically stated by land owners that land of village Gather is similar to village Ghayaal and the said assertion has not been questioned on behalf of the State in cross examination to these witnesses and RW1 Babu Ram Thakur is also silent in this regard. Therefore, the claim of land owners with regard to equivalency of land of village Ghayaal with that of village Gather remains un-controverted. In aforesaid facts and circumstances, the Reference Court has rightly relied upon award Ext.PW2/D for determining the value of land under acquisition.

14. It is an admitted fact that in Ext.PW2/D notification under Section 4 of the Act was issued on 29th March, 1995 and therefore value of land therein, was determined as it was on 29th March, 1995. Though the Reference Court has passed the award on 22.8.2000 but passing of award cannot be taken as a date on which value of land was determined. Reference Court has given 10% enhancement for each year after the year 2000 by considering that value of land keeps on increasing every year. On this ground, at the time of calculating 10% enhancement from the year 2000, the Reference Court has committed an error as the value so determined vide award Ext.PW2/D was to be considered as a value determined in the year 1995 and enhancement, if any, was to be calculated from that year.

In case on the value of Rs.1,20,000/-, as determined vide award Ext.PW2/D, 10% enhancement is given by taking the base year 1995, the value of land in the present case will become about Rs.3,11,200/- per bigha. It gives the increase of Rs.1,91,207/- to the basic value of Rs.1,20,000/-. It is also a fact that it is not necessary that value of land is increased every year at uniform rate of 10%. It may be higher or lesser than 10%. After 1995, there is a gap of ten years between the value determined vide award Ext.PW2/D and in the present case. In case it is considered that in lump sum, there is enhancement of 100% value in the land within ten years, an addition of Rs.1,20,000/- will be appropriate and thus, value of land becomes Rs.2,40,000/- per bigha.

15. Therefore, in view of above discussion, I am of the considered view that value of land in the present case deserves to be determined at the rate of Rs.2,40,000/- per bigha and accordingly the respondents/land owners are held to be entitled for compensation on the basis of value of land at the rate of Rs.2,40,000/- per bigha along with all consequential statutory benefits. Therefore, appeals No. 356 to 358 of 2009 filed by land owners are allowed and appeals No. 382 to 384 of 2009 filed by the State are dismissed in aforesaid terms. All pending miscellaneous application(s), if any, also stands disposed of.

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

Nikhil Malik …Petitioner
Versus
State of Himachal Pradesh …Respondent

Cr.MPs(M) No. 1363 & 1364 of 2019
Decided on: 19th August, 2019

Code of Criminal Procedure, 1973– Section 439– Regular bail– Filing of successive applications– Effect– Held, person seeking bail has to clearly demonstrate change in circumstances in case his earlier bail application was dismissed– Mere examination of some prosecution witnesses during trial subsequent to dismissal of earlier application, is not a change of circumstances entitling accused to seek bail. (Para 9)

Cases referred:
Anil Kumar Tulsiyani vs. State of U.P. & Another, 2006(2) Apex Court Judge 280 (SC)
Chandrakesjwar Prasad vs. State of Bihar, 2016(9) SC 443
Iqbal & Another vs. State of Uttar Pradesh, 2017(6) MDSC 17
Kalyanchandra Sarkar vs. Rajesh Ranajan @ Pappu, 2004(1) Apex Court Judgment 380 (SC)

For the petitioners:	Mr. N.S. Chandel, Sr. Advocate, with Mr. Vinod Gupta, Advocate.
For the respondent/State:	M/s. Shiv Pal Manhans and P.K. Bhatti, Additional Advocates General with Mr. Raju Ram Rahi, Deputy Advocate General. ASI Ramesh Chand, Police Station, Dharampur, District Solan, H.P.
For the complainant:	Mr. Anand Shamra, Sr. Advocate, with Mr. Karan Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail applications have been maintained by the petitioners under Section 439 of the Code of Criminal Procedure seeking their release in case FIR No. 68 of 2016, dated 27.06.2016, under Section 302, 307, 147, 148, 149 IPC and Section 25 of the Arms Act, registered at Police Station Dharampur, District Solan, H.P.

2. The facts giving rise for registration of the above case against the petitioners, amongst others, can tersely be encapsulated as under:

On 26.06.2016 Smt. Taran Jeet Kaur (complainant) got her statement recorded under Section 154 Cr.P.C. The complainant stated that she alongwith her husband, Shri Param Jeet Singh (deceased) used to run a restaurant (*dhaba*) at Sanawara and the said *dhaba* was being looked after by her, her husband and nephew Hansdeep (injured). On 26.06.2016, when she was washing clothes, around 05:00 p.m., 10/15 persons of a tourist group were in the *dhaba* and they were being attended by Naresh Kumar (attendant). There arose a dispute qua the freshness of the meals and scuffle ensued. One of the persons from the tourist group went to the vehicle, brought a pistol and fired on her husband (Shri Param Jeet Singh). Shri Hansdeep was also hit with gun shot on his chest. Thereafter, all the persons fled away from the spot in their vehicle, having registration number of Uttar Pradesh. The husband of the petitioner and Shri Hansdeep were rushed to the CHC, Dharampur. The husband of the petitioner was declared dead and Shri Hansdeep was referred to PGI, Chandigarh. On the basis of the statement of the complainant, police registered a case and the investigation ensued. Postmortem examination on the corpse of the deceased was conducted. Police prepared the spot map and clicked photographs of the spot. CCTV footage was obtained and police recovered empty cartridges, sword like weapon, having blood, pieces of carton etc. During the course of investigation, it was unearthed that the petitioners alongwith other accused persons fled away from the spot in vehicle, having registration No. UP14FT-3871. The petitioners was arrested on 27.06.2016 and they were medically examined. Police collected the scientific evidence for analysis. Other accused persons were also arrested. Scientific samples collected from the spot were chemically examined in Forensic Science Laboratory, Junga. CCTV footage was also examined, which shows the presence of the petitioners and other accused persons on the spot. During the course of investigation, it was unearthed that the petitioners alongwith other accused persons were on tour to Dharamshala and Shimla and while returning they stopped in the *dhaba* of the deceased. The petitioners and other accused persons were not satisfied with the food quality, so a quarrel started and petitioner Rahul Malik fired on the deceased. As per the prosecution, *challan* stands presented in the Court and now the prosecution witnesses are being examined. Lastly, it is prayed that the bail applications of the petitioners be dismissed, as the petitioners were involved in a serious offence and in case they are enlarged on bail, they may tamper with the prosecution evidence and may also flee from justice. The prosecution objected the petition on the ground that there exists *prima facie* case against the petitioners and other accused persons and there is reasonable ground that the petitioners, alongwith other accused persons, committed the murder of the deceased, the offence of which the petitioners are accused of is grave and there is possibility that the petitioners, in case enlarged on bail, may abscond. Simultaneously, the prosecution is objecting the bail applications on the premises that in case the petitioners are enlarged on bail, they may try to influence the witnesses and there is possible danger of justice being thwarted by granting bail to the petitioners.

3. I have heard the learned Senior Counsel for the petitioners, learned Deputy Advocate General for the State, learned Senior Counsel for the complainant and gone through the record, including the police report, carefully.

4. The learned Senior Counsel for the petitioners has argued that now three prosecution witnesses have examined and their depositions clearly show that the crime is not attributable to the present petitioners. He has further argued that the petitioners are innocent and they have been falsely implicated in the present case. He has specifically referred to the statements of the examined prosecution witnesses and other documents. He has argued that the petitioners are not liable to the crime, as portrayed by the prosecution and by keeping them behind the bars for an unlimited period no purpose will be served. He has further argued that one of the petitioners sustained a bullet injury in his stomach and the bullet was fired by the deceased and for medical treatment the petitioner remained admitted in PGI, Chandigarh. The learned Senior Counsel for the petitioners has referred to Section 300 IPC and argued that no case is made out against the petitioners, as has been projected by the prosecution. He has taken his arguments a step ahead by arguing that there is no allegation against petitioner Rahul Malik and not even a single iota of evidence has come in the investigation against him, which even remotely connects him with the alleged offence.

5. Conversely, learned Deputy Advocate General has argued that as the petitioners are residents of Uttar Pradesh, there is possibility that in case they are enlarged on bail, they may flee from justice. He has further argued that there is ample material against the petitioners and it has come in the investigation that the petitioners alongwith other accused persons were first aggressors. He has argued that a person lost his life in the occurrence and the material, which has come on record, including the CCTV footage, clearly show that he was killed by one of the petitioners herein. He has further argued that bail applications are being filed in succession, but there is no change in the circumstances, so keeping in view the heinousness of the crime and the manner in which the same was done by the petitioners, alongwith other accused persons, the bail applications may be dismissed.

6. Learned Senior Counsel for the complainant and argued that in the present case the prosecution witnesses are being examined and till now only three witnesses have been examined. He has further argued that at this stage it is untimely and premature to conclude from the statements of examined prosecution witnesses that the petitioners are innocent and no crime is attributable against them. He has argued that the learned Trial Court is yet to examine all the remaining prosecution witnesses. CCTV footage of two CCTV cameras is revealing, trustworthy and truthful evidence and now the same is only to be corroborated by the ocular evidence. He has further argued that in case the petitioners are enlarged on bail, they may tamper with the prosecution evidence by threatening or influencing the witnesses, who are yet to be examined. He has further argued that as there is no change in the circumstances, so the present bail applications are not maintainable and the same may be dismissed. The learned Senior Counsel, in order to draw lateral support to his arguments, has placed reliance on the following judicial pronouncements:

"1. Kalyanchandra Sarkar vs. Rajesh Ranajan @ Pappu, 2004(1) Apex Court Judgment 380 (SC);

2. Anil Kumar Tulsiyani vs. State of U.P. & Another, 2006(2) Apex Court Judge 280 (SC);

3. Chandrakesjwar Prasad vs. State of Bihar, 2016(9) SC 443; &

4. Iqbal & Another vs. State of Uttar Pradesh, 2017(6) MDSC 17."

7. In rebuttal, the learned Senior counsel for the petitioners has argued that the conduct of the deceased is clear from the fact that he had kept a sword and a revolver in his restaurant. He has further argued that by keeping a sword and a revolver, it is clear that the deceased was a quarrelsome person. As per the learned Senior Counsel, two days prior to the incident the deceased fired a gun shot from his revolver on some other customer. He has argued that in case PW-3 has been won over by the accused persons, then the prosecution could have declared him hostile, but the prosecution did not do so. He has further argued that when the circumstances do not suggest that the petitioner and other accused persons committed heinous crime, then this Court is not precluded from granting bail to the petitioners. He has argued that each day spent in detention is change in the circumstances and since the Trial is not concluded within six months, then it is a fresh ground to approach the learned Trial Court seeking bail, but he has moved the bail applications before this Court. Lastly, the learned Senior Counsel prayed that the bail applications of the petitioners may be allowed and the petitioners be enlarged on bail.

8. Section 439 Cr.P.C. gives an unfettered discretion to the High Courts or Court of Sessions to admit an accused on bail, but that discretion must be exercised judicially. The Court can always refuse bail on any of the grounds, be it possibility of tampering with the prosecution evidence by the person seeking bail, gravity and seriousness of the offence or otherwise.

9. Admittedly, the petitioners have moved bail applications in succession when the same are being dismissed. It is settled law that the person seeking bail has to clearly demonstrate change in the circumstances, in case his earlier bail application was dismissed. In the case in hand, the learned Senior Counsel for the petitioners has tried to sketch out the ground for grant of bail mainly on the premise that now there is change in the circumstances. The change, as per the learned Senior Counsel is that now the learned Trial Court has recorded the testimonies of three prosecution witnesses and their testimonies create a doubt qua the veracity of the prosecution case. Be that as it may, this Court does not see any change in the circumstances and mere examination of some of the prosecution witnesses cannot be said to be a ground for change in circumstances and ultimately for grant of bail. In a catena of cases, the Hon'ble Supreme Court, as also different High Courts, culled out the principles for grant of bail.

10. In the case in hand, this Court cannot shut its eyes to gravity and seriousness of the crime, the manner in which the alleged crime was perpetrated, the fact that there is possibility that in case the petitioners are enlarged on bail, they may tamper with the prosecution evidence, as most of the prosecution witnesses are yet to be examined. This Court also finds that presently the trial is at crucial stage and there is strong possibility that in case the petitioners are enlarged on bail, they may tamper with the prosecution evidence and they will be in a position to influence and threaten the prosecution witnesses.

11. This Court has also meticulously examined the judgments, as cited by the learned Senior Counsel for the complainant. As these judgments mainly deal with the settled broader principles qua grant of bail, they are not discussed in depth, however, these judgments are fully applicable to the facts of the present case.

12. The harmoniously reading of the settled law, as discussed above, viz-a-viz facts of the present case and also the material, which has come on record and without discussing the same at this stage, this Court finds that the present are not the fit cases where the judicial discretion to admit the petitioners on bail is required to be exercised in their favour. The petitions, which lack merits, deserve dismissal and are accordingly dismissed.

13. The views expressed hereinabove, are only confined to the present petitions and shall not be construed as an opinion expressed on the merits of the main case, which shall be adjudged on its own merits.

14. In view of the disposal of the main petitions, pending miscellaneous application(s), if any, shall also stand(s) disposed of.

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

Vijay Kumar Aggarwal (deceased) through his LRs. Rajeev Aggarwal and another ….Petitioners.

Vs.

Sh. Ankush Sood ….Respondent.

CMPMO No.: 164 of 2018
Reserved on: 08.07.2019
Date of decision: 19.08.2019

Code of Civil Procedure, 1908 – Order XXXIX Rules 1 & 2– Temporary injunction– Grant of- Requirement of meeting of triple test i.e., prima facie case, balance of convenience and factum of irreparable loss– Absence of- Effect– Tenanted premises damaged in a fire– Tenant trying to effect repairs by relying upon a clause of rent agreement entitling him to carry out internal repairs necessary for carrying out business without damaging structural aspects– Landlord filing injunction application for restraining tenant from carrying out internal repairs during pendency of suit- Tenant laying counter claim and also praying for temporary injunction restraining landlord from interfering in his internal repair work– Trial court directing landlord not to interfere in possession of tenant– But restraining tenant from doing internal repair work– On appeal, appellate court allowing tenant's appeal and permitting him to do necessary internal repair work– Petition against by landlord– Held, premises had destroyed in fire making it unfit for purpose of running business for which it was let out without carrying out renovation work– Clause 4 of agreement envisages factual position of demised premises as existed on date it was leased out to tenant– No material on record suggesting that tenanted premises can still be used for purpose it was let out– As such no interim order restraining landlord from interfering in repair works of tenant could have been passed by first appellate court– Petition allowed– Order of appellate court set aside and of trial court restored. (Paras 19 & 20)

For the petitioners:	Mr. Arjun K. Lall, Advocate.
For the respondent:	Mr. R.K. Bawa, Senior Advocate, with Mr. Prashant Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition filed under Article 227 of the Constitution of India, the petitioners have prayed for the following relief:

"It is, therefore, respectfully prayed that this Hon'ble Court may kindly be pleased to allow the present petition and to set aside the impugned order Annexure PJ, dated 07.05.2018, passed by the Ld. Additional District Judge (I) in Civil Appeal No. 1 of 2018, whereby the Ld. Trial Court's order dated 18.11.2017 has been partly modified and to pass such further and other orders as may be deemed fit in the interest of law and justice."

2. Petitioner No. 2 and predecessor-in-interest of petitioner No. 1 have filed a suit against the respondent herein in the Court of learned Civil Judge (Senior Division), Shimla praying for a decree of permanent perpetual prohibitory injunction against the defendant for restraining him from constructing/reconstructing/restoring or repairing the suit premises known as '*Tara Bhojnalya',* The Mall Shimla.

3. The case of the petitioners-plaintiffs (hereinafter referred to as 'the plaintiffs') is that they are exclusive owners of the suit property measuring 24' x 24' known as '*Tara Bhojnalya'* at the Mall Road Level. A room and a toilet measuring approximately 21' x 8.2' are situated on the second storey of the aforementioned four storeyed building. The Mall Road Level constitutes the third storey alongwith an attic. The premises were rented out by the plaintiffs to the defendant vide lease agreement dated 01.04.2017. Defendant was running a restaurant in the tenanted premises, which restaurant abuts and is situate on The Mall Road Shimla. On 17th October, 2017, at around 8:15 p.m., a fire broke out in the tenanted premises known as '*Tara Bhojnalya'* and the entire tenanted premises were engulfed in a devastating fire and were destroyed. The attic floor was completely burnt and razed. The tenanted premises at the Mall Road Level wherein restaurant was run by the defendant, was destroyed in fire and in effect, the tenanted premises ceased to exist in the manner that the same could constitute to be 'tenanted premises', which could be legally used and occupied by the tenant. According to the plaintiffs, with the destruction of the tenanted premises in fire, defendant ceased to be in possession of the original tenanted premises and he also ceased to have any right over the same as a tenant. His tenancy rights over the suit premises were literally extinguished by the fire. As per the plaintiffs, after destruction of the suit premises in fire, they were again in exclusive possession of the same as also the owners/landlords of the suit property. However, defendant was openly threatening the plaintiffs that he shall interfere in their aforesaid possession of the suit property. Defendant had further threatened to re-construct, restore and repair the premises in question, though he had no legal right to do so. As per the plaintiffs, the right to re-construct, restore or repair the suit premises was exclusively vested in plaintiffs as owners of the suit property and re-construction/restoration work could not be carried out by anyone much less the defendant. It is primarily on these grounds that the suit has been filed by the plaintiffs against the defendant, which is pending adjudication.

4. Alongwith with the suit, plaintiffs also filed an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure praying for a temporary injunction against the defendant for restraining him from constructing/re-constructing/restoring or repairing the suit premises either himself or through any other person and from interfering in the possession of the plaintiffs over the suit land.

5. The suit has been contested by the defendant, who by way of his written statement-cum-counter claim has denied the allegation that as a result of the suit premises having been burnt in a fire, his tenancy has come to an end. According to the defendant, the fire had caused some damage to the premises in question, particularly to the wooden furniture and fixtures etc. The premises situated adjoining and below the premises in question were perfectly in good condition and it was incorrect that tenanted premises were completely destroyed or that attic floor had been completely burnt and razed. Defendant

denied that he had no right to re-construct, restore or repair the premises or to occupy or possess the same. As per the defendant, he was in possession of and carrying on business in the suit premises and had right to repair doors, windows, toilets and roofs etc. without causing any damage or disturbing structure of the building and he was also entitled to carryout internal repairs necessary for carrying on his business. By way of counter-claim, defendant sought a decree of injunction against the non-claimants/plaintiffs for restraining them from interfering in any manner with the possession of the counter-claimant/defendant over the suit premises or with the internal repair work necessary for carrying on business therein in accordance with the terms of lease agreement, dated 01.04.2017. Alongwith the counter-claim, the defendant also filed an application under order 39, Rules 1 and 2 of the Code of Civil Procedure praying for an interim injunction against the plaintiffs for restraining them from interfering with his possession over the suit premises or carrying out of internal repairs necessary for carrying on business therein as per lease agreement, dated 01.04.2017.

6. The Court of learned Civil Judge, Court No. 3, Shimla vide order, dated 18.11.2017, allowed the application of the plaintiffs/landlords filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure and restrained the defendant/tenant from constructing, re-constructing, restoring or repairing in any manner whatsoever suit premises known as 'Tara Bhojanalya', directly or through his agents, servants etc. and partly allowed the application filed by the defendant under Order 39, Rules 1 and 2 by restraining the landlords/plaintiffs from interfering in possession of the tenant/defendant in the suit premises, however, learned Court declined the prayer of the tenant/defendant for injunction to restrain the landlord from interfering in internal repairs necessary for carrying on business in the suit premises.

7. Feeling aggrieved, the tenant/landlord filed an appeal under Order 43, Rule 1(r) of the Code of Civil Procedure against order, dated 18.11.2017, passed by the Court of learned Civil Judge, Court No. 3, Shimla.

8. Learned Appellate Court vide judgment dated 07.05.2018 has partly allowed the appeal so filed by the tenant/defendant and has modified the order passed by the learned Trial Court to the extent that defendant/tenant has been held to have right to repair window and door as per rent agreement, dated 01.04.2017.

9. While arriving at the said conclusion, learned Appellate Court held that it was a question of ordinary prudence that after fire took place in Tara Bhojnalya, some damage might have been caused to the window panes, doors and other fixtures. It further held that perusal of Clause-4 of the Agreement entered into between the plaintiffs and defendant demonstrated that tenant was entitled to carry out internal repairs necessary for carrying out the business without damaging or disturbing the structure of the premises leased out. Learned Appellate Court held that it was provided in the agreement that tenant can repair doors, windows, roof and toilet without causing any substantial damage to the structure at his own expenses, meaning thereby, the right was provided to the tenant to do internal repairs as per the terms of Clause-4 of the rent agreement. Learned Appellate Court thereafter, while distinguishing the case law relied upon before it by the plaintiffs, held that in the case in hand, it was the pleaded case of the defendant that he was not doing any reconstruction and was only repairing internal structure, i.e., doors and window panes etc. and in view of the same, order passed by the learned Trial Court required to be modified to the extent that tenant can do internal repairs necessary for carrying out the business as per agreement dated 01.04.2017. Learned Appellate Court also held that said right of the tenant demonstrated that he was having prima facie case in his favour and he could not be deprived of his valuable right which was recognized by the landlord in the agreement.

10. Feeling aggrieved by the findings returned by the learned Appellate Court, the landlords have preferred the present petition.

11. I have heard learned counsel for the parties and have also gone through the order passed by the learned Trial Court as also the judgment passed by the learned Appellate Court as well as other documents appended with the petition.

12. It is settled principle of law that in order to see as to whether a party is entitled for an interim relief in terms of Order 39, Rules 1 and 2 of the Code of Civil Procedure, all that the Court has to see is whether the party concerned is able to meet the requirements of tripple test of having a prima facie case in its favour, having balance of convenience also in its favour and demonstrating that in the event of interim relief being denied to the party, it shall suffer from irreparable loss.

13. Coming to the facts of the present case, it is not in dispute that the defendant was running a restaurant in the name and style of '*Tara Bhojanalya*' in the suit premises as a tenant, which suit premises are owned by the petitioners. The factum of the premises being held by the defendant in terms of lease agreement, dated 01.04.2017, is also not in dispute. Clause-4 of the said agreement, which has been relied upon by the learned Appellate Court while partly allowing the application filed by the defendant/tenant before it reads as under:

> *"4. That the tenant shall not carry out any structural changes in the premises leased out so as to impair or deminish the value and utility of the premises. However, the tenant shall be entitled to carry out internal repairs necessary for carrying out the business without damaging or disturbing the structure of the premises leased out. However, the tenant can repair doors, windows, roof, toilet without causing any substantial damage to the structure at his own expenses."*

14. It is not in dispute that the suit premises were gutted in fire on 17th October, 2017. Whereas the plaintiffs claim that as a result of the suit premises having been destroyed in fire, the tenancy of defendant has come to an end, as no such premises exist at the spot which were contemplated while executing the lease agreement, dated 01.04.2017, the case of the defendant is that the suit premises were only partly destroyed and the same does exists and it cannot be said that tenancy of the defendant has come to an end.

15. Be that as it may, whereas the plaintiffs contend that the suit premises cannot be utilized for the purpose for which lease agreement was entered into between the plaintiffs and defendant, however, as per the defendant, said premises can be used for the said purpose.

16. The application which was filed by the defendant alongwith the counter-claim preferred by him was inter alia with the prayer that during the pendency of the suit and the adjudication of the counter-claim filed by him, plaintiffs be restrained from interfering with the possession of the defendant over the suit premises or with the internal repair work necessary for carrying on business therein in terms of lease agreement, dated 01.04.2017.

17. A perusal of the averments made in the application filed by the defendant under Order 39, Rules 1 and 2 alongwith the counter-claim demonstrates that it was mentioned therein that in terms of agreement, dated 01.04.2017, the defendant was not only entitled to run his business, but he was also entitled to carry out internal repairs necessary for running the business, particularly the internal repair work/renovation. The

tone and tenor of the averments made in the application fully demonstrate that the restraint order which was being prayed for by the defendant against the landlords was for restraining the landlords from interfering in the work of repair etc., which the tenant either was carrying out or was intending to carry out to make the suit premises business worthy. In other words, it was not the case of the tenant either before the learned Trial Court or before the learned Appellate Court that the fire had not destroyed the suit premises to such an extent that the same had been rendered unfit for the purpose of running business of a restaurant without carrying out some repair/renovation work.

18. In this background, when one peruses the order passed by the learned Appellate Court, the same demonstrates that learned Appellate Court on the basis of Clause-4 of Agreement, dated 01.04.2017 held that there was a prima facie case in favour of the tenant as said Clause conferred upon him the right to carry out internal repairs necessary for carrying on business over the same. On these basis, learned Appellate Court while modifying the order passed by the learned Trial Court, allowed the tenant the right to repair windows and doors of the suit premises as per agreement, dated 01.04.2017.

19. In my considered view, said order passed by the learned Appellate Court is not sustainable in the eyes of law. Learned Appellate Court has erred in not appreciating that Clause-4 of the agreement, dated 01.04.2017, did not contemplate a situation wherein on account of some act of omission and commission of either of the parties or due to an act of God, the premises were rendered unfit for carrying out the business. Clause-4 was inserted in agreement, dated 01.04.2017, envisaging a factual position as it was of the demised premises at the time when they were let out to the tenant, so that the tenant could make them business worthy. This important aspect of the matter has not been appreciated by the learned Appellate Court while passing the impugned order. Today, the factual position is that the suit premises have been damaged in fire. Whether even after damage, the suit premises are in the same position in which they were let out to the defendant, is a fact/an issue which shall be decided by the learned Trial Court on the basis of evidence which shall be led before it by the parties. Therefore, no order could have been passed by the learned Appellate Court permitting the tenant to carry out repair work of windows and doors etc. In fact, order passed by the learned Trial Court in the applications which were filed before it under Order 39, Rules 1 and 2 of the Code of Civil Procedure by the plaintiffs as also the defendant was a prudent and just order and the same did not warrant any interference. By modifying the same and by passing the impugned judgment, learned Appellate Court has exercised jurisdiction vested in it with material irregularity, as it has erred in not appreciating that by granting permission to the tenant to carry out repair work of doors and windows in the premises, which have been engulfed in fire, the same would complicate the adjudication of the lis between the parties.

20. Accordingly, this petition is allowed. Judgment, dated 07.05.2018, passed by the learned Appellate Court in Civil Miscellaneous Appeal No. 2-S/14 of 2018 is set aside, with the direction that the defendant shall not be entitled to carry out any repair work, including that of doors and windows in the demised premises during the pendency of the suit. However, it is clarified that the protection granted to the parties vide order dated 18.11.2017, passed by the learned Trial Court in CMA No. 26-6 of 2017 in Civil Suit No. 46-1 of 2017 & CMA No. 28-6 of 2017 in Counter Claim No. 51-1 of 2017 shall remain in force during the pendency of the suit. Petition stands disposed of, so also pending miscellaneous applications, if any.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Ved Prakash Gupta ....Petitioner.
Versus
State Bank of India and another ...Respondents

CWP No.1190 of 2017
Decided on: 26.07.2019

State Bank of Patiala Officers Service Regulations, 1979–Registration 19(2)– Order retiring officer on date of his superannuation but without relieving/suitable retiring certificate on ground of his alleged misconduct– Held, an employee of the bank can be retired under this regulation only in case disciplinary proceedings had been initiated against him before his date of retirement– Date of retirement of petitioner was 31.5.2015- Disciplinary proceedings were initiated against him after normal date of retirement by issuing charge sheet to him on 26.10.2015– Issuing of retirement order in purported exercise of Regulations 19 (2) not valid and it rendered all subsequent proceedings invalid. (Paras 4 & 5)

State Bank of Patiala Officers Service Regulations, 1979– Registration 70(3)– Power of Reviewing Authority to enhance punishment– Procedure to be followed– Held, before enhancing punishment, Reviewing Authority is bound to issue show cause notice to delinquent. (Para 6)

Cases referred:

Bhagirath Jena vs. Board of Directors, O.S.F..C. and others, (1999) 3 SCC 666
Bhajan Singh vs. State of Uttarakhand and others, (2013) 14 SCC 32
Dev Prakash Tewari vs. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others, (2014) 7 SCC 260

For the petitioner Mr. Manohar Lal Sharma, Advocate.
For the respondents Mr. G.C. Gupta, Sr. Advocate with Ms. Meera, Advocate, for the respondents.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(Oral)*

This writ petition has been filed, praying for following reliefs :-

"i) That writ in the nature of certiorari may kindly be issued, whereby quashing and setting aside Annexure P-3 with the directions to issue suitable relieving letter in the favour of the petitioner.

ii) That the impugned Inquiry report dated 29.02.2016, Annexure P-6, order dated 21.05.2016 Annexure P-7, order dated 28.11.2016, Annexure PO-8 and order dated 31.03.2017, Annexure P-11 may kindly be quashed and set aside by issuing writ in the nature of certiorari.

iii) That the respondents may kindly be directed to pay the interest @ 12% per annum on the retiral benefits i.e. gratuity and pension commutation of the petitioner w.e.f. 01.06.2015 to 01.06.2016 as the same were paid to him after one year.

2. **The factual position of the case:-**

Petitioner served in erstwhile State Bank of Patiala, which during the pendency of the writ petition was succeeded by State Bank of India.

2(i) On 1.12.2010, the petitioner was promoted as Chief Manager in the respondent Bank. In March, 2015, certain explanations were called from the petitioner regarding his work, while issuing loans in favour of the customers of the respondent Bank. All these explanations, primarily pertained to non compliance by petitioner to the prescribed procedure while sanctioning the loans.

2(ii) Vide Annexure P-3, issued on 28.5.2015, the competent authority of the respondent Bank decided to retire the petitioner from the bank services w.e.f. 31.05.2015, under Regulation 19(2) of State Bank of Patiala Officers Service Regulations, 1979 (hereinafter to be referred as 'SBOP officers Service Regulations' for short). 31.05.2015, was otherwise normal superannuation date of the writ petitioner.

2(iii) Petitioner retired on 31.5.2015, which was his normal date of superannuation. However, in view of Annexure P-3 no separate retirement certificate/notification/letter/ relieving letter etc., was issued to him.

2(iv) Disciplinary proceedings were initiated against the petitioner subsequent to his superannuation on 31.5.2015. Charge-sheet was issued against the petitioner on 26.10.2015, vide Annexure P-4. The reply (Annexure P-5) filed by the petitioner to this charge-sheet on 09.11.2015, was not considered satisfactory by the competent authority.Inquiry on this charge-sheet was started against the petitioner. The inquiry officer was appointed on 04.12.2015. The inquiry report was submitted on 29.02.2016, vide Annexure P-6, wherein all the charges levelled against the writ petitioner were held as proved. The copy of the inquiry report was sent to the petitioner. After considering his representation, the Appointing Authority, vide Annexure P-7 dated 21.05.2016, imposed penalty of reduction of pay by three stages with effect from date of superannuation of the petitioner i.e. 31.05.2015, thereby also affecting his pension. The order was passed in terms of Regulation 67(f) of SBOP (Officers') Service Regulations, 1979. Thus, in terms of this penalty order, basic pay of petitioner was to reduce from Rs.59,170/- p.m. to Rs.54,410/- p.m. in turn affecting his pension.

2(v). Feeling aggrieved against imposition of above penalty (major penalty under Regulation No. 67 of SBOP Regulations), petitioner preferred an appeal before the Appellate Authority, under Regulation 70(1) . The Appellate Authority, after examining the case of the petitioner and after hearing him in person on 29.09.2016, modified the penalty orders vide order dated 28.11.2016 (Annexure P-8). The Appellate Authority modified the penalty and reduced it to 'Censure'.

2(vi) Censure, though a minor penalty under Regulation 67(a) of SBOP (Officers') Services Regulations, 1979, yet the petitioner for want of actual relieving/retirement letter, was not in a position to seek employment, elsewhere,hence, approached the Reviewing Authority on 22.12.2016. The Reviewing Authority enhanced the punishment. In addition to the earlier imposed penalty of 'censure', a financial punishment in form of cash penalty of Rs.50,000/- was also imposed upon the petitioner, vide order dated 31.3.2017 (Annexure P-11).

3(i). Feeling aggrieved, the petitioner has challenged the inquiry report and the punishment orders as imposed upon him, in terms of Annexures P-6, P-7, P-8 and P-11 and

has also prayed for issuing him a suitable relieving letter. Annexure P-3, whereby petitioner was retired under Regulation 19(2) has also been challenged.

3(ii) The stand taken by the respondent Bank in its reply is that disciplinary proceedings have been conducted in accordance with SBOP (Officers') Services Regulations, 1979. Charges against the petitioner were proved in the Inquiry report. Accordingly, the penalty was imposed upon him. The penalty was imposed upon the petitioner after giving him opportunities of hearing on 27.04.2016 and 21.5.2016. It is asserted that the action taken against the petitioner by the respondent-Bank is in accordance with its rules and regulations, entailing no interference in exercise of the writ jurisdiction.

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

5. **Retirement of the petitioner/initiation of the disciplinary proceedings:**

5(i) It's not in dispute that petitioner's normal date of superannuation was 31.5.2015.

5(ii) It is borne out from the record that no disciplinary proceedings were initiated against the petitioner before his date of superannuation i.e. 31.5.2015.

5(iii) The disciplinary proceedings were actually initiated against the petitioner on 26.10.2015, when the charge-sheet was issued to him. It would be apt to quote the judgment passed in (2013) 14 SCC 32, titled **Bhajan Singh Vs. State of Uttarakhand and others**, it was held as under:-

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> *"The officer has sought to contend that these charge-sheets do not mention that they have been issued under any disciplinary proceedings. By stating so he has betrayed his ignorance of the legal position that the disciplinary proceedings begin with the issuance of the charge-sheet."*

5(iv) Annexure P-3, whereunder, respondent-Bank had purportedly retired the petitioner on 31.5.2015, in exercise of Regulation 19(2) of SBOP Officers' Service Regulations, 1979, is wholly unjustified. Regulation 19(2) being relevant is reproduced hereinafter

> *"In case disciplinary proceedings under the relevant regulations of service have been initiated against an officer before he ceases to be in the Bank's service by the operation of, or by virtue of, any of the said regulations or the provisions of these regulations, the disciplinary proceedings may, at the discretion of the Managing Director, be continued and concluded by the authority by which the proceedings were initiated in the manner provided for in the said regulations as if the officer continues to be in service, so however, that he shall be deemed to be in service only for the purpose of the continuance and conclusion of such proceedings."*

A bare perusal of above regulation makes it evident that an employee of the bank can be retired under this regulation only in case disciplinary proceedings had been initiated against him, before his date of retirement.

It would be apt in this regard to refer to the judgment passed in (2014) 7 SCC 260, titled **Dev Prakash Tewari Vs. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others**, wherein it was held as under:-

"8. Once the appellant had retired from service on 31.3.2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits.

9. The question has also been raised in the appeal with regard to arrears of salary and allowances payable to the appellant during the period of his dismissal and upto the date of reinstatement. Inasmuch as the inquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him.

10. The appeals are, therefore, allowed and the judgment and order of the High Court are set aside and the respondents are directed to pay arrears of salary and allowances payable to the appellant and also to pay him his all the retiral benefits in accordance with the rules and regulations as if there had been no disciplinary proceeding or order passed therein. No costs".

In another judgment of Hon'ble Apex Court in (1999) 3 SCC 666, titled **Bhagirath Jena Vs. Board of Directors, O.S.F..C. and others**, it was held as under:-

"6. It will be noticed from the abovesaid regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of departmental enquiry after superannuation.

7. In view of the absence of such provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30.6.95. there was no authority vested in the Corporation or continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement.

8. Learned senior counsel for the respondent placed reliance on the judgment of this Court in Takhatray Shivadattray Mankad v. State of Gujarat reported in, [1989] Suppl. 2 SCC 110. It is true that that was a case of imposing a reduction in the pension and gratuity on account of unsatisfactory service of the employee as determined in an enquiry which was extended beyond the date of superannuation. But the above decision cannot help the respondent inasmuch as in that case there was a specific rule namely Rule 241-A of the Junagadh State Pension and Parwashi Allowance Rules, 1932 which enabled the imposition of a reduction in the pension or gratuity of a person after retirement. Further, there were rules in that case which enabled the continuance of departmental enquiry even after superannuation for the purpose of finding out whether any misconduct was established which could be taken into account for the purpose of Rule 241-A. In the absence of a similar provision with

Regulations of the respondent Corporation, the above judgment of Mankad case cannot help the respondent.

9. The question has also been raised in the appeal in regard to the payment of arrears of salary and other allowances payable to the appellant during the period he was kept under suspension and upto the date of superannuation. Inasmuch as the enquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him after deducting the suspension allowance that was paid to him during the above said period.

10. The appeal is therefore allowed directing the respondent to pay arrears of salary and allowances payable to him during the period of suspension upto the date of superannuation after deducting the suspension allowance paid to him for the said period and also to pay the appellant, all the retiral benefits otherwise payable to him in accordance with the rules and regulations applicable, as if there had been no disciplinary enquiry or order passed there in."

5(v). Action under Regulation 19(2) of SBOP Officers' Service Regulations, 1979, could have been taken only in case disciplinary proceedings had been initiated against the petitioner before his retirement. In the present case, the date of retirement of the petitioner was 31.05.2015 and disciplinary proceedings were initiated against him after his normal date of retirement by issuing charge-sheet to him on 26.10.2015. Therefore, the issuance of Annexure P-3, in purported exercise of Regulation 19(2), SBOP (Officers) Service Regulations, 1979, is not valid. This would in turn render all subsequent proceedings invalid. Thus, entire disciplinary proceedings, inclusive of charge-sheet, inquiry conducted and the penalties orders imposed upon the petitioner are illegal & nonest and are quashed as such.

6. **Validity of Punishment orders:**

Independent of above aspect, on merits also, the case of petitioner is being examined hereinafter:-

6(i) The inquiry report, (Annexure P-6) dated 29.2.2016, proved all charges against the petitioner. The Appointing Authority on the basis of inquiry report, imposed a major penalty of reduction of pay by three stages with effect from date of superannuation of petitioner thereby specifically affecting his pension.

6(ii) In appeal preferred by the petitioner, the Appellate Authority reduced the 'major penalty' imposed by the Appointing Authority to 'minor penalty' of censure.

6(iii) Petitioner since had not been granted the benefit of having a suitable retirement/relieving order, approached for review of even this penalty of 'censure'. The Reviewing Authority vide order dated 31.03.2017, though did not reduce the punishment of censure imposed upon the petitioner by the Appellate Authority, but, further imposed financial punishment by imposing a cash penalty of Rs.50,000/- upon him.

6(iv) Regulation 70 of SBOP (Officers) Service Regulations, 1979, gives the power to review the punishment, to the Reviewing Authority. It would be in place to reproduce relevant part of Regulation 70, hereinafter:-

70(3) "Notwithstanding anything contained in this Section, the Reviewing Authority may call for the record of the case within six months of the date of

the final order and, after reviewing the case, pass such orders thereon as it may deem fit.

Provided that:

i) If the enhanced penalty, which the Reviewing Authority proposes to impose, is a major penalty specified in Clauses (f), (g), (h), (I) and (j) of regulation 67 and an enquiry as provided under sub-regulation (2) of regulation 68 has not already been held in the case, the Reviewing Authority shall direct that such an enquiry be held in accordance with the provisions of sub regulation (2) of regulation 68 and thereafter consider the record of the enquiry and pass such orders as it may deem proper.

ii) If the Reviewing Authority decides to enhance the punishment but an inquiry has already been held in accordance with sub-regulation (2) of regulation 68, the Reviewing Authority shall give show cause notice to the officer as to why the enhanced penalty should not be imposed upon him and shall pass final order after taking into account the representation, if any, submitted by the officer."

The regulation clearly stipulated issuance of show cause notice to the officer before enhancing the penalty. It is not the case of the respondent that any show cause notice was issued to the petitioner, before enhancing penalty by the Reviewing Authority. Even the reply filed by the respondent-Bank, gives only two dates viz. 27.04.2016 and 21.5.2016 given to the petitioner for personal hearing by the Appellate Authority, but not by the Reviewing Authority. Thus, the punishment imposed upon the petitioner vide Annexure P-11, dated 31.03.2017, cannot be held to be in accordance with Regulation 70 of SBOP Officers Service Regulations 1979.

6(v) Thus even if Annexure P-3, is treated to be valid then also, penalty imposed upon petitioner in terms of Annexure P-11dated 31.3.2017 has to be held illegal. In this way, the only penalty, which would remain is that of 'Censure' passed by the Appellate Authority vide Annexure P-8 dated 28.11.2016, which cannot bar issuance of retirement/relieving letter to the petitioner or curtail his salary, pension etc.

7. In view of above, the writ petition is allowed and the impugned annexures dated 28.05.2015, 29.02.2016, 21.5.2016, 28.11.2016 and 31.3.2017 are quashed and set aside with all consequential benefits. Respondents are also directed to issue proper relieving letter/retirement letter to the petitioner. The present petition is disposed of, so also the pending application, if any.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Ram Prasad ...Petitioner

Versus

State of Himachal Pradesh & another ...Respondents

CWP No. 837 of 2019

Date of Decision : July 11, 2019

Himachal Pradesh Panchayati Raj Act, 1994 – Section 145 (1) and (3) – Suspension of member of Zila Parishad for his alleged involvement in offence - Duration of suspension, whether it would automatically lapse after expiry of period of six month? - Held, under Section 145(3) of Act, Authority concerned is required to conduct an inquiry and pass an order within six months – If inquiry is not conducted and completed within six months, then suspension order shall be deemed to have been revoked – But Sub- section of (3) of Section 145 by its very nature would apply only to cases where proceedings are initiated departmentally – It can not apply to cases where criminal charges are framed against a person. (Paras 10 & 11)

Himachal Pradesh Panchayati Raj Act, 1994- Section 145 (1) and (3), whether inconsistent to each other? – Held, Sub-section (1) of Section 145 deals primarily with registration of criminal complaints – Whereas clauses(b) and (c) of Sub-section (1) deal with departmental proceedings – On account of clauses (b) and (c) finding place in Sub-section (1) that Sub-section (3) makes a reference to Sub-section (1) in it – Therefore, there is no incongruity between Sub-section (1) and Sub-section (3) of Section 145 of Act – Suspension of members in cases where criminal complaints are under investigation/ trial can exceed six months. (Para 13)

Interpretation of Statutes - **Himachal Pradesh Panchayati Raj Act, 1994** - Section 145 (1) (a) – Word 'or' – Meaning of – Held, word used is 'or' which is a disjunction and not 'and' which is a conjunction. (Para 14)

For the petitioner	:	Mr. Sudhir Thakur, Senior Advocate with Mr. Anirudh Sharma, Advocate, for the petitioner.
For the respondents	:	Mr. Ajay Vaidya, Senior Addl. Advocate General with M/s J.K. Verma, Ritta Goswami, Adarsh Sharma, Ashwani K. Sharma, Addl. AGs.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice. (Oral)

Challenging an order of suspension passed in terms of Section 145(1)(a) of the Himachal Pradesh Panchayati Raj Act, 1994 (hereinafter referred to as the "Act"), the elected Member of the Zila Parishad, Sirmour, has come up with the above writ petition.

2. Heard Mr. Sudhir Thakur, learned Senior Counsel for the petitioner and Ms. Ritta Goswami, learned Additional Advocate General for the respondents.

3. The petitioner was elected as a Member of the Zila Parishad, Sirmour in January, 2016. On 24.8.2017, a Criminal Complaint in FIR No. 393 of 2017, was registered against him for alleged offences under Sections 304 and 201 IPC read with Section 34 IPC, on the file of Police Station, Paonta Sahib, Distt. Sirmour.

4. The petitioner was arrested and remanded to custody. Admittedly, he remained in custody for more than 14 days.

5. Therefore, by an order dated 21.7.2018, the petitioner was suspended from the membership of the Zila Parishad.

6. Challenging the order of suspension, the petitioner filed one writ petition in CWP No. 1916 of 2018. The writ petition was disposed of on 17.9.2018, with a direction to the Director, Panchayati Raj to consider his representation and take a decision afresh. The

petitioner was also granted a small reprieve till the final order was passed. In other words, his suspension was kept in abeyance, till the decision was taken by the Director, Panchayat Raj. However, the Director Panchayati Raj, passed an order dated 1.10.2018, reaffirming the order of suspension dated 21.7.2018. Therefore, challenging the said order, which was also affirmed by the Divisional Commissioner, by an order dated 23.3.2019, the petitioner has come up with the above writ petition.

7. The contentions of the learned Senior Counsel appearing for the petitioner are two fold namely; (a) that under sub-section (3) of Section 145, a suspension cannot be in force for a period of more than six months and hence the impugned order is liable to be set aside; and (b) that in any case, clause (a) of sub-section (1) of Section 145 does not deal with an offence under Section 304 IPC and hence a person implicated in a criminal case for an offence, not covered by clause (a), cannot be placed under suspension.

8. We have carefully considered the contentions.

9. Section 145 of the Act reads as follows:

> "145. Suspension of office bearers of Panchayats. -
>
> (1) The prescribed authority may suspend from office any office bearer-
>
> (a) who remained in custody for more than fourteen days on a criminal charge or otherwise or against whom charges have been framed in any criminal proceedings under chapter V-A, VI, IX-A, X, XII, sections 302, 303, 304-B, 305, 306, 307, 312 to 318, 336- A, 366-B, 373 to 377 of Chapter XVI, sections 395 to 398, 408, 409, 420, 436, 458 to 460 of Chapter XVII and Chapter XVIII of the Indian Penal Code, 1860 (45 of 1860) or under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) or under sections 41 and 42 of the Indian Forest Act, 1927 (16 of 1927) or under sub-section (1) of section 61 of the Punjab Excise Act, 1914 or any law for the time being in force for the prevention of adulteration of food stuff and drugs, suppression of immoral traffic in women and children and protection of civil rights;
>
> (b) who has been served with a notice alongwith a charge sheet to show cause under this Act, for his removal from the office;
>
> (c) where on a complaint made against him the preliminary enquiry prima-facie discloses the misappropriation, misutilization or embezzlement of Panchayat funds or he has been found guilty of misconduct in the discharge of his duties:
>
> Provided that any office bearer, if placed under suspension against whom charges have been framed in any criminal proceedings under clause (a), shall remain under suspension till the final decision of the competent court.
>
> (2) Where the inspection or an audit report discloses the misappropriation, misutilization or embezzlement of Panchayat funds by an office bearer of a Panchayat and the prescribed authority is satisfied that continuance in office of such a person will prejudice the enquiry under section 146 and apprehends tampering with record and witnesses, may suspend such a persons and in case he is in possession of any record, money or any property of the Panchayat, order him to handover such records, money or property to the Secretary of the Panchayat.
>
> (2-A) No office bearer shall be placed under suspension under subsection (1) or (2) unless he has been given an opportunity of being heard.

(3) The order of suspension under sub-section (1) or (2) shall be reported, in the case of office bearers of Zila Parishad, to the Divisional Commissioner concerned, and in the case of office bearers of Panchayat Samiti and Gram Panchayat, to the Deputy Commissioner concerned, within a period of ten days from the date of suspension, who shall, thereafter within ten days from the date of receipt of such report, order enquiry under section 146 and shall complete enquiry and action within six months and in case enquiry and action is not completed within stipulated period, the suspension order shall be deemed to have been revoked and formal order shall be issued accordingly.

(4) In the event of both the Pradhan and Up-Pradhan of Gram Panchayat, Chairman or vice-Chairman of Panchayat Samiti or Zila Parishad being suspended under sub-section (1) or sub-section (2) the Gram Panchayat, Panchayat Samiti or Zila Parishad shall elect an office bearer qualified to hold the office of Pradhan or Chairman, as the case may be, such person shall perform all the duties and exercise all the powers of Pradhan or Chairman, as the case may be, during the period for which suspension continues.

(5) A person who has been suspended under sub-section (1) or subsection (2) shall also forthwith stand suspended from the office of member or office bearer of any other Panchayat of which he is a member or office bearer. Such person shall also be disqualified for being elected, under the Act during his suspension."

10. It is true that under sub-section (3) of Section 145, the Authority concerned, is to conduct an inquiry and pass an order within a period of six months. If an inquiry is not conducted and completed within six months, the suspension order shall be deemed to have been revoked.

11. But sub-section (3) of Section 145, by its very nature, would apply only to cases where the proceedings are initiated departmentally. They cannot apply to cases where criminal charges are framed against a person.

12. That will take us to the next question as to why sub-section (3) of Section 145 makes a reference to both sub-section (1) and sub-section(2). Sub-section (1), as can be seen from what we have extracted above, deals primarily with the registration of criminal complaints in clause (a). But clauses (b) and (c) of sub-section (1) deal with departmental proceedings. It is only on account of clauses (b) and (c), finding a place in sub -section (1), that sub-section (3) makes a reference to sub-section (1). Therefore, there is no incongruity between sub-section (1) and sub-section (3) of Section 145 of the Act.

13. Take for instance a case where a criminal complaint is registered for alleged offence under Section 302 IPC. If the interpretation, as sought to be given by the petitioner, is accepted, then the Deputy Commissioner of the concerned Department should hold a departmental inquiry into the criminal charge of murder. That can never be the purport of sub-section (3) of Section 145. Sub-section (3) of Section 145 has to be understood harmoniously with clauses (b) and (c) of sub-section (1) of Section 145. Therefore, the first contention that the suspension cannot exceed a period of six months in any case, including cases where criminal complaints are under investigation/trial, cannot be accepted.

14. Insofar as the second contention is concerned, clause (a) of sub-section (1) speaks of two different contingencies. The first is that the elected member remained in

custody for more than fourteen days on a criminal charge or otherwise, and second is that the elected member faces criminal charges, in any capacity, for certain offences. In relation to the second part, Section 304 IPC does not find place. But insofar as the first part is concerned, namely a person remaining in custody for 14 days on criminal charges or otherwise, the offences in relation to which he was detained in custody, are of no significance. This is the only way, clause (a) can be interpreted, in view of the fact that word used is "or" which is a disjunction and not 'and' which is a conjunction.

15. In other words, clause (a) of sub-section (1) covers two types of cases. The first type of cases are those where a person is in custody for more than 14 days, on a criminal charge or otherwise. This is irrespective of the offence which he is charged with. The second type of cases are those where a person gets involved in certain types of criminal offences indicated in clause(a) itself. This is irrespective of whether he is in custody for 14 days or not.

16. Unless clause (a) of sub-section (1) of Section 145 of the Act is understood in this manner, the object of ensuring that persons with criminal background do not continue in office, cannot be achieved. Once the purport and object behind this clause is understood, it will be very clear that the second contention cannot hold water. Therefore the writ petition is dismissed.

17. It is needless to point out that in case the petitioner gets acquitted in the criminal case and if his elected tenure has not come to an end by then, he will be reinstated subject to the right of the prosecution, to file an appeal.

Pending application(s) also stands disposed of accordingly.

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

Sh. Rattanu …..Appellant.
Vs.
Shri Lakhu and others …..Respondents.

RSA No.: 325 of 2007
Date of Decision: 02.08.2019

Specific Relief Act, 1963–Section 38- Decree of permanent prohibitory injunction –Grant of –Plaintiff seeking decree of permanent prohibitory injunction against defendant for restraining him from interfering in his land or raising construction over it– Suit of plaintiff dismissed by trial court and appeal by District Judge– RSA– Held, oral evidence of plaintiff not proving that construction of defendant was over his land– Report of local Commissioner vague inasmuch as it did not include difference of two Karukans as reflected in musabi– Plaintiff not entitled for decree of permanent prohibitory injunction – RSA dismissed. (Paras 11 to 14)

For the appellant: Mr. T.S. Chauhan, Advocate.
For the respondents: Mr. Dinesh Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge(Oral):

By way of this appeal, the appellant has prayed for the following relief:

"It is, therefore, respectfully prayed that this appeal may very kindly be allowed and the impugned judgment and decree, dated 07.05.2007, passed by the learned District Judge, Bilaspur, in Civil Appeal No. 3 of 2006, whereby he has affirmed the judgment and decree dated 5.11.2005, passed by learned Civil Judge (Senior Division), Bilaspur in Civil Suit No. 30/1 of 2000 may very kindly be quashed and set aside and consequently decreeing the suit of the plaintiff/appellant with costs throughout."

2. Brief facts necessary for the adjudication of the present appeal are that appellant-plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for permanent prohibitory injunction against the respondents-defendants (hereinafter referred to as 'the defendants'), *inter alia,* on the ground that he was owner in possession of the suit land comprised in Khewat No. 426, Khatauni No. 654, Khasra Nos. 871 and 886, measuring 0.11 bigha, situated in Village Panjgain, Pargana and Tehsil Sadar, District Bilaspur, H.P. and the defendants who had no right, title or interest over the same, were threatening to build a house over the suit land, for which, they had also collected construction material. As per the plaintiff, he had requested the defendants not to raise any construction or interfere with the suit land, but they were not paying any heed, hence the suit for permanent prohibitory injunction against the defendants.

3. The defendants by way of their written statement contested the suit and took the stand that they were not giving any threats to build any house over the suit land nor they were raising any construction over the same by collecting any construction material and in fact the suit stood filed by the plaintiff falsely without any cause.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:

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

2. Whether the plaintiff in the alternative is entitled to a decree for vacant possession of the suit land? OPP.

3. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD.

4. Whether this Court has no jurisdiction to hear and decide the suit? OPD.

5. Relief."

5. These issues were decided by the learned Trial Court as under:

"*Issue No. 1:*	*No.*
Issue No.2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Relief:	*The suit of the plaintiff is dismissed as per operative part of the judgment."*

6. The suit was dismissed by the learned Trial Court by holding that the plaintiff had not produced any evidence on record to demonstrate that defendants were

either interfering in the suit land or had raised any construction over the same. Learned Court held that as the plaintiff had filed suit against the defendants alleging that they were raising construction over the suit land, hence onus to prove this fact was upon the plaintiff and the statement of the plaintiff as well as other two witnesses who had deposed in favour of the plaintiff did not prove the said fact. Learned Court also held that there was no other evidence on record to prove the allegation of the plaintiff and the statement of the plaintiff and other two witnesses did not demonstrate that the defendants had raised any construction over the suit land. Learned Court further held that the case of the defendant was that they had raised construction over their own land and not over the suit land. Learned Court observed that the plaintiff had not filed any *Tatima* to pin-point where the construction had been raised by the defendants and in the absence of any documentary record on file, merely on the basis of oral, uncertain and vague statements of the plaintiff and his witnesses, no relief could be granted to the plaintiff, as it was not clear from the evidence on record that the defendants had raised any construction over the suit land.

7. These findings in appeal were upheld by the learned Appellate Court. Learned Appellate Court held that there was no reason to disbelieve the version of defendant-Lakhu Ram, who had entered the witness box as DW-1 and had deposed that he had raised construction over his own land, which version of his was duly corroborated by the statement of DW-2-Parma Nand. While rejecting the contention of the plaintiff that as there was boundary dispute, therefore, Local Commissioner was required to be appointed to resolve the same, learned Appellate Court held that there was no legal force in the said contention, because the plaintiff has to stand upon his own legs to prove the facts narrated in the plaint, on the basis of evidence led by him and in the plaint, there was no such allegation that there was a boundary dispute between the parties. On the contrary, it was quite apparent that plaintiff was well aware of his boundary and for this reason, he had made a specific allegation that defendants had theretened to raise construction over the suit land. Learned Appellate Court, thus, while upholding the findings returned by the learned Trial Court, dismissed the appeal by holding that there was no infirmity with the findings of the learned Trial Court that as the plaintiff had failed to prove his case, therefore, he was not entitled for permanent prohibitory injunction or mandatory injunction.

8. Feeling aggrieved, the plaintiff has filed the present appeal, which was admitted on 24.09.2008 on the following substantial questions of law:

> *"1. Whether the impugned judgment and decree is result of misreading and mis-appreciation of oral as well as documentary evidence particularly Ex.D-4 and Ex.PA on record?*
>
> *2. Whether the learned Courts below are justified in dismissing the suit without waiting for the report of the Local Commissioner, who was appointed by the Court vide its order dated 18.07.2005?"*

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

10. I will deal with both the substantial questions of law independently.

Substantial Question of law No. 1:

> *"1. Whether the impugned judgment and decree is result of misreading and mis-appreciation of oral as well as documentary evidence particularly Ex.D-4 and Ex.PA on record?"*

Ex.-D4 is the copy of demarcation report, dated 10.01.2002 and Ex. PA is the copy of Jamabandi for the year 1996-97 pertaining to Khasra Nos. 871 and 886. Learned Trial Court held that perusal of the statement of Local Commissioner (PW-5) and his report Ex.-D4 also Musabi Ex.-PX demonstrated that there was a difference of two *Karukans*, which had not been added in the report of Local Commissioner and as two Karukans were less in the report Ex.-D4, therefore, the report did not tally with the Musabi. On these bases, learned Trial Court held that there was some lapse while preparing the demarcation report, hence the Court was not inclined to accept the same as fully correct. In appeal, learned Appellate Court held that as per order dated 18.07.2005 passed by the learned Trial Court, both the learned counsel for the parties had submitted that report of the Local Commissioner was vague and did not state anything specifically. It held that statement of DW-5 demonstrated that demarcation had not been carried out on the spot as per the instructions issued by the Financial Commissioner (Revenue) and it was writ large from the report as well as copy of *Musabi* that there was a difference of two *Karukans*, which were not added in the report of Local Commissioner and as there was infirmity in the said report, the same could not be relied upon.

11. Thus, it is evident from the above that there are concurrent findings to the effect that there was a difference of two Karukans, which were not added in the report of the Local Commissioner as compared to Musabi. A perusal of Musabi Ex.-PX and report of the Local Commissioner Ex.-D4 demonstrates that the findings so returned by the learned Courts below are duly borne out from the record of the case. Thus, it cannot be said that there is a mis-reading or mis-appreciation of the said two documents by the learned Courts below. Said findings of fact concurrently recorded in favour of the defendants by the learned Courts below, in the light of the same not being contrary to the evidence on record, call for no interference. Therefore, it cannot be said that the judgments and decrees passed by the learned Courts below are a result of mis-reading or mis-interpretation of either Ex.-D4 or Ex.-PA on record.

12. It is pertinent to mention that it is clearly borne out from the order passed by the learned Trial Court on 18.07.2005 that it was submitted by the learned counsel for the parties before the Court that the report of the Local Commissioner was vague and does not state anything specifically and it does not show where the construction allegedly raised by the defendants falls. In this view of the matter also, it is not understood as to how the appellant can now submit that learned Courts below have erred in discarding the said report of the Local Commissioner.

13. During the course of arguments, learned counsel for the appellant could not point out as to which document on record or statement of which witness has been misread or mis-appreciated by the learned Courts below. On the contrary, a perusal of the findings returned by the learned Courts below when compared to the record of the case, demonstrate that the same are duly borne out from the record of the case. Substantial question of law is answered accordingly.

<u>Substantial Question of law No. 2:</u>

> *"2. Whether the learned Courts below are justified in dismissing the suit without waiting for the report of the Local Commissioner, who was appointed by the Court vide its order dated 18.07.2005?"*

14. Record of the learned Trial Court demonstrates that on 18.07.2005, the following order was passed:

"At this stage, both the counsels for the parties have submitted that the report of the Local Commissioner is vague and does not state anything specifically. It does not show where the construction allegedly raised by the defendants falls. Both the counsels for the parties have requested to appoint another L.C. in order to set at rest the controversy between the parties once for all. In view of this, the request of the counsels for the parties is allowed. Both the counsels for the parties have agreed to appoint the S.D.M., Sadar, District Bilaspur as Local Commissioner. Accordingly, the S.D.M., Sadar, District Bilaspur is appointed as such. He is directed to visit the spot and to demarcate the Khasra No. 886 out of the suit land and fix its boundaries and also to find out whether any construction falls on Khasra No. 886 and by whom the such construction has been raised. His report is called for on or before 20.09.2005. His fee is fixed at Rs.2,000/- to be paid by the plaintiff on the spot. Order be issued accordingly."

However, it is clearly borne out from the subsequent order passed by the Court on 20.09.2005 that S.D.M., Sadar, District Bilaspur did not visit the spot and he had explained the reasons as to why he could not do so. Thereafter, it was agreed by the parties to proceed with the matter without waiting for the report of the Commissioner, who was so appointed by the Court on 18.07.2005. In this view of the matter, the appellant cannot be permitted to submit that the judgments and decrees passed by the learned Courts below, especially the learned Trial Court is bad, as it ought to have waited for the report of the Local Commissioner so appointed on 18.07.2005. Substantial question of law is answered accordingly.

15. In view of the discussions held hereinabove, as there is no merit in this appeal, the same is dismissed, so also pending miscellaneous applications, if any.

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

M/s J. K. Exim Pvt. Ltd. ….Petitioner

Versus

Director of Women & Child Development, H.P. & another ….Respondents.

Arb. Case No. 3 of 2017 a/w
Arb. Case No.9 of 2017
Reserved on : 24.7.2019
Date of decision: 13.8.2019

Arbitration and Conciliation Act, 1996–Section 34– Dispute as to termination of contract– Jurisdiction of arbitrator– Held, arbitrator has jurisdiction to determine whether termination of contract by department was valid or illegal and qua it contractor being entitled to monetary compensation on that ground. (Para 3)

For the petitioner: Mr. Suneet Goel, Advocate, for the petitioner in Arb. Case No. 3 of 2017 and for respondent No.1 in Arb. Case No.9 of 2017.

For the respondents: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs. for respondent No.1 in Arb. Case

No. 3 of 2017 and for respondent No.2 in Arb. Case No. 9 of 2017.
Mr. Mandeep Chandel, Advocate, for the petitioner in Arb. Case No.9 of 2017 and for respondent No.2 in Arb. Case No. 3 of 2017.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

Since Arbitration Case No. 3 of 2017, and, Arbitration Case No. 9 of 2017, arise, from a common award, rendered, by the learned Arbitrator, thereupon both, are, amenable for, a, common verdict, being rendered thereon.

2. Through, Arbitration Case No. 3 of 2017, the contractor, casts, a challenge, upon, the validity, of, only partial affirmative findings, standing recorded, upon, issues No. 1, and, 2, hence under, the impugned award, of, 20.10.2016, (i) whereas, rather the completest affirmative findings were enjoined, to, be rendered thereon, for hence ensuring parity inter-se therewith, and, vis-a-vis, issue No.3, whereon rather findings fully supportive qua the claimant, stand pronounced, by the learned Arbitrator. Furthermore, a challenge is also cast, vis-a-vis, rejection, of, claim No.4, appertaining, to loss of profit, on account of termination of supply order, (ii) given the afore rejection also conflicting with, the, findings returned, upon, issue No.3, whereas, both were inter-linkable, and, hence in tandem, rather vis-a-vis, both apt findings, were enjoined to be returned, given, both being in segregable, (iii) and, on the other hand, the recipient of, the, supply order i.e. H. P. State Civil Supplies Corporation, has, through Arbitration Case No.9 of 2017, hence, contested the fastening, of, the apposite liabilities, upon, it, along with the fastening thereof, upon, proforma respondent No.2, purportedly, on, the principle of joint, and, vicarious liability, (ii) whereas, the afore principle neither being attracted nor hence the afore conjoint liability being amenable, for, fastening upon it, vis-a-vis, the, claim(s) allowed, by the learned Arbitrator. Furthermore, through, the afore arbitration case, cast, before this Court, by the recipient(s), of, apposite supply(ies), it is also contended, that the learned Arbitrator, relegating into, the realm of obfuscation, (ii) the order rendered by this Court, on 26.3.2013, upon, CWP No. 782 of 2013, (iii) whereat, this Court, had, permitted the making, of, supply(ies), after, completion of 45 days, and, only, when prior thereto, the apt leave of the Court, was, sought, (iv) whereas, the afore leave being not asked, and, yet the supply(ies) being also made, hence the, allowing of the contractors' claim, vis-a-vis, supply(ies) made, without the leave, of, the Court, being asked, nor granted, rather being interferable. The vigor, of, the afore submissions, made, before this Court by the recipient, of, the supply(ies), H.P. State Civil Supplies Corporation, is, effaced. (v) given even though, this Court, had, on 26.3.2013, upon, CWP No. 782 of 2013, hence, made the hereinafter extracted pronouncement:-

> "As prayed for, on behalf of the parties, list on 9th April, 2013, before the learned Single Judge. However, any supply after completion of 45 days will only be made after seeking prior permission of this Court."

3. However, for the reasons, to be assigned hereinafter, (a) even, upon, the requisite leave remaining, un strived, nor standing granted, (b) yet, would, not, erode the jurisdiction, of, the learned Arbitrator, to, upon entering, upon, the reference, hence his determining, from, the, evidence, adduced, by the rival contestants, rather before him, hence, the, apt tenacities appertaining, to, concurrent therewith claims. The vigor of the afore inference, is also, fortified, (b) from, the trite factum, qua, in the afore writ petition, the

claimant-contractor, hence, casting a challenge, upon, the validity of the termination, of, the contract, entered inter-se him, and, the department concerned, (c) and, when the Principal Division Bench of this Court, on 6.8.2013, had, upon, accepting the preliminary objections, reared by the learned Advocate General, vis-a-vis, the maintainability, of, the writ petition, upon anvil, qua despite its being covered, by, the apposite arbitration clause, hence existing in the contract drawn, inter-se, the contesting parties, hence declined the espoused relief, borne in, CWP No. 4501, of, 2013, vis-a-vis, the claimant-contractor, (d) wherethrough, reiteratedly he had strived, to, cast a challenge, vis-a-vis, the illegal termination of the contract, entered into, inter-se, him, and the department concerned, of, the State, of, H.P. The effect thereof is qua, given the afore order previously pronounced, on, 26.3.2013, upon, CWP No. 782 of 2013, rather merging into, the, final order pronounced, upon, CWP No. 4501 of 2013, and, thereafter, with the learned Arbitrator entering, upon, the reference, (iv) hence he was fully, and, omnibusly empowered, to determine, the, sway, and, the clout, and, the domain(s) of the dispute, engaging the parties, at contest, inclusive, of, (v) whether the termination of the contract being illegal or legal, and, concomitantly whether the strivings, made, by the claimant-contractor, against, the department, of the Government concerned, and anvilled, upon, the illegal termination, of the contract, hence being amenable for, acceptance or rejection, and, besides obviously, qua the claimant-contractor, being entitled, to, monetary compensation.

4. Be that as it may, the afore determination, rests, the vigor of the afore espousal made before this Court, by the counsel appearing, in Arbitration Case No.9 of 2017, (i) nonetheless, this Court is enjoined to determine, and, fathom the worth, of, the reasoning assigned, by the learned Arbitrator, qua, the apposite termination hence being unilateral, and, arbitrary, (ii) given the records unfolding qua preceding therewith, no imperative compliance, being meted, vis-a-vis, the principle(s), of, *audi-alterem-paretem,* and, also qua adherence, being not meted, vis-a-vis, conditions No. 21, and, 22 borne, in Annexure C-3, conditions whereof are extracted hereinafter:-

> "21. The delivery of PSE Kits must be completed within 45 days from the date of issue of supply order by the managing director, H.P. state Civil Supplies Corporation Ltd, Kasumpati, Shimla-9. The articles to be supplied should strictly conform to the description, specifications, quality and workmanship as per samples given by the supplier.
>
> 22. If the supplier fails to complete the delivery of the supplies on or before the date of completion as given in supply order, the supplier will be charged with a penalty @ 1% (of the cost of delayed supplies) per week. Provided that if the delay is more than 3 weeks, the department will be at liberty to cancel the remaining order and procure the balance supply from the open marked and the extra cost incurred due to the same shall be the borne by the supplier. Provided further, the amount of such damages may be recovered/adjusted or set off against any sum payable to the supplier arising under this or any other contract or the security deposit made under this contract."

(i) upon making reading thereof, in conjunction, with, the afore statutory formula hence prevailing thereat, the, conclusion, that, hence ensues, is qua, with the apposite provisions rather enshrining qua the apposite delay, being extendable, if, not exceeding beyond three weeks, and, the afore, extendable period, is, made computable, after the expiry, of, the initial period, of 45 days, commencing, vis-a-vis, the date, of, issuance, of, supply order, (ii) thereupon the contracting parties, not hold, any contemplation, vis-a-vis, hence compliance(s), for, the relevant purpose, being imperatively made, within 45 days, from, the

date of issuance of supply order, by the agency concerned, rather hence, even beyond, the, initial period of 45 days, prescribed in condition No. 21, hence the contractor-claimant, also holding a leverage, to, make the relevant supply(ies), but within three weeks' thereafter (iii) and, when hence hereat, the, supply order, was made, on 14.2.2013, and, in consonance, with, condition No. 21, the supplies were to be completed, within 45 days therefrom, hence on 31.3.2013, (iv) yet, when the proviso, borne in condition No. 22, unfolds qua even within three weeks, rather therefrom, he could make suppl(ies), and, upon, yet, apt default(s) evidently emerging rather, thereupon, the, procuring/agency of the State, being empowered hence to forthwith rescind, the, contract. Nowat, hence when the afore period of three weeks, countable, from 31.3.2013, expired on 31.1.2014, and, when upon occurrence, of, the apposite defaults, the department concerned, though was empowered to forthwith cancel, the contract, (v) yet, with the termination, occurring much belatedly therefrom, rather hence on 7.6.2013, hence renders, the rescission, of, the contract, to, infract the principles, of, natural justice, also hence the belated termination, sparking a conclusion(vi) qua the enshrinings, embodied, in, condition No.22, being waived, and, abandoned and, also, the afore espousal rather working against the department concerned.

5. The afore reasoning has, immense merit, as, despite within, the, extended period, of, completion, of, supplies, as, contemplated, in condition No. 22, theirs' not occurring, nor occurring in contemporaneity, therewith, whereas, hence the respondent department concerned, was, empowered, to, in contemporaneity therewith, hence forthwith rescind, the contract, whereas, it not forthwith making cancellation, of, the contract, (i) thereupon the afore prolonged procrastination, on, the part of the agency concerned, of, the State, to, invoke either condition No. 21 or condition No. 22, (ii) bolsters, an inference, qua the agencies abandoning, and, waiving hence invocation, at their instance, of either condition No.21 or condition No. 22, and, rather their impliedly extending, the, afore period, of, contract vis-a-vis, the claimant-contractor, and thereupon also, the, rescission being, vitiated. Furthermore, since Annexure C-7, comprises the statement, rendered by RW-5, Arvind Sharma, statement whereof, is extracted hereinafter:-

> "Stated that I am working as Company Secretary 9CS) in HP state civil supplies Corporation Ltd. SDA complex, Shimla since 2011. I tender in evidence my affidavit Exbt. RW5/A. I am fully conversant with the facts relating to the transaction in question. I authorized to appear as witness and make statement in these proceedings on behalf of respondent No.2-civil supplies Corporation as resolution dated 29th June, 1988 exbt. RW5/B. I tender in evidence my affidavit Exbt. RW5/A. Letter Exbt. RW5/C dated 7.6.2013 was sent by respondent No.2 corporation to the claimant company. I have brought the original record relating to the tender process of two in one boards with stands which is subject matter of the present proceedings.
>
> xxx xxx cross examination on behalf of claimant by Mr. Ajay Vaidya, Advocate.
>
> Initially the bid submitted by another tenderer 9L-1) being the lowest was accepted, but owing to its inability to supply the sample of two in one boards with stands, the claimant company being the next lowest tenderer (L-2) was called for negotiations after which supply order was issued in its favour. After the supply order was issued in Feb. 2013, the claimant company started making supplies in March, 2013. it is correct that in between L-1, M/s Rajesh Scientific Industries filed a writ petition in the Hon'ble High Court of Himachal Pradesh, in which the Hon'ble Court had passed a conditional stay order. We had come to know about it on the same day and

applied for the copy of order and received the same after 2/3 days. As the claimant company was duly represented by an Advocate when the stay order was passed by the Hon'ble Court, we were not supposed to inform about it. We had not taken any steps to get the stay order vacated from the Court. Communications regarding the supplies made by the claimant company not confirming to specification/approved samples were received by respondent No.2-corporation from the Director, women and child Welfare, Shimla (respondent No.1), but I do not remember the exact dates/month(s) of receipt thereof. I am not aware as to whether any inspection committee was formed by respondent No.1-department to ascertain whether the supplies being made by the claimant company were upto the specifications/approved samples. The supply order was canceled pursuant to the recommendation received from the Director Child and Women Himachal Pradesh as also for the reason that the supplies made by the claimant company were not upto the specification/approved samples. Though before cancellation of the supply order a discussion was held in the corporation whether a show cause notice was required to be issued to the claimant company, yet on perusal of the tender document, it was found that there was no condition requiring giving of such notice after expiry of the delivery period. Officials notings about these discussions are Exbt. C7 (colly) (42 pages). However, even despite these discussion show cause notice was not issued to the claimant company as it would have been only a futile exercise as the delivery period stipulated under the tender document was already over, without there being any request for extension from the claimant company. Even otherwise the legal opinion submitted by the legal advisor of the corporation was not binding on the corporation. Volunteered that the claimant company had also not applied for prior approval of the court to continue supplies after delivery period of 45 days. It is correct that condition No. 22 of the tender document provides that supplies could be made within three weeks after the initial period of 45 days subject to "a penalty @1% (of the cost of delayed supplies) per week. Provided that if the delay is more than three weeks, the department will beat liberty to cancel the remain order and procure the balance item from the open item and the extra cost incurred due to the same shall be the liability of the supplier."

The writ petition filed by M/s Rajesh Scientific Industries was pending when the supply order in favour of the claimant company was cancelled. Only letters informing about the supplies being not upto the specifications/approved samples were received by respondent No.2 corporation from respondent No.1-department and no inspection report to the effect that the supplies were substandard was received. Letter dated 20.4.2013 addressed by the claimant company to the Managing Director, HP civil supplies Corporation, Shimla with copy to the Director women Welfare and Child Development Department Shimla was received in respondent-corporation on 30.4.2013. However, no action was taken by the corporation pursuant to this letter".

(i) and, its reading making clear and categorical, unfoldings, qua before, the, cancellation of supply order, discussions being held, in, the corporation, qua, a show cause notice being required to be issued, to the claimant company, (ii) yet, a perusal of, the, tender document unveils qua the afore necessity, being not explicitly borne therein, nor hence when even after expiry, of the apt covenanted delivery period, there was, prima facie no necessity of any show cause notice being issued, upon, the contractor imperatively, hence preceding the

termination of the contract, (ii) thereupon even, if, neither the tender document nor even, if, conditions No. 21 and 22, borne in the relevant contract, hence pronounce, the, necessity, of, issuance of, a, show cause notice, upon, the claimant-contractor, rather, preceding the apposite termination, (iii) yet, the afore reticence(s) therein would, not estop, the claimant-contractor, to challenge, the afore termination, hence upon the afore anvil, qua, rather hence, the, rescinding, of, the contract, being unilateral, (iv) conspicuously, given the afore echoings also making emanations, vis-a-vis, the necessity, of, the department concerned, hence issuing, a show cause notice, upon him hence preceding, the, termination, of, contract. Emphatically also when, the, supplies were also made, vis-a-vis, department concerned rather subsequent, to, the completion, of, the period, as, contemplated, in, condition No.22. Consequently, the findings recorded by the learned Arbitrator, upon issue No. 2 are meritworthy, and, do not warrant any interference. The sequel of the afore, is qua when a reading, of, further echoings, made respectively, by, RW-2, RW-6, and, RW-7 qua lack of constitution, of, the apposite inspection committee, for hence determining, whether, the supplies were defective or deficient, and, therefrom, the, rejection, of, the, supply(ies), are, construable to be both not tenable, and, are also not meritworthy, reiteratedly hence when, the, afore, did not make, the afore requisite testifications, in their respectively recorded, statements, before the learned Arbitrator, (i) thereupon, the rejection of the supply(ies) of the claimant-contractor, on, the pretext of theirs' deficient or theirs not conforming, vis-a-vis, the requisite standards, of, quality, is ingrained, with, a, vice of arbitrariness, (ii) conspicuously, for, wants, of, in consonance, with the relevant instructions, hence the constitution, of, the apt inspection committee remaining rather unconstituted nor it making an apt pronouncement qua the afore defect, being found, vis-a-vis, the goods supplied. The afore findings returned, upon, issue No.2, for the reasons hence assigned thereon, by the learned Arbitrator, and, also for the reasons aforestated, hence warrant no interference, (iii) thereupon the findings in contradiction therewith pronounced, upon, issue No.4, by the learned Arbitrator, while rejecting, the, claim, under, the head "material supplied being sub standard", hence, leading to termination, of, the contract rather infracting, the, solemmnity, of, the affirmative findings recorded earlier thereto, even upon, issue No.2. Consequently, the, partial hence affirmative findings returned, upon, issue 4, by the learned Arbitrator, for theirs being brought at par, with, connected therewith issue No. 2, rather are converted into full affirmative findings thereon, and, also thereon the requisite contractual rates, of, interest as, accruable thereon, are, ordered, to, be levied thereon, and, the fastening of, the, apposite liability, upon it, along with, the, department concerned, of, the government, is not erroneous, and, thereupon Arbitration Case No. 9 of 2017, is, dismissed.

6. For the foregoing reasons, CARBC No. 3 of 2017, is, partly allowed, and, the award of 20.10.2016, rendered, by the learned Arbitrator, is, hence modified, in the afore manner. All pending applications also stand disposed of. Records be sent back forthwith.

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

Ram Lal deceased through LRs. .....Appellants

Versus

Chitra Rai & others ....Respondents.

FAO No. 331 of 2012
Reserved on : 7.8.2019

Date of decision: 13.8.2019

Motor Vehicles Act, 1988– Section 166– Motor accident – Compensation for loss of business income during treatment and also future income on account of disability – Grant of - Held, no evidence on record that disability also resulted in loss of business income to claimant during period of treatment or he was permanently precluded to perform callings of his avocation– Claimant not entitled for any compensation in this regard – Moreover, such compensation cannot be claimed by his legal representatives after his death which took place during pendency of claim proceedings. (Para 2)

For the appellants: Mr. Manish Sharma, Advocate.
For the respondents: Mr. Deepak Bhasin, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The legal representatives, of, deceased Ram Lal, claimants herein, standing, aggrieved, by the award, rendered, by the learned Motor Accident Claims Tribunal-II, Mandi, H.P. (for short "MACT"), upon, Claim Petition No. 50 of 2004, have, hence through the instant appeal, cast, before this Court, sought enhancement, of, the compensation amount, assessed therethrough, vis-a-vis, them.

2. The learned counsel appearing for the appellants, has, made, a, vigorous espousal before this Court, qua, the compensation amount, determined, vis-a-vis, the claimants being deficient, (i) given, the disability certificate, embodied, in Ext. PW-3/A, proven by PW-3, making, a proclamation, vis-a-vis, one Ram Lal, suffering Lefort-1 and Lefort-II, of face, in respect whereof, he undertook treatment in Dental College, Shimla, (ii) and, also,a, proclamation qua his being also entailed, with post-tromatic neck stifness, besides being entailed, with, trismus, and, nasal deformity, and, also, with RT eye medial ractum muscle palsy, (iii) thereupon, hence the nonassessment, of, compensation, under, the head loss of business, during, the period of treatment, and, also qua further loss of business, arising, from the afore disabling injuries, befalling upon, deceased Ram Lal ratherbeing interferable by this Court, and, hence the impugned award, being amenable, for, modificaiton. However, the afore submission, has, no vigor, as PW-3 in his deposition, has, not made any echoings, in his examination-in-chief, vis-a-vis, the disability, also entailing apt loss of income from his business, vis-a-vis, deceased Ram Lal, both, during the period of his treatment, nor, with his proving, vis-a-vis, the afore Ram Lal, being perennially precluded, to, perform, the, callings of his avocation. Consequently, the lack of, the, afore imperative echoings, in, the testification, rendered, by PW-3, hence leverages, an inference qua their being neither any loss of income, to, the afore Ram Lal, during, the period of his treatment, if any, nor his being precluded, by the afore disabling injuries, to, perform the callings of his business, nor his being entitled to receive compensation, for, the loss of earnings from his business, in sequel to the disability, pronounced in Ext. PW-3/A, being hence entailed upon him. Consequently, and, with the afore Ram Lal, no longer surviving, also, constrains this Court to conclude, that, under the afore head, compensation, if any, being assessable, only, during the life time of deceased Ram Lal, and, when hence, it is not assessable, vis-a-vis, his legal representatives, thereupon also the afore submission, has no vigor.

3. For the foregoing reasons, there is no merit in the appeal filed, by the claimants, and, is hence dismissed, and, the impugned award, is, maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. .....Petitioner

Versus

Sunil Kumar & others ....Respondents.

Cr. Revision No. 368 of 2017
Reserved on : 9.8.2019
Date of decision: 13.8.2019

Code of Criminal Procedure, 1973– Section 173 (8)– Further investigation, when can be ordered? Prosecution filing charge sheet against public notaries without obtaining necessary prosecution sanction from Competent Authority– Filing application under Section 173(8) of Code at charge stage for further investigation so as to obtain and annex prosecution sanction against accused– Trial court dismissing application– Petition against– Held, cognizance of offences alleged in FIR could be taken only after prosecution sanction is accorded by Competent Authority– Otherwise also, investigating officer could have filed prosecution sanction by submitting supplementary charge sheet in the court- Prosecution permitted to do further investigation. (Paras 3 & 4)

For the petitioner: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs.

For the respondents: Ms. Soma Thakur, Advocate, vice counsel for respondent No.1.
Mr. Ravinder Singh Jaswal, Advocate, for respondents No. 2 to 4, 9, 12 and 18.
Mr. Rakesh Thakur, Advocate, for respondent No.5.
Mr. Deepak Negi, Advocate, vice counsel for respondent No.11.
Ms. Neelam Kaplas, Advocate, vice counsel for respondent No.13.
Mr. Varun Chauhan, Advocate, for respondent No.14.
Mr. Dibender Ghosh, Advocate, for respondent No.16.
Ms. Sheetal Vyas, Advocate, for respondent No.19.
Mr. Lakshay Parihar, Advocate, for respondent No.20.
Mr. H.S. Rana, Advocate, for respondent No.21.
Mr. Vinod gupta, Advocate, for respondent No.22.
Mr. Arun Kumar, Advocate, vice counsel for respondent No.23.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The State of Himachal Pradesh, stands, aggrieved by the, order, pronounced on, 18.4.2017, by the learned Special Judge (Forests), Shimla, wherethrough, it barred the

Investigating Officer concerned, to, make further investigations. The reasons cast therein, are borne, in paragraph-7 thereof, paragraph whereof, is, extracted hereinafter:-

> "From the challan and other documents placed on record, it becomes clear that the investigating agency came to know in the very beginning that the accused namely S/Sh. S.S. Deshta, K.s. Pathania and Mahesh Gupta are Public Notaries. No fresh facts came to the knowledge of the police or the learned Public Prosecutor while addressing arguments on the point of charge. The police in its wisdom omitted to comply with the provisions of the Notaries Act, 1952. The applicant/State cannot be permitted to fill up the lacunae in its case particularly when no fresh facts have come to its notice and it took almost seven years to complete the investigation of the case. The accused cannot be made to suffer because of the fault of the investigating agency."

2. For the reasons to be assigned hereinafter, the impugned order is not, anvilled, upon, any legally sound interpretation, being meted, vis-a-vis, the mandate, borne in Section 173, sub Section (8) of the Code of Criminal Procedure, 1973, (for short Cr.P.C.). However, before proceeding to make, an, interpretation, vis-a-vis, the hereinafter extracted mandate, embodied in sub Section (8) of Section 173, Cr.P.C., the, stark fact, for, resting, the, contentious factum, is, comprised, vis-a-vis, some amongst, the, accused namely Mahesh Kumar Gupta, and, Surender Singh Deshta, given theirs being Public Notaries, and, also theirs being public servants, thereupon, before assumption, of, a valid jurisdiction, or cognizance qua the the charges, hence by the learned Court, rather enjoins, the meteings qua them, of, the imperative prosecution sanction, rather, by the competent authority:-

> "(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)"

However, omissions, of, the Investigating Officer, to, alongwith his report, initially submitted under, Section 173 Cr.P.C., before the learned trial Court, hence, append therewith, the, apposite prosecution sanction, qua, the afore co-accused, though, was curable even through, his submitting a supplementary challan hence thereafter. However, the subsequent, application, cast, under the provisions of sub-section (8) of Section 173 Cr.P.C. wherein, he strives to seek permission, to, obtain the apposite prosecution sanction qua the afore accused, from, the competent authority, was, also a permissible recoursing, rather within domain thereof.

3. For the reasons assigned hereinafter, yet, the rejection of the prosecution endevour, by the learned trial Court, hence to collect the apposite prosecution sanction, and, thereafter appended, it, with a supplementary challan, is untenable, (i) as, the connotation, of, the phrase "further investigations" as occurrs, in, Section 173 Cr.P.C." does not require, qua the prosecution in contemporaneity, vis-a-vis, its availing the afore provisions, its thereat holding the requisite oral as well, as documentary evidence, (ii) rather the afores' is mandated, to, emerge or make appearances, only upon, such further investigations, being permitted by the learned Court concerned, (iii) and, when the prosecution, strives to after, the requisite permission being granted, qua it, by the learned

Court concerned, hence obtain the requisite prosecution sanction, (iv) and, when the afore sanction, is, obviously, a, piece, of, documentary evidence, and, also hence necessary, for, ensuring the learned trial Judge concerned, to, assume, a, valid cognizance, vis-a-vis, the offences, constituted in the FIR, and, qua the accused concerned, (v) thereupon, the afore reasons constituted, in the impugned order are flimsy, and, are not made, on a sound and proper appreciation, of, the mandate, of, the afore statutory provisions.

4. In view of the afore observations, the impugned order is quashed and set aside. Consequently, the espoused leave is granted, vis-a-vis, the prosecution, for making, the, further investigations in the matter. All pending applications, if any, also stand disposed of.

5. Any observation made herein above, shall not, be taken as an expression of opinion, on, the merits of the case, and, the learned trial Judge concerned, shall decide the matter uninfluenced, by any observation made hereinabove.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Chaudhary Sarwan Kumar & Others ...Appellants
Versus
Shyam Verma & Others ...Respondents

LPA No. 458 of 2011
Reserved on:22.07.2019
Decided on: 20.08.2019

Constitution of India, 1950-Articles 14 & 226 – **Himachal Pradesh Universities of Agriculture Horticulture and Forestry Act, 1986** – Chaudhary Sarwan Kumar Agriculture University - Whether bound by Circulars issued by Indian Council of Agriculture Research (ICAR) ? - Held - Agriculture education comes within purview of Department of Agriculture Research and Education – ICAR provides Grants-in-Aid provided to it by the Government of India for disbursement to State Agriculture Universities (SAUs)- It is ICAR which in case of SAUs plays same role as is played by University Grants Commission for the general universities – Therefore, service conditions of teachers in SAUs as well as their scales of pay will be determined only by ICAR. (Para 4)

Constitution of India, 1950-Articles 14 & 226– Indian Council of Agriculture Research (ICAR)– Career Advancement Scheme (CAS) dated 19.7.2000 read with Clarification dated 19.4.2001– Promotion to post of Professor– Eligibility criteria– Held, as per Circular of ICAR, minimum eligibility for promotion to post of Professor was eight years of service as Associate Professor in pay scale of Rs.3700–5700– These Circulars of ICAR were binding on State Agriculure Univsersity, Palampur– Amendment carried out by the University in Clause 6.4 of CAS not stipulating condition of service as Associate Professor on the required pay scale of Rs. 3700-5700 and thereby reducing eligibility criteria for promotion to post of Professor fixed by ICAR, was illegal. (Para 4)

For the appellants : Mr. Lokendar Paul Thakur, Advocate.
For the respondents : Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

The University, is in appeal against the judgment dated 18.06.2011, passed by learned Single Judge, whereby the writ petition preferred by the respondents (petitioners therein), was allowed and impugned Annexure-P-9, i.e. office order dated 18.08.2010, was quashed.

2. Primarily question involved for adjudication in the instant appeal is:-

Whether the university, which as per Government of India, Ministry of Agriculture/ ICAR's circulars and as per its own pleadings in the writ petition, being bound by all directions/circulars/clarifications issued by ICAR in respect of pay scales/service conditions of its teachers, could have issued a Notification dated 18.12.2001, in complete variance to the directions of ICAR while professing to abide by the same. And whether based on such Notification issued by the University, could it have issued another bizarre Notification dated 17.01.2002, when these two Notifications resulted in absolute unjust enrichment of the petitioners and their undue promotions as Professors; and whether it was open for the University in the facts and circumstances of the case to correct its mistakes by issuing Notification dated 11.08.2010, in line with ICAR clarifications/circulars and to withdraw wrong benefits given to the petitioners by impugned order dated 18.08.2010, after realizing the mistakes committed by it, pointed out by Auditor General of Himachal Pradesh.

Parties are being referred to hereinafter as they were in the writ petition. The factual position of the case along with our observations is being given hereinafter:-

2(i) **<u>Position in University Prior to 1999</u>:-**

2(i)(a) A Career Advancement Scheme of ICAR as well as a Personal Promotion Scheme (PPS) of the University, were in vogue in university, applicable *inter alia* to the writ petitioners.

2(i)(b) The teachers were availing the benefits of Personal Promotion Scheme as well as Career Advancement Scheme by exercising options thereunder.

To quote an example, one Dr. Shyam Verma/ petitioner No.1, availed the benefit of CAS (notified on 03.08.1989, as amended from time to time) and was promoted vide order dated 11.11.1998, from the post of Assistant Plant Breeder (Asstt. Prof.) to Plant Breeder (Associate Prof.) in pay scale of Rs. 3700-5700, retrospectively w.e.f. 10.05.1996. All petitioners in the similar manner by availing the benefit of CAS, had been promoted as Associate Professor in the pay scale of Rs. 3700-5700 before 03.03.1999.

2(ii) **<u>Position in 1999</u>:-**

2(ii) (a) A letter dated 03.03.1999, was circulated by the Government of India, Ministry of Agriculture, Department of Agriculture Research & Education, in respect of '*revision of pay scales of teachers in Agriculture Universities and Colleges following the revision of pay scales of Central Government employees on the recommendations of Fifth Central Pay Commission'*. Some of the contents of letter, which are relevant to the controversy, are being reproduced hereinafter:-

> *"……………it has now been decided that the revised scales as extended to ICAR Scientists may be extended to the corresponding teaching posts in the*

Central Agriculture University, Imphal and the State Agriculture Universities. The revised pay scales, incentives for Degrees, and Career Advancement Scheme, extended to CAU and SAUs, will be as detailed in this letter……..”

“………6. *It is requested that necessary action may please be taken to revise the pay scales of the teachers of the State Agriculture Universities and Central Agriculture University, Imphal, as per the conditions laid down in the instant letter and the Regulations to be framed by the ICAR.”*

“7. *Further clarification, if any, in the implementation of the scheme may be sought from the ICAR.”*

“8. *The revision of pay scales is further subject to the following conditions:-*

> *(i) The pay scales and the service conditions of SAUs/CAU personnel, will be determined only by ICAR and that decisions taken by UGC in this regard will not be applicable unless they are accepted by the ICAR.”*

2(ii)(b) In view of above extracted directions, the matter in respect of pay scales of teachers in State Agriculture Universities (SAUs) was to be governed by Indian Council of Agriculture Research (ICAR), therefore, the conditions imposed in the above circular, had to be accepted and were formally also accepted by the university, by issuing its own Notification dated 03.06.1999. This Notification was issued under reference and in accordance with letter dated 03.03.1999, issued by the Ministry of Agriculture, Government of India, New Delhi, as extracted above.

2(ii)(c) ICAR, issued another letter on 16.04.1999, addressed to the Chief Secretaries of the State Governments and Vice Chancellors of SAUs/CAU. The subject matter of the communication was, ‘revision of pay scales for the teachers and officers of SAUs, following the revision of pay scales of Central Government employees on the recommendation of 5th Central Pay Commission.’

The issuance of letter dated 16.04.1999, was necessitated, as many State Governments had sought certain clarifications with respect to the earlier ICAR letter dated 03.03.1999. Following clarifications *inter-alia* others were issued by ICAR vide letter dated 16.04.1999:-

1. Agriculture Education comes within the purview of Department of Agriculture Research and Education.

2. The grants-in-aid provided by Government of India (DARE) for agriculture education are processed for disbursements to State Agriculture Universities (SAUs) by ICAR.

3(i) ICAR, plays the role for Agriculture Universities, which UGC plays for general Universities.

3(ii) The revision of pay scales of the teachers of the State Agriculture Universities (SAUs), has, therefore, to be processed by ICAR.

3(iii) While approving the proposal of the council for revision of the pay scales of teachers of SAUs, the Ministry of Finance has stipulated that the pay scales and service conditions of SAUs/CAUs personnel will be determined only by ICAR and the decision taken by the UGC in this regard will not be applicable unless the same is accepted by ICAR.

4. *This clarification was issued as in the past some of the Agriculture Universities had made certain deviations in the pay scales & service conditions approved by the Council during Fourth Pay Commission.*

5. *In so far as revision of pay scales in Fifth Pay Commission, the pay scales notified vide letter No. 1(15)/98-per. IV dated 3.3.99, issued by Director, DARE had the approval of the Council. However, for other service conditions such as Carrier Advancement Schemes etc., the SAUs were required to follow guidelines to be approved by the council.*

2(ii)(d) Following the mandate of the above clarification dated 16.04.1999, the university, issued its own letter of compliance to it. By following the ICAR directions as contained in above referred circulars, the PPS Scheme of university, which was in vogue, till that time was admittedly abolished.

2(iii) **<u>Position in University as on 18.12.2000</u>:-**

2(iii)(a) ICAR, had circulated a Career Advancement Scheme for Scientists under: (i) ICAR and; (ii) SAUs & CAUs, vide letter dated 19.07.2000.

2(iii)(b) The University, which was even otherwise bound to adopt and implement the CAS, circulated by ICAR and also bound to abolish its own earlier prevalent, Personal Promotion Scheme (PPS), issued a formal Notification in this regard on 18.12.2000. In terms of this Notification, the Board of Management of the University in its 70th meeting held on 01.11.2000, approved the CAS, for the teachers of the university w.e.f. 01.01.1996, by substituting the existing Personal Promotion Scheme/CAS Scheme.

2(iii)(c) The CAS Scheme w.e.f. 01.01.1996, as circulated by the ICAR and as formally adopted by the university, had following as clause 6.4 :-

> "***6.4*** *Eligibility for career advancement of Associate Professor/equivale*nt *(directly as well as promoted) as Professor/equivalent.*
>
> *An Associate Professor/equivalent (directly recruitment as well as promoted) shall be eligible for promotion as Professor/equivalent in the scale of Rs. 16400/450-20900-500-22400, if he/she has:*
>
> (i) *Obtained a Ph. D. degree.*
>
> *(ii) Completed 8 years service as Associate Professor (directly recruited as well as promoted) provided that the requirement of 8 years service will be relaxed if the total service as Asstt. Prof./Asstt. Prof. Senior Scale/Asstt. Prof. Selection Grade/Assoc. Prof. Is not less than 17 years. Provided further that at least 5 years of service should have been rendered as Assoc. Prof. Equivalent in HPKV. ...."*

2(iii)(d) Thus, as per above Scheme, the eligibility for Career Advancement as Professor, *inter alia,* was : (i) Either 8 years of service as Associate Professor; (ii) or total 17 years of service, necessarily including 5 years of service, as Associate Professor.

2(iv) **<u>Clarification issued by ICAR on 19.04.2001</u>:**

2(iv)(a) Many ICAR Institutions sought clarification from ICAR, regarding CAS Scheme (2000) of ICAR. The ICAR issued clarifications vide its letter dated 19.04.2001, as under:-

" Many ICAR Instts. and SAUs have been seeking clarification on the applicability of the above point. The matter has been examined in the Council and it has been observed that UGC vide its letter number F.2-3/2000 (PS) dated 8th June, 2000 and letter number F.3-1/94 (PS-6) dated 5th October, 2000, has clarified that a Lecturer who is in Sr. Scale with a total of 9 years service (with Ph.D)/10 years service (with M. Phil)/11 years service will become eligible for Lecturer (Sel. Grade)/Reader (Promotion) without requiring the stipulated 5 years service as Lecturer (Sr. Scale) and 8 years service as Reader in the scale of 3700-5700 (revised Rs. 12000-18300) (with Ph. D) must remain the minimum eligibility for consideration of promotion from Reader to the post of Professor under CAS.

Keeping in view the above clarification issued UGC it is clarified that a Scientist (Sr. Scale)/Lecturer (Sr. Scale)/ Asstt. Professor (Sr. Scale) with 5 years of service in the senior scale or with a total of 9 years service (with Ph.D)/10 years service (with M.Phil)/11 years service would be eligible for promotion to the post of Sr. Scientists/Scientist (Sel. Grade)/Reader (promotion)/Associate Professor (promotion)/Lecturer (Sel. Grade). But for promotion to the post of Principal Scientist/Professor (promotion) 8 years service as Senior Scientist/Reader/Associate Professor with Ph.D in the revised pay scale of Rs. 12000-18300, must remain the minimum eligibility."

2(iv)(b) Thus, by way of above clarification, ICAR made condition of 8 years of service as Associate Professor in the pay-scale of Rs.3700-5700, mandatory for further promotion to the post of Professor.

2(iv)(c) Illustratively, Dr. Shyam Verma/ petitioner No.1, who having availed the benefit of the then CAS, had become Associate Professor in the scale of Rs. 3700-5700, on 11.11.1998, retrospectively w.e.f. 10.05.1996, would have become eligible for promotion as Professor on 10.05.2004, i.e. after completing 8 years of service as Associate Professor.

2(v) **Adoption of ICAR Clarification dated 19.04.2001 by University:**

2(v)(a) Since, the ICAR circulars/directions in respect of promotions/pay-scales, were binding on the university, therefore, it convened a meeting of its Board of Management for making necessary amendment in CAS Scheme of ICAR, adopted by it earlier vide Notification dated 18.12.2000.

2(v)(b) Accordingly, Item No.2, as placed before the Board in its 72nd Special Meeting held on 27.11.2001, read as follows:-

"To place before the Board of Management the matter regarding amendment in Career Advancement Scheme on the analogy of UHF, Solan and on the basis of guidelines received from the ICAR."

2(v)(c) The proposed amendment with which, we are presently concerned, was pursuant to ICAR clarification and not because of analogy of University of Horticulture and Forestry (UHF), Solan.

The Board of Management on 27.11.2001, approved the amendments, as proposed in following language:

"The Board of Management approved the amendments as proposed (as per annexure) in the existing CAS rules. However, the Board of Managment

desired that the language should be the same as used by the ICAR while adopting amending ICAR Rules/Instructions in the University, in future."

Thus, Board of Management on 27.11.2001, approved the agenda with rider that amendment will carry same language as was used by ICAR. The amendment being in respect to pay scale and promotion, even otherwise had to be approved only as per ICAR clarification dated 19.04.2001. There was no other option with either the Board or the University to take any different decision in this regard, at variance with ICAR Clarification.

2(v)(d) The approval was accorded by the Board to amend the existing CAS only in terms of language used by ICAR while making amendment in the ICAR, Rules/Instructions. Thus, the ICAR Clarifications, issued on 19.04.2001, were approved to be incorporated by way of amendment in the University, but without changing the language used by ICAR. In fact, need for amending the CAS was necessitated by the University only on account of the clarificatory letter issued by ICAR on 19.04.2001. The Annexure, which was placed before the Board (part of Annexure P-3), itself mentions at the top that the amendments have been proposed in CAS, in view of fresh ICAR guidelines and in view of UHF, Solan. In the present case, we are concerned with Clause 6.4(ii) of CAS and amendment thereof, which were necessitated not on account of UHF, Solan, but only on account of ICAR, clarification.

2(v)(e) Even though, the Board of Management of the University, was required to and had specifically approved the amendment proposals to be only in terms of the language used by ICAR, yet the amendment, which was eventually notified by the University, vide Annexure P-4 dated 18.12.2001, was at variance with ICAR clarification dated 19.04.2001 as well as in contradiction to Board's decision dated 27.11.2001. The amendment as notified by the University on 18.12.2001 is extracted hereinafter:-

"S.No. Name of Section/Clause Existing ProvisionAmended Provision as approved by the B.O.M.

....

6.4(ii) Completed 8 years service as Associate Prof.Completed 8 years as Associate (directly recruited as well as promoted) Professor (directly recruited as provided that the requirement of 8 years service well as promoted). will be relaxed if the total service as Asstt. Prof./Asstt. Prof. Senior Scale/Asstt. Prof. Selection Grade/Assoc. Prof. is not less than 17 years. Provided further that at least 5 years of service should have been rendered as Assoc. Prof. Equivalent in HPKV.

2(vi) <u>The difference between notified amendment with whatshould actually have been notified</u>:-

ICAR had clearly stipulated in its clarification dated 19.04.2001 that for promotion to the post of Professor, 8 years of service as Reader (in the present case Associate Professor) in the scale of Rs. 3700-5700 will remain the minimum eligibility criteria. As discussed earlier, this clarification was binding on the University. However, while issuing its formal letter of accepting the ICAR clarification, University deviated not only from ICAR circular, but also deviated from its Board's of Director's decision dated 27.11.2001. The only condition by way of amendment of clause 6.4 (ii) of CAS, incorporated by the University, was possession of 8 years of service as Associate Professor for promotion as Professor. Thus, the condition of Associate Professor to be in a particular pay scale (Rs.3700-5700) as stipulated by ICAR, was done away with by the University, while professing to be acting as per ICAR terms and conditions.

2(vii) **<u>Benefits: Unjust Enrichment of Petitioners</u>**:

2(vii)(a) Here, it is to be noticed that the petitioners by taking the benefit of the then existing Personal Promotion Scheme/Career Advancement Scheme, had already been promoted as Associate Professors in the pay scale of Rs. 3700-5700. We had earlier extracted example of Dr. Shyam Verma/ petitioner No.1, who was promoted on 11.11.1998, as Associate Professor, in the pay scale of Rs.3700-5700, retrospectively w.e.f. 10.05.1996 under the then CAS Scheme. He would have become eligible for promotion to the post of Professor w.e.f. 11.05.2004, after completion of 8 years of service as Associate Professor.

2(vii)(b) By issuing Notification dated 18.12.2001, the University had already illegally done away with the condition of mandatory pay scale (Rs. 3700-5700) to be possessed by an Associate Professor for his further promotion as Professor, by notifying the only required eligibility condition as service of 8 years as Associate Professor. The petitioners, at that time, were serving in the pay scale of Rs. 3700-5700, and were having the designation of Associate Professor. They had already availed the benefit of CAS Scheme and that's why they got retrospective promotion as Associate Professor in pay scale of Rs. 3700-5700. However, as per clarification of ICAR dated 19.04.2001, they had to wait for 8 years from their respective retrospective dates of promotion as Associate Professor for becoming Professors.

2(vii)(c) The University, having already committed one illegality in form of Notification dated 18.12.2001, came out with another strange Notification dated 17.01.2002 (Annexure P-5). Whereunder, surprisingly, an opportunity was given to those Assistant Professors/equivalent, who were appointed on or before 01.02.1988, to exercise a fresh option under Personal Promotion Scheme as on 01.02.1988. Noticeably, this Scheme (PPS) stood already abolished w.e.f. 03.03.1999.

2(vii)(d) The conjoint result of above two notifications dated 18.12.2001 & 17.01.2002, resulted in unjust enrichment of petitioners. The petitioners grabbed this opportunity given to them by the University and exercised their options for promotion under lapsed Personal Promotion Scheme. Resultantly, the petitioners got designated as Associate Professor from back dates, but on a reduced pay scale of Rs. 3000-5000. Petitioners, naturally would not have minded going on less scale, as their such retrospective promotions would have given them requisite 8 years of service as Associate Professor much earlier, which was required for promotion as Professor under the University Notification of 18.12.2001. Since, the designations of the petitioners were retrospectively, changed as Associate Professors by the University by giving them benefit of strange Notification dated 17.01.2002, therefore, the petitioners even though, were in the lesser pay scale of Rs. 3000-5000, but came to retrospectively designated as Associate Professors, and further because of illegal Notification dated 18.12.2001, wherein University had removed the condition of possession of pay scale of Rs. 3700-5700, required by an Associate Professor for further promotion as Professor, got their promotions as Professor. All the petitioners in this manner were promoted as Professors.

2(vii)(e) To again quote the example of Dr. Shyam Verma/ petitioner No.1; (i) He on 11.11.1998 got benefit of Personal Promotion Scheme and became Associate Professor in pay scale of Rs. 3700-5700, retrospectively from 10.05.1996; (ii) under the strange Notification dated 17.01.2002, he exercised option and went back as Associate Professor in the pay scale of Rs. 3000-5000 w.e.f. 01.06.1991; (iii) under the illegal Notification dated 18.12.2001, by showing that 8 years of service as Associate Professor was completed on 01.06.1999, he got promotion as Professor on 01.06.1999; (iv) Thus, as against CAS, he got promotion as Professor about 5 years earlier due to option of Personal Promotion Scheme; (v) Thus, in an utmost unjustifiable manner, petitioners first got benefit of CAS, thereafter of

abolished Personal Promotion Scheme and thereafter were again allowed to revert to Career Advancement Scheme. The only beneficiaries of these illegalities are the petitioners.

2(viii) **Corrections of mistake by University:**

2(viii)(a) The gross illegalities committed by the University were pointed out by the Audit of Accountant General, Himachal Pradesh. The Audit para is reproduced hereinafter:-

> **"ii)(a)** *That a minimum 8 years experience/service as associate professor/equivalent.*
>
> *Test check of pay fixation orders in establishments/section of CSKHPV, Palampur revealed that eleven Scientists as per details given in Annexure 'A' to this para were promoted to the post of professor/equivalents in the pay scale of Rs. 16,400-450-20,900-500-22400(pre revised Rs. 4,500-5700) from the post of assistant professor/associate professor/equivalents in the pay scale of Rs. 10,000-325-15,200 (pre revised Rs. 3,000-100-3,500-125-5000) instead of promoting them to the post of associate professor/equivalent in the pay scale of Rs. 12,000-420-18,300 (pre revised Rs. 3,700-125-4,700-150-5,700) which was the minimum eligibility criteria along with Ph. D. degree and 8 years experience/ service as associate professor/equivalents,which resulted in non-adherence of provision contained in career advancement scheme (CAS) and clarification issued by the ICAR from time to time and irregular payment of basic pay Rs. 29,22,120 which taking into account of Dearness pay and other allowances admissible from time to time.*
>
> *Under Personal Promotion Scheme (PPS) 1983, minimum eight years of service as associate professor/reader will be required for appointment/promotion to the post of professor.*
>
> *Indian Council of Agriculture Research, Krishi Bhawan, New Delhi vide letter No. 1/(8)/99-per IV dated 8th Feb. 2000, clarified that the merit promotion scheme of 1983 (in University PPS) which was terminated in 1987 for those who did not opt for it, existing in State University and Central Agriculture University, Imphal stands abolished with effect from the date of notification of revised pay scale of teachers in SAUs issued by the Council, i.e. 03.03.1999.*
>
> *The ICAR letter dated 05.10.2000, 19.04.2001 and 15.02.2006 stipulate that for promotion to post of professor, 8 years service as associate professor with Ph. D. Degree in the revised pay scale of Rs. 12,000-420-18,300 (pre-revised Rs. 3,700-5,700) must remain the minimum criteria/eligibility.*
>
> *Further test check of pay fixation order revealed that ten scientist were promoted to the post of professor/equivalents under personal promotion scheme (PPS)/Merit promotion scheme, 1983 which was terminated stands abolished with effect from the date of notification of revised pay scales of teachers in State Agriculture Universities issued by the Indian Council of Agriculture Research i.e. 03.03.1999 and the said scientist were promoted under PPS on or after 02.06.1999, i.e. after the termination of PPS; who were required to be promoted under Career Advancement Scheme (CAS) to the post*

of Associate Professor/Equivalents in the pay scale of Rs. 12000-420-18,300 (per-revised Rs. 3,700-5,700) and thereafter to the post of professor/equivalents keeping in view the minimum eligibility criteria of Ph.D degree and 8 years service/experience as an associate professor/equivalents. Which result in irregular promotion of the post of professor/equivalents and also resulted in irregular drawl of basic pay of Rs. 37,25,500 (without taking into account of Dearness pay and other allowances admissible from time to time). Approximately Rs. 66,7,620 as per detail given in Annexure 'A' to the para was paid excess basic pay to these professor promoted under CAS and PPS which was irregular and needs justification.

In reply to audit memo No. 42 dated 01.01.2010, the Assistant Registrar EI stated that the required information will be supplied after examining/compiling the same on receipt of the reply from the concerned HOD/Offices at earliest possible.

However, during discussion held on 08.01.2010 in the Chamber of Comptroller, CSKHPV Palampur, the Comptroller confirmed the facts and stated that the matter will be reviewed in the light of the instructions issued by the ICAR and action will be initiated accordingly.

The requisite information may be supplied to audit at earliest besides this review of all such cases whether in equipment/service of retired may be done under intimation to audit."

Audit pointed out that approximately Rs. 66,47,620/-, in form of irregular excess payment had already been made by that time to these Professors/Petitioners.

2(viii)(b) The mistakes committed by it, having dawned upon the University, it sought to rectify the same by issuing Notification dated 11.08.2010 in sync with ICAR, circulars/directions and by issuing office order dated 18.08.2010. In terms of this office order; the excess payments released as well as undue promotions to the post of Professors, given to the petitioners were sought to be withdrawn, were to be recovered/adjusted after re-fixing their pay scales/promotions etc. By way of the Notification dated 11.08.2010 and order dated 18.8.2010, everything was to be streamlined on the basis of ICAR guidelines.

2(ix) Feeling aggrieved against the Notification dated 11.08.2010 and office order dated 18.08.2010, the petitioners preferred the writ petition. The writ petition was allowed by learned Single Judge on 18.08.2011, primarily on grounds:-

(i) Board of Management of University had taken its own decision to deviate from ICAR guidelines of 19.04.2001. Therefore, ICAR guidelines of 19.04.2001 could not be applied by the University in 2010.

(ii) University does not accept ICAR guidelines straightway and takes its own decision for their adoption. Therefore, ICAR guidelines are not straightaway applicable to University.

(iii) Petitioners, based on the position as it existed in terms of Notifications dated 18.12.2001 & 17.04.2002, had exercised options and were granted benefits. Impugned order of 18.08.2010, allegedly correcting previous illegalities, visits petitioners by way of reduction in their pay scales and designations, therefore, needs to be quashed.

Against the judgment passed by the learned Single Judge, the instant appeal has been preferred by the University.

3. We have heard learned counsel for the parties and carefully gone through the record. While giving factual position of case in paras supra, we have discussed facts along with our observations. Succinctly put, following are points, which emerge for consideration in the instant case:-

(a) Whether the University is bound by the ICAR circulars/ directions, in respect of pay scales and the service conditions including the promotions to the post of Professor. Whether University was bound by ICAR clarification letter dated 19.04.2001.

(b) Whether Annexure P-3, dated 27.11.2001/ 18.12.2001, was validly issued by the University.

(c) Whether it was open for the University to have issued Notification dated 17.01.2002, giving option to the teachers under Personal Promotion Scheme, which had been abolished by ICAR, w.e.f. 03.03.1999.

(d) Whether it was open to University to issue Notification dated 11.08.2010, streamlining its position as per ICAR instructions and whether it was open for University to issue order dated 18.8.2010, withdrawing the benefits given to the petitioners under Notification dated 18.12.2001 & 17.01.2002 in form of their promotions as Professor and scale of Professor.

We propose to discuss hereinafter the above issues.

4. **Binding Nature of ICAR, Circulars:-**

4(i)(a) Letter dated 03.03.1999, issued by Government of India, Ministry of Agriculture, very clearly culls out the position that the pay scales of teachers in State Agriculture Universities, will be regulated by ICAR. Not only the pay scales, but the service conditions of teachers in SAUs, are required to be determined in terms of this letter, only by ICAR. Even the decisions taken by UGC, will not be applicable to SAUs, unless and until, the same are adopted by ICAR.

4(i)(b) Letter dated 16.4.1999, issued by ICAR, addressed to all the State Governments and SAUs, categorically states that Agriculture Education comes within the purview of Department of Agriculture Research and Education. ICAR, provides the Grants-in-Aid, in turn, provided by the Government of India for disbursement to SAUs. It is the ICAR, which in case of SAUs, plays the same role, as is played by UGC for the general universities. Therefore, the service conditions of teachers in SAUs, as well as their scales, will be determined only by ICAR.

4(i)(c) It is the admitted and pleaded case of the University that it is bound by ICAR circulars and that it has followed the directions issued in the aforesaid communications dated 03.03.1999 and 16.04.1999, by issuing its own formal Notifications in this regard on 03.06.1999 & 14.06.1999, respectively. On the face of these communications, it is not even open to the University to contend otherwise. It is the University's own case, in its reply that the directions issued by ICAR, are to be followed by the University. Various other aspects of the case, taken note of under other heads, also point out the position that the directions issued by ICAR, in respect of pay scales and service conditions of teachers, are binding on University. We answer the point accordingly.

4(ii) **Issuance of letter dated 19.4.2001 and its implementation by the University (Point No.2):-**

4(ii)(a) After abolishing Personal Promotion Scheme on 03.03.1999, ICAR had issued Career Advancement Scheme for Scientists of ICAR as well as for Teachers of SAUs, on 19.07.2000. This CAS issued by ICAR, since was binding on the University, it, therefore, accordingly issued a formal Notification in this regard vide Annexure P-2, dated 18.12.2000. The University while adopting the CAS, issued by ICAR, abolished its the then existing Personal Promotion Scheme.

4(ii)(b) The revised CAS Scheme, issued by the University vide Notification dated 18.12.2000, was in tune with the CAS, issued by ICAR. We are only examining the CAS, issued by ICAR and the University, in respect of the eligibility for Career Advancement of an Associate Professor/equivalent to the post of Professor as contained in Para 6.4 (ii) of the Scheme.

4(ii)(c) In terms of the Scheme circulated by ICAR and adopted by the University in 2000, the eligibility criteria for an Associate Professor for his promotion as Professor was either 8 years of service as Associate Professor or total service not less than 17 years with minimum 5 years of service as Associate Professor.

4(ii)(d) On the request of SAUs, the ICAR on 19.04.2001 issued a clarification regarding its CAS Scheme of 19.07.2000. In terms of this Clarification dated 19.04.2001, total service of 17 years with minimum 5 years as Associate Professor for promotion to the post of Professor was done away. It was clearly stipulated that minimum eligibility for promotion to the post of Professor will be 8 years of service as Associate Professor in the pay scale of Rs. 3700-5700.

4(ii)(e) The above was a clarification, which was issued by ICAR to 19.6.2000 CAS and since the University had already even formally adopted 19.6.2000 Scheme, therefore, it was bound to incorporate such clarification in its CAS, Scheme of 18.12.2000. We have already held that ICAR circulars in matters of pay scale and promotion conditions were binding on the University. University has also taken this very stand in its reply and rightly so.

4(ii)(f) The University in the instant case, accordingly went for issuing a formal adoption of clarification issued by ICAR by formally amending its 2000 CAS Scheme. The proposed amendment document in form of Annexure, was prepared by the University, proposing the amendment in clause 6.4 (ii), in view of the clarification issued by ICAR. Even though, the amendment exercise was undertaken by the University in view of the clarification issued by ICAR, yet, while proposing amendment to clause 6.4 (ii), in the Annexure, it deviated from the clarification issued by ICAR. In as much as, the proposed amendment of clause 6.4 (ii), though, incorporated 8 years of service required by Associate Professor for promotion as Professor, it, however, left out the pay scales of Rs. 3700-5700 required by Associate Professor for further promotion.

4(ii)(g) The Annexure as drafted above was placed before the Board of Management of the University for approval. It contained various other proposals, with which, we are not concerned in the present case. The Board of Management of University, approved the amendments as proposed. However, the Board of Management desired that language while adopting/amending the ICAR Rules/Circulars should be the same as used by ICAR. Thus, it cannot be said that the Board of Management while approving the amendments on 27.11.2001, had consciously taken a decision to deviate from ICAR Clarification. In fact, decision was to the effect that ICAR instructions had to be adopted in totality. So, in that

sense, no illegality/irregularity has been committed by the Board of Management, in approving Item No.2, on 27.11.2001, even though, the Annexure prepared for the approval of the Board, was in complete variance to the instructions/clarifications of ICAR. Even otherwise, it was not open for the Board to take a decision different from the one taken by ICAR in its letter dated 19.04.2001.

4(ii)(h) Though, the Board of Management of University, had directed the University Authorities to make amendments only in terms of ICAR language, yet it appears nobody in the University was willing to look into the language of the circular dated 19.4.2001 of the ICAR and to compare the same with its own Annexure placed before the Board, either before taking the matter to the Board or even after the Board's approval dated 27.11.2001. Resultantly, the Notification which finally came to be issued, vide Notification dated 18.12.2001, was nothing less but a blunder, where-under, the condition for promotion of an Associate Professor to the post of Professor, was reduced only to 8 years of service as Associate Professor. The required pay scale of Rs. 3700-5700, was not reflected at all against the eligibility condition. We, are, therefore, of the firm view that ICAR circular dated 19.04.2001 was binding on university, the Board of Management of University had also actually directed the Authorities to retain the language of ICAR while adopting the ICAR Rules, it was not even open to it to take a different decision in this case, yet, the Notification, which eventually came to be issued on 18.12.2001 was in complete contradiction to ICAR circular as well as Board's decision dated 21.11.2001. This was absolutely illegal. Actions taken under this illegal Notification of 18.12.2001, cannot be allowed to be sustained.

4(iii) **<u>Grant of Benefit to Petitioners under Lapsed Personal Promotion Scheme</u>**:

4(iii)(a) University by way of above referred; (a) Notification of 18.12.2001 had illegally altered and reduced the eligibility criteria for becoming a Professor, from 8 years of service as Associate Professor in pay scale of Rs. 3700-5700, to just 8 years of service as Associate Professor; (b) Petitioners had already been granted the benefit of CAS/PPS and stood promoted as Associate Professor on 11.11.1998, (example quoted of Dr. Shyam Verma/petitioner No.1) in pay scale of Rs. 3700-5700 retrospectively w.e.f. 10.05.1996. Petitioners at that time in 2001 didn't have complete 8 years of service as Associate Professor, to make them eligible for promotion as Professor, though had the requisite pay scale; (c) University in utter bizarre manner gave the petitioners an opportunity of exercising fresh option under Personal Promotion Scheme, which was abolished by ICAR w.e.f 3.3.1999. How and under circumstances, the teachers/petitioners who had already been granted the benefit of CAS Scheme were given the opportunity to exercise option under an abolished Scheme, defeats the logic. It only gave the petitioners a cause to be unjustly enriched.

4(iii)(b) The petitioners naturally grabbed this opportunity, which enabled them to go backwards and claim retrospective promotions as Associate Professor in pay scale of Rs. 3000-5000. The ICAR condition of possessing the pay scale (Rs. 3700-5700) by Associate Professor to become eligible for promotion to the post of Professor, had already been done away with, by the University by way of issuance of an illegal Notification dated 18.12.2001, whereafter taking advantage of Notification dated 17.1.2002, the petitioners exercised their option under lapsed PPS and were granted retrospective designation/promotions as Associate Professors in the scale of Rs.3000-5000/-. In this manner the petitioners satisfied the only required eligibility condition for promotion to the post of Professor, i.e. 8 years of service as Associate Professor.

4(iii)(c) We are of the considered view that Notification dated 17.1.2002, came to be issued only in connection with Notification dated 18.12.2001. On its own, 17.1.2002 Notification, would not have benefitted the petitioners. The condition of possession of pay scale of (Rs. 3700-5700) by Associate Professor for promotion as Professor had been illegally removed under 18.12.2001, Notification and, therefore, retrospective promotions by taking the advantage of option provided to them under an abolished Scheme under Notification dated 17.01.2002, entitled the petitioners to the promotions to the post of Professors. Petitioners were accordingly promoted as Professors. The action is absolutely, illegal. Benefits given under illegal Notification dated 18.12.2001, is required to be withdrawn. The errors in previous Notifications have been corrected by the University by issuing fresh Notification dated 11.08.2010, in line with ICAR directions/clarifications. No illegality can be found in impugned Notification dated 11.08.2010 and impugned order dated 18.08.2010, withdrawing such benefits, wrongfully given to the petitioners. The fact situation of this case read with applicable instructions leave no escape from concluding that the order dated 18.08.2010, withdrawing the benefits illegally granted to the petitioners, is justified.

5. Even though, the University was aware of 19.4.2001, circular, issued by ICAR as well as required adherence to the conditions imposed by ICAR, for promotion to the post of Professors, yet, it made no efforts on its own to prevent the departures being made by it in promoting the petitioners as Professors. It was only the audit of Accountant General of Himachal Pradesh, raised objections that huge excess payments have been made to the petitioners and wrong promotions have been effected that the University issued Annexure P-6, dated 18.08.2010, withdrawing the benefits given by it earlier.

6. We refrain ourselves from commenting upon the work and conduct of University/its officials in issuing (i) Notification dated 18.12.2001, contrary not only to binding ICAR Clarification dated 19.04.2001, but also contrary to the decision of its Board of Management as well; (ii) In issuing Notification dated 17.02.2002, genesis of which, was obviously based upon illegal Notification dated 18.12.2001, and gave options to petitioners, who had already availed benefit of CAS Scheme to avail benefit of lapsed PPS Scheme and thereafter again allowed them to come to CAS Scheme of 2000. University can neither be heard to contend nor this is an argument of University that ICAR Clarification dated 19.04.2001, was not to its knowledge. We leave it to the governing body of University to decide on the actions and measures, if any, required to be taken in the matter against the erring officials on such issues, it deems fit, in the fact and circumstances of the case.

7. With the above observations, this appeal is allowed. The judgment passed by learned Single Judge is set aside. Consequently, writ petition filed by the respondents/ original petitioners is dismissed.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Dila Ram ...Appellant

Versus

State of H.P. & others ...Respondents

LPA No. 414 of 2012

Reserved on:05.8.2019
Decided on: 20.08.2019

Constitution of India, 1950- Articles 14 & 226 – Selection and appointment as Vidya Upasak – Petitioner alleging selection and appointment of private respondent as Vidya Upasak as the result of fraud – Petitioner also sending complaints regarding fraud and tampering with record etc to police and administrative authorities but without any result – Filing Writ and challenging selection and appointment of private respondent - Writ filed by him dismissed by Hon'ble Single Bench on ground that private respondent had secured more marks than him - LPA – Held, result sheet showing overwritings and cuttings in marks secured by candidates – Initially petitioner was shown as first and private respondent figured at fourth place – Marks given under head 'Viva' were altered qua petitioner and private respondent – '8' marks initially given to petitioner for viva were changed to '4' and of private respondent increased from '4' to '9' as a result making her top the selection list – Cuttings and over writings not initialed by any officers / members of selection Committee – No cutting or overwriting against name of any other candidate affecting his total marks – Overwritings and cuttings not on account of wrong averaging of marks given under head 'Viva' as pleaded by respondents but a cover up to practical fraud committed by Selection Committee –Private respondent was appointed after giving undue advantage as a result of fraudulent selection process – Selection and appointment set aside – Show cause notices issued to Chairman (Presently Deputy Commissioner) and other members of Committee as why action be not taken against them. (Paras 4, 5 8 & 9)

Cases referred:
Khub Ram vs. Dalbir Singh and Others, (2015) 8 SCC 368
Meghmala and Others vs. G. Narasimha Reddy and Other, (2010) 8 SCC 383

For the appellant	:	Mr. Dilip Sharma Sr. Advocate with Mr. Manish Sharma, Advocate.
For the respondents	:	Mr. Vikas Rathore, Mr. Narender Guleria, Additional Advocate Generals with Mr. J.S. Guleria, Deputy Advocate General and Mr. Manoj Bagga, Asstt. Advocate General, for respondents No. 1 to 3 & 5 to 7. Mr. Karan Singh Parmar, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

Having failed in his attempt before the learned Single Judge, the writ petitioner is taking a second chance in the instant appeal, to contend that the appointment of respondent No.4, Ms. Meena Devi, as Vidya Upasak, is the result of fraudulent selection process and, therefore, is liable to be quashed and set aside.

2 **The facts may be narrated thus**:-

2(i)(a) A selection process was undertaken by the respondents for filling up one post of Vidya Upasak in Government Primary School, Naharan, Tehsil Karsog, District Mandi.

2(i)(b) Applications were invited for this post and interviews were fixed for 23.07.2002. 23 candidates appeared in the interview including the petitioner and respondent No.4, Ms. Meena Devi.

2(i)(c) Selection Committee consisted of Sub Divisional Magistrate, Karsog-cum-Chairman of the Selection Committee; (ii) Block Elementary Education Officer, Karsog-I, as Secretary of the Selection Committee; (iii) Officiating Central Head Teacher, as Member; (iv) Pradhan Gram Panchayat Tebban, as its Member: (v) Up Pradhan Gram Panchayat, Tebban, as Member of the Section Committee.

2(i)(d) In the selection criteria followed by the Selection Committee, 10 marks were allocated for *viva* of the candidates. The result of the selection process was declared on 23.07.2002, itself. Respondent No.4, Ms. Meena Devi was declared selected and was appointed as such.

2(i)(e). Subsequent to the implementation of Right to Information Act, the petitioner applied for the documents and the result sheet in respect to the selection process, so undertaken for filling up the post of Vidya Upasak. The documents were supplied to him vide Annexure P-6.

2(ii)(a) Noticing the over writings, cuttings in the marks, given to the candidates, in particular to the petitioner and respondent No.4, the petitioner submitted a representation dated 28.02.2009, to respondent No.6/Director General of Police, Himachal Pradesh, requesting for inquiring into the matter and for registration of criminal case against the concerned officials, because of whose alleged action in tampering with the marks secured by the candidates, respondent No.4, Ms. Meena Devi, was wrongly shown to have been selected and consequently appointed, causing wrongful loss and prejudice to the petitioner.

2(ii)(b) Petitioner followed the above representation with another one dated 29.06.2009, addressed to Principle Secretary Education as well as to District Primary Education Mandi, for cancelling the appointment of respondent No.4 and instead claimed his appointment in her place.

2(ii)(c) The representation/complaint of the petitioner was inquired into by respondent No.7, Superintendent of Police, Mandi and Report dated 18.08.2009, was submitted to respondent No.6, Director General of Police. The report was to the effect that; there have been over-writings in the marks allotted to the petitioner and respondent No.4; however, over-writings were necessitated because average of marks given by all the Members of the Selection Committee was incorrectly calculated and thus placed in viva-voce marks; the incorrectly calculated average, was corrected with the consent of all the Members of the Selection Committee; the overwriting is only on account of such correction of initially incorrectly calculated average; the overwriting was not to give any undue benefit to respondent No.4 or to cause wrongful loss to the petitioner.

2(ii)(d) The petitioner unsatisfied with Inquiring Report, submitted separate representations to Principle Secretary (Vigilance), Director General of Police, Principle Secretary Education on 28.01.2010, praying that fraud committed upon him is apparent from the perusal of the result sheet and in such circumstances, selection and appointment of respondent No.4, Ms. Meena Devi, deserves to be cancelled and he deserves to be given the appointment as Vidya Upasak.

Judgment in Writ Petition:

3. Having failed before the Administrative Officers, the petitioner approached this Court by filing the writ petition. His writ petition was dismissed by the learned Single Judge on 26.06.2012, with following observations:-

> *"The petitioner who had applied for the post of Vidya Upasak in the Govt. Primar School-Naharan, village Tebban, Tehsil Karsog, District Mandi. He also appeared in the interview held on 23.07.2002 along with other persons. The name of the petitioner appears at Sr. No.11, in the interview Performa and he had been firstly given the marks as 45.3, as it appears, then it is mentioned 46.3 and the learned counsel for the petitioner submits that he had been granted marks as 48.3 in the record. This is not borne out from the record which shows that the final marks awarded were 46.3, in favour of the petitioner then even if the petitioner is held to be granted the marks 48.3. Respondent No.4, whose name figured at Sr. No.12 had got 48.8 marks and was mentioned first and there is no cutting in the marks awarded to her at any place. Even if, the submission of learned counsel for the petitioner are accepted, the petitioner had secured less marks than Meena Devi, respondent No.4 and as such, the petitioner was not entitled to be appointed as Vidya Upasak. An enquiry was also held by the police in this regard and nothing substantial has come up in favour of the petitioner. In regard of the plea that petitioner was not associated with the enquiry or the rules of natural justice were not followed. Enquiry was sought to be made by the police rather the complainant should have approached to Director of Elementary, Education and the police had made an Enquiry and it was not necessary that the petitioner should have been associated at the time of Enquiry. Since, the petitioner was at number 2 and there was only one post against which respondent No.4, has been appointed and she has been regularized also as submitted by counsel for respondent No.4, there is no merit in the petition by the petitioner which is dismissed accordingly and the petition is disposed of accordingly, so also the pending application(s) if any."*

4(i) We have heard learned counsel for the parties and also gone through the original record of selection process.

4(ii) **<u>The record of Selection Process</u>:**

The record of selection process, in particular, the result sheet prepared by the Selection Committee reveals that:-

4(ii)(a) Glaring over-writings and cuttings have been made in the marks of petitioner Dila Ram and respondent No.4, Ms. Meena Devi, under the headings *viva* and resultant heading *total marks*.

4(ii)(b) So much so, a bare perusal of marks allotted under '*viva*' to two candidates in question, makes it evident that:- petitioner initially scored:

(viva) **(total)**

22.3+ 10+10+**8** = **50.3**

and accordingly was shown as '**First**'.

Respondent No.4, Ms. Meena Devi, was having:

(viva) **(total)**

19.8+ 10+10+**4**= **43.8**.

Sr. No.15 in the result sheet Sh. Het Ram at **45.5** marks, was shown as **Second** and Sr. No.19, one Neelama Devi with **44** marks, was shown as **Third**.

4(ii)(c) A careful perusal of the result sheet again, makes it apparent that to give undue benefit to respondent No.4, Ms. Meena Devi, her marks have been altered; originally allotted **4** marks to her under *viva*, have been converted to **9**, by overwritings and resultantly her initial total marks of **43.8** was changed to **48.8** and she by overwritings has been shown as **First** in the merit list.

4(ii)(d) Similarly, in case of petitioner Dila Ram, **8** marks initially allotted to him under *viva*, by way of overwritings and cuttings have been changed to **4**, to reduce the original total from **50.3** to **46.3**. In fact, it appears that initially attempts were made to change the petitioner's marks to **45.3** and also to **48.3**. With **46.3** marks, the petitioner by way of cutting is shown at second position in the merit list. Sr. No. 14, Het Ram, earlier standing in second position with **45.5** marks, as a result of overwriting, has been shown to have secured third place in the merit list.

4(iii) The over-writings are glaring and apparent to the naked eyes. The injustice caused to the writ petitioner is writ large. One cannot turn a blind eye to the overwritings and cuttings in the marks secured by the candidates. The defence that these overwritings and cuttings were necessitated because of the average of marks given by the Members of the Selection Committee having been incorrectly calculated under the head *viva*, is not satisfactory. The Selection Committee consisted of a Sub Divisional officer as its Chairman and also Block Elementary Education Officer as its Secretary besides Officiating Central Head Teacher and Pradhan as well as Up Pradhan, Tebban, as its Members. Had it been a case of incorrectly calculated average originally figuring in the *viva* marks of the candidates, the least which, was expected from the Selection Committee, was to put initials on the corrections so made. No initials of any of the Members of the Selection Committee including its Chairman are there on the overwritings and cuttings so made in the result sheet. A glance on the result sheet leads to the only conclusion that theory of correction of wrong average of *viva* marks given by Members of Selection Committee, leading to overwriting in the marks, has been put forward only to cover up the practical fraud committed by the Selection Committee in the result sheet, after the same was brought to light by the petitioner after getting the documents under Right to Information Act. Even otherwise, if any corrections were required in the score card of the candidates, one may expect to see clear-cutting and not cuttings, tamperings and over-writings in the marks again and again and without initials. The result also reflects that primarily, it is only against the name of the petitioner and respondent No.4, Ms. Meena Devi that these tamperings and over-writings have been made in their *viva-voce* and total marks, affecting the entire scenario of the final results of the selection process. There is no cutting in fact against the name of any other candidate, which affects his total marks.

5. It is, thus, clear that respondent No.4, Ms. Meena Devi, was appointed as Gram Vidya Upasak by giving her undue advantage, rather, as a result of fraudulent selection process, on account of Selection Committee having made material alterations, over-writings and tampering with the marks originally allotted to the candidates. Such an appointment, genesis of which is fraudulent selection process, cannot be sustained. We have been informed that respondent No.4, Ms. Meena Devi, having been appointed in 2002, now stands regularized in service. However, such regularization cannot make her initial void and invalid appointment as valid.

6(i) It is apt to quote Hon'ble Apex Court in ***Civil Appeal No. 3925 of 2019***, titled as ***Punjab Urban Planning and Development Authority & Anr. vs. Karamjit Singh,*** as under:-

> ***"3.3***.......*Since the appointment of the Respondent on regular basis was void on account of having been fraudulently obtained by collusion, the Respondent was not entitled to the protection under the provisions of the Industrial Disputes Act, 1947."*
>
> *"**5.2** The Respondent had sought to have his name included in the final list recommended for regularization by colluding with certain officials of the Appellant Authority, who had interpolated his name in the final list forwarded to the Authority."*
>
> ***"6.*** *In the present case, the Single Judge had held that "rightly or wrongly", the Respondent had obtained regularization, and was therefore entitled to a disciplinary enquiry. The Division bench affirmed the judgment of the Single Judge.*
>
> ***6.1*** *the High Court however failed to appreciate that the decision in Managing Direcotr, ECIL Hyderabad (supra)is applicable to "employees" of Government Departments. Since, the very appointment of the Respondent on regular basis was illegal, he could not be treated as an "employee" of the Appellant-Authority.*
>
> *In Rupa Rani Rakshit & Ors. vs. Jharkhand Gramin Bank & Ors., this Court held that service rendered in pursuance of an illegal appointment or promotion cannot be equated to service rendered in pursuance of a valid and lawful appointment or promotion.*
>
> ***6.2*** *The illegality of such an appointment goes to the root of the Respondent's absorption as a regular employee. The Respondent could not be considered to be an "employee", and would not be entitled to any benefits under the Regulations applicable to employees of the Appellant-Authority.*
>
> *Therefore, the High Court erroneously placed reliance on the decision in Managing Director, ECIL, Hyderaband (supra), which would not be applicable to the facts of the present case.*
>
> ***7.*** *The question of holding disciplinary proceedings as envisaged under Article 311 of the Constitution, or under any other disciplinary rules did not arise in the present case since the Respondent was admittedly not an "employee" of the Appellant-Authority, and did not hold a civil post under the State Government. He was merely a daily wager on the muster rolls of the Appellant-Authority.*
>
> ***8.*** *It is abundantly clear from the facts of the case, and the material on record that the regularization of the services of the Respondent was illegal and invalid. The Respondent was provided a full opportunity to adduce evidence to establish that he had 3 years' continuous service prior to 22.01.2001. However, he failed to furnish any proof whatsoever to substantiate his claim.*
>
> ***9.*** *In light of the aforesaid discussion, the present Civil Appeal is allowed and the Order dated 09.07.2018, passed by the Division Bench of the Punjab & Haryana High court is set aside.*
>
> *The appointment of the Respondent on regular basis was invalid since the Respondent did not have the pre-requisite experience of 3 years' continuous service prior to 22.01.2001.*

The Respondent had sought to secure regularization on the basis of interpolation in the final list of employees recommended for regularization. Such an appointment would be illegal and void ab initio, and cannot be sustained.

The Appellant-Authority rightly terminated the Respondent vide order dated 22.05.2003..."

6(ii) ***Hon'ble Apex Court*** **in** ***(2010) 8 SCC, 383,*** *titled as* ***Meghmala and Others*** *v.***G. Narasimha Reddy and Other, held as under:-**

"28.Fraud/Misrepresentation: -

It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal." (Vide S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath). In Lazarus Estate Ltd. Vs. Besalay, the Court observed without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything."

29. *In A.P State Financial Corpn. Vs. GAR Re-Rolling Mills and State of Maharashtra Vs. Prabhu, this Court observed that a writ Court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courtsare obliged to do justice by promotion of good faith."Equity is, also, known to prevent the law from the crafty evasions and subleties invented to evade law."*

30. *In Shrisht Dhawan Vs. Shaw Bros., it has been held as under:-*

"20 Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."

31. *In United India Insurance Co. Ltd. Vs. Rajendra Singh, this Court observed that "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.*

32. *The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See District Collector & Chairman, Vizianagaram Social Welfare Residential School Society Vs. M. Tripura Sundari Devi, Union of India Vs. M. Bhaskaran, Kendriya Vidyalaya Sangathan Vs. Girdharilal Yadav,* State of Maharashtra v. Ravi Prakash Babulalsing Parmar, *Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company and Mohammed Ibrahim & Ors. Vs. State of Bihar.*

33. *Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. (Vide Dr. Vimla (Dr.) Vs. Delhi, Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd., State of A.P. Vs.*

T. Suryachandra Rao, K.D. Sharma Vs. SAIL and Central Bank of India Vs. Madhulika Guruprasad Dahir.

***34**. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide S.P. Changalvaraya Naidu Gowrishankar . Vs. Joshi Amba Shankar Family Trust, Ram Chandra Singh Vs. Savitri Devi, Roshan Deen Vs. Preeti Lal, Ram Preeti Yadav Vs. U.P. Board of High School & Intermediate Education and Ashok Leyland Ltd. Vs. State of T.N).*

***35.** In kinch Vs. Walcott (1929) AC 482, it has been held that "....mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained y perjury."*

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

***36.**From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est."*

6(iii) ***Hon'ble Apex Court* in *(2015) 8 SCC, 368,*** *titled as* ***Khub Ram*** *v.* ***Dalbir Singh and Others*, held as under:-**

***"10.** We have carefully looked into the averments made in the writ petition, the reply filed by State and other respondents as well as the judgment of the learned Single Judge as well as the Division Bench. We find no good reason to take a different view in respect of the finding that the appellant lacked the essential qualification of experience because his experience certificates were only from private bus operators. It is also found that even the alleged corrected certificate said to be dated 06.06.1989 contained in Annexure P-2 is an unreliable document inasmuch as the date 06.06.1989 is clearly a subsequent correction without any authorization by way of counter signature and so is the case with the words and letters 'June 1987' which have been altered subsequently by converting '1986' to '1987'. Even after such unauthorized corrections the total experience as per last line of the certificate remains two years. Had the Bus Service concerned issued a fresh corrected certificate then the experience from June 1987 to June 1988 could not have been certified to be experience for two years. The list of dates also has been subsequently corrected to show the date of experience certificate, Annexure P-2 as 06.06.1989 in place of 05.06.1989. This appears to have been done at the instance of the appellant to justify his stand and apparently a bogus claim that*

he had obtained a correct certificate on the very next date *when he found mistakes in the certificates dated 05.06.1989. Had this been the case, there was no occasion for submission of the certificate dated 05.06.1989 with his application which issue has been discussed in detail by the learned Single Judge.*

11. *Had the appellant not committed such acts for obtaining selection and appointment, we could have considered the issue of delay as well as judgments supporting such a claim. However, Mr. Patwalia has rightly submitted that delay in impleading the appellant could not weigh with this Court when a case of fraudulent entry into service has been found by the learned Single Judge as well as Division Bench and an attempt has been made by the appellant even to mislead this Court by producing Annexure P-2 and claiming it to be copy of the corrected certificate freshly issued on 06.06.1989. Such conduct of the appellant in our considered view disentitles the appellant – Khub Ram to get any relief under Article 136 of the Constitution of India.*

12. *Mr. Patwalia has rightly placed reliance to support the aforesaid submissions, on a judgment of this Court in the case of* Meghmala v. G. Narasimha Reddy. *The law relating to effect of fraud upon a competent authority to get an appointment/office as well as effect of fraud upon court has been discussed in detail in paragraphs 28 to 36 of the said judgment with which we are in respectful agreement. As a result, we hold that the appellant – Khub Ram is not entitled to hold the office which he obtained by submitting questionable certificates of experience and more so when he lacked the essential qualification of working experience in a Government/Semi-government/Public Sector Undertaking. Hence his appeal is dismissed."*

7. Therefore, the judgment dated 26.06.2012, passed by learned Single Judge, is set aside. Appointment of respondent No.4, Ms. Meena Devi, is quashed and set aside. Respondents are at liberty to initiate fresh selection process for the post in question, in accordance with law.

8. Before parting, we shall be failing in our duty if we do not take into consideration the overall facts, conduct and behaviour of the Chairman and Members of the Selection Committee comprising Shri Gopal Chand, the then Sub Divisional Magistrate, Karsog (Chaiman), presently Deputy Commissioner, Kinnaur at Recong Peo, District Kinnaur, H.P., Smt. Bhuvneshwari Gupta w/o Shri Tara Chand Gupta, the then B.E.E.O Karsog-I (Secretary), resident of village and Post Office Pangna, Tehsil Karsog, District Mandi, Himachal Pradesh, Shri Kirat Ram s/o Shri Mangal Ram, the then officiating CHT, Government Primary School, Paloh, Education Block, Karsog-I (Member), r/o Village Porla, Post Office Tebban, Tehsil Karsog, District Mandi, Shri Ganga Ram, the then Pradhan, Gram Panchayat Tebban (Member), r/o Village Keulidhar, P.O. Tebban, Tehsil Karsog,District Mandi, Himachal Pradesh and Shri Tulsi Ram, the then Up-Pradhan, Gram Panchayat, Tebban (Member), r/o village Porla, P.O. Tebban, Tehsil Karsog, District Mandi, Himachal Pradesh.

9. The Chairman of the Committee and also other Members, *prima facie*, were not fair in conducting the interviews of the candidates and in awarding marks to them. It is

writ large on the face of the evaluation chart/the marks list produced in original before us that the marks originally awarded had been tampered with by way of interpolation, overwriting and cuttings made and thereby changed the result to the reasons best known to them. The Chairman and Members of the Committee have, therefore, rendered themselves liable to be dealt with in accordance with law. However, before that we would like to have their version(s) in the matter. Therefore, issue show cause notice to each of them for **16.09.2019**.

The copy of evaluation chart/marks list, duly authenticated by the Deputy Registrar (Judicial) on perusal of the original lying in sealed cover be also supplied to them along with the show cause notices. The record be re-sealed by the Deputy Registrar (Judicial) himself and retained for our perusal at the time of further consideration of this matter after filing of responses by the then Chairman and Members of the Selection Committee to the show cause notices issued against them pursuant to this order.

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

Saroj Kumari .....Petitioner.
Vs.
Gayatri Devi .....Respondent.

CMPMO No.: 82 of 2018
Date of Decision: 21.08.2019

Code of Civil Procedure, 1908- Order XXI Rule 35– Possession pursuant to final decree– Objections to delivery of possession– Forum of filing- Civil court passing final decree of partition of immovable property on basis of report of Naib Tehsildar and making said report as part of decree– Parties approaching 'Revenue Authorities' for putting them in possession of allotted portions– Feeling dissatisfied with report of field Kanungo, petitioner filing objections to his report before 'Civil court' which dismissed such objections on merit- Petition against– Held, petitioner should have approached Civil court for execution of decree if it was not being executed in accordance with final decree– Similarly Civil court had no jurisdiction whatsoever to entertain and adjudicate so called objections to the report of field Kanungo on merits which he had submitted before Revenue Authorities– Petition allowed– Order of Civil court deciding such objections on merits rather than on maintainability set aside. (Paras 6 & 7)

For the petitioner: Mr. Subhash Sharma, Advocate.
For the respondent: Mr. N.K. Thakur, Senior Advocate, with M/s Karan Veer & Nitish Negi, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner/Decree Holder has challenged order, dated 09.10.2017, passed by the Court of learned Civil Judge (Junior Division), Court No. II, Palampur, H.P. on the Objections which were filed before the said Court to the report of a

Field Kanungo, dated 19.04.2017, which objections learned Court below rejected by way of the impugned order.

2. Brief facts necessary for the adjudication of present petition are that the petitionerherein filed a suit for partition and rendition of accounts against the respondent-defendant, in which, a preliminary decree was passed in favour of the plaintiff and against the defendant in the following terms:

> *"14. In view of my findings on aforesaid issues, the suit of the plaintiff is partly decreed whereby preliminary decree of partition is passed in favour of plaintiff and against defendant qua suit property comprised in Khewat No. 63, Khatonies No. 140 to 144, Khasra Nos. 512, 513, 514, 521, 523, 525, 519, 520, 522, 526, 524, land measuring 304-91 Square meters, situated in Mouja Palampur, Tehsil Palampur, District Kangra (H.P.) wherein three storey house is situated as shown in site plan Ex.P3 owned by plaintiff and defendant in equal share. The rest of the suit is dismissed. There is no order as to costs. Decree be prepared accordingly. The file after its completion be consigned to record room."*

3. In terms of the preliminary decree, Naib Tehsildar, Palampur undertook the process of partition between the parties, as is reflected in Annexure P-2 appended with the petition. Two lots were proposed by the Local Commissioner for effecting partition, which were termed as Lot 'A' and Lot 'B' and in addition to said two lots, it was further mentioned in the said report that apart from above, path comprised in Khasra Nos. 512, 513, 514, Kita 3, measuring 40-58 square metres was kept joint so that the same could be used jointly and severally by both the owners. Report further demonstrates that Lot 'A' was partitioned in favour of the petitioner, i.e., Decree Holder, whereas Lot 'B' was partitioned in favour of the respondent/Judgment Debtor. The area of Lot 'A' was mentioned therein as 131-43 square metres and that of Lot 'B' was mentioned as 132-90 square metres. Path which was reflected in the joint ownership of both in equal shares, was mentioned as 40-58 square metres.

4. In terms of the said report, learned Court below passed a final decree of partition of the suit land in favour of the Decree Holder and against the Judgment Debtor, wherein it was directed that the property was liable to be partitioned as per the mode of Local Commissioner, Naib Tehsildar, Palampur, dated 29.10.2004, which shall form part of the decree. Thereafter, when the Revenue Authorities were approached by the parties for the purpose of putting them in possession of the respective land in terms of the partition mode, the petitioner was not satisfied with the report which was prepared by the Field Kanungo in the said process on 19.04.2017.

5. Feeling aggrieved, the petitioner filed Objections against the report of Field Kanungo in the Court of learned Civil Judge (Junior Division), Court No. II, Palampur, H.P., which, as I have already mentioned above, have been decided against the petitioner by the said Court vide impugned order.

6. Having heard learned counsel for the parties and after going through the impugned order as well as the documents appended with the petition, this Court is of the view that the Objections which stood filed by the petitioner against the report of Field Kanungo before the learned Court below, which stand adjudicated upon vide impugned order, dated 09.10.2017, were not maintainable before the learned Court below. A perusal of said objections which are on record as Annexure P-7 demonstrates that nothing is mentioned therein as to under which particular provision of law these objections were filed by the petitioner against the report of Field Kanungo before the learned Court below. The

objections were not supported by any affidavit of the Objector. Even otherwise, in my considered view, if the grievance of the petitioner was that the decree passed in her favour by the competent Court of law was not being executed in terms thereof, then she ought to have approached the learned Executing Court under the provisions of the Code of Civil Procedure, but obviously not by filing objections to the report of Field Kanungo. While adjudicating upon the said objections, learned Civil Court also erred in not appreciating that it was not having any jurisdiction either to entertain any such objections which were filed before it by the petitioner or pass any order on the same.

7. A Court in the process of adjudication is bound by the procedure, which has to be adopted by it for the purpose of deciding a lis. As already mentioned above, there is a procedure prescribed under the Code of Civil Procedure as to how a decree has to be executed. Decrees cannot be executed by filing vague applications/objections before the Courts below with the presumption that the same shall be treated as Execution Petitions by the Court concerned.

8. One more important aspect of the matter which this Court wants to highlight is that it has been observed that it is a practice rampant before the Courts below that pleadings are being filed on behalf of the parties without the contents thereof being supported with an affidavit by the party concerned. This Court is not oblivious to the fact that a formal application can be filed on behalf of the party by the counsel of the party, but this practice cannot be extended to applications which cannot be termed as formal and which are based on the knowledge of the party. In other words, whenever any application/ reply/ objections/petition etc. is filed by the party before the Court concerned, then obviously its contents have to be verified and supported on an affidavit of the party concerned and in the absence of any such affidavit accompanying any such petition/application/objections/reply etc., the Courts below should not even take such kind of pleadings on record.

9. Coming back to the facts of this case, as this Court is of the view that the objections which were filed by the petitioner before the learned Court below, which have resulted in the passing of impugned order, were not maintainable before the learned Court below, this petition is disposed of by setting aside order, dated 09.10.2017, passed by the Court of learned Civil Judge (Junior Division), Court No II, Palampur, H.P. on the said objections, not on merit but on the issue of maintainability, but with liberty to the petitioner to have the judgment and decree passed in her favour by the learned Court below executed in accordance with law. Miscellaneous applications, if any, also stand disposed of.

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

Lakhbir Singh ….Petitioner.
Versus
State of Himachal Pradesh ….Respondent.

Cr.MMO No. 285 of 2019
Decided on: 6.8.2019

Code of Criminal Procedure, 1973– Section 235(2) 353 & 354– Conclusion of sessions trial- Stage- Held, sessions trial comes to an end only after sentence is awarded to the convict– Judgment in criminal case is not complete unless punishment to which he is

sentenced is set out therein– There are two stages in trial before Sessions court i.e., stage up to recording a conviction and the stage post conviction up to imposition of sentence– Judgment becomes complete only after both these stages are covered. (Para 11)

Code of Criminal Procedure, 1973 – Section 363 – Supply of copy of judgment to accused – Stage – Held, judgment in criminal trial is complete only after determination of sentence which is to be imposed upon accused- He is entitled for a copy of judgment only after quantum of sentence is determined by court and not at time of announcing of conviction order. (Para 13)

Cases referred:

Lakdey Ashok vs. Government of A.P., (2009) 6 AnLT 67
Rama Narang vs. Ramesh Narang and others, (1995) 2 SCC 513
Yakub Abdul Razak Memon vs. State of Maharashtra, (2013) 13 SCC 1

For the petitioner. Mr. Kul Bhushan Khajuria, Advocate.
For the respondent. Mr. R.P. Singh, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.*(Oral)*

Present petition has been preferred under Section 482 Cr.P.C. against the two orders dated 17.5.2019, passed by learned Special Judge, Chamba rejecting Cr. M.A. Nos. 465 and 466 of 2019, which were filed by petitioner respectively under Sections 91 and 311 of the Code of Criminal Procedure (in short 'Cr.P.C.') during pendency of trial.

2. I have heard Mr. Kul Bhushan Khajuria, learned counsel for the petitioner and Mr. R.P. Singh learned Deputy Advocate General for the respondent and have also gone through the record of the Trial Court which was summoned during the pendency of the present case.

3. It is undisputed that after closing defence evidence on 7.5.2019, petitioner had preferred an application Cr.MA No. 465 of 2019 under Section 311 Cr.P.C. on 15.5.2019 for re-examining DW Regional Manager and production of CCTV footage and earlier, in April 2018, when petitioner was in judicial custody as under trial prisoner, he had preferred an application, later on numbered as CrMA No. 466 of 2019, through Jail Superintendent for production of CCTV footage and both these applications were taken up together by Special Judge on 15.5.2019 and were listed for replies on 16.5.2019 on which date after filing reply, these applications were listed for arguments on the same day at 2:30 p.m. and after hearing arguments, these applications were listed for orders on 17.5.2019 and on that day after passing of the impugned orders, the main case was also taken up for hearing and thereafter it was listed on 20.5.2019 for passing final orders. On that day i.e. 20.5.2019, an application Cr.MA No. 487 of 2019 was filed on behalf of petitioner-accused for seeking time to file revision against orders dated 17.5.2019 whereby applications preferred by petitioner were dismissed. The said application Cr.MA No. 487 of 2019 was dismissed by learned Special Judge on the same day on 20.5.2019 and thereafter vide even dated separate judgment passed by learned Special Judge, petitioner has been convicted under Sections 20 and 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and thereafter case was adjourned for 1.6.2019 for hearing the petitioner-accused on quantum of sentence.

4. After passing of the orders dated 17.5.2019 in the applications, petitioner had applied for certified copy of the impugned orders by submitting CDI Form which was allowed by learned Special Judge on the same day i.e. 17.5.2019 but it was diarized by the Copying Agency on 20.5.2019 as 18th and 19th May, 2019 were holidays. Copy was completed, attested and supplied on the same day i.e. 20.5.2019. On the very same day conviction of petitioner was also pronounced by Learned Special Judge. Present petition, on behalf of the petitioner, was filed on 25.5.2019 after passing of the order of conviction against the petitioner but before hearing him on the quantum of sentence, wherein vide order dated 27.5.2019, on prayer of petitioner, further proceedings fixed on 1.6.2019 for awarding sentence were stayed.

5. It is grievance of the petitioner that application Cr.MA No. 466 of 2019, under Section 91 of the Cr.P.C., was preferred by him in April, 2018 but the same was never taken up for hearing before May, 2019 and even it was entered in the computer and numbered in the year 2019 only, whereas this application, as it was preferred by under-trial prisoner from the Jail, should have been taken up on priority basis by the Court and further that after passing the impugned order dated 17.5.2019 whereby the applications have been rejected, learned Special Judge should have adjourned the case for reasonable period so as to enable the petitioner to exercise his right to file the revision against the said orders, as according to him, impugned orders passed by learned Special Judge are revisable. It is contended that learned Special Judge had not granted the time despite filing a separate application Cr.MA No. 487 of 2019 on 20.5.2019 with specific prayer for seeking time to file the revision petition before the High Court against the orders dated 17.5.2019 passed in the applications preferred by him, but after rejecting the said applications, had announced conviction orders in case on the very same day.

6. It is canvassed by learned counsel for the petitioner that everyone has a right of a fair trial and therefore after passing of the order rejecting the prayer of an accused, the Trial Court should give reasonable time to him to avail remedy to assail the rejection order and particularly, in present case, when an application was preferred in April, 2018 and was not taken up for hearing for about one year and not only this the said application was not even registered by the officials of the Court, was never listed in the Court, learned Special Judge should have given reasonable time to the petitioner and further that observations of the learned Special Judge that applications have been filed only for delaying the trial is also factually incorrect as the application i.e. Cr.MA No.466 of 2019 was preferred in April, 2018 and at that time the accused was behind the bar and was not going to be benefited in any manner by delaying the trial. It is also canvassed that another application bearing Cr.MA No. 465 of 2019, filed under Section 311 of Cr.P.C., was also preferred by exercising the right available to the accused to file the same at any time and the petitioner/accused was having every right to take any such step for protecting his personal liberty and therefore, in this application also, observations of the Trial Court are not sustainable.

7. It is also argued that on 17.5.2018 no arguments had taken place but learned Special Judge had wrongly observed that arguments in main case were heard. According to him, deliberate delay was caused in supplying the copy of the impugned orders dated 17.5.2019 so as to depriving the petitioner from approaching the High Court against the said orders. Learned Counsel for the petitioner has also raised the issue with respect to non-supply of copy of the judgment/order of conviction to the petitioner on 20.5.2019 and further that the same was not uploaded on the official website of the Court even till 27.5.2019 which has caused grave prejudice to the petitioner and further that such act on the part of learned Special judge was contrary to the settled principle of law, as he was duty bound to provide the copy of conviction judgment/order, immediately after pronouncement

thereof, to the accused, free of cost, and was also under obligation to upload it on the official website of the Court.

8. Finally it is contended that impugned orders are illegal and unreasonable and that by rejecting the applications, learned Special judge has curtailed valuable right of petitioner/accused which has affected the valuable right of personal liberty adversely.

9. On the contrary, learned Deputy Advocate General has submitted that it is a matter of fact that final order of conviction has been pronounced by the Trial Court on 20.5.2019 and thereafter adjudication of present petition assailing the impugned orders dated 17.5.2019 passed in applications would be a futile exercise, as now trial stands concluded except hearing the petitioner/accused on quantum of sentence to be imposed upon him. Further that right to fair trial to the accused is an undisputed and settled principle in criminal jurisprudence but the same does not mean that after passing of any order in every application, preferred during the trial, the Trial Court is obliged to adjourn the case so as to grant time to the aggrieved party to assail the said order in the Higher Court, particularly when the case is at final stage i.e. stage of addressing the arguments/pronouncement of final order. It is also submitted that though there is an allegation that arguments were never heard by learned Special Judge and delay in supplying the copy of impugned orders was caused to debar the petitioner from exercising his right to assail the order, however, there is no allegations of personal mala fide in the petition against the learned Special Judge or any other person nor the said Judge or any such other person has been made party in present petition and therefore issue with regard to such allegations, which are personal in nature, cannot be permitted to be raised in this petition. It is also submitted by learned Deputy Advocate General that in the order dated 17.5.2019 it is recorded that arguments were heard and presumption of truth is attached to the record unless rebutted by placing reliable and trustworthy material on record and no such material has been placed on record nor has been demonstrated from the record of the Trial Court. It is further contended that though, application Cr.MA No. 466 of 2019 under Section 91 Cr.P.C. was preferred in April, 2018 when petitioner/accused was in Jail but it is also a matter of fact that in February, 2019 petitioner was released on bail and neither after April, 2018 nor even after February, 2019, petitioner or his counsel had ever pointed out during the hearings of the case about non-listing or non-consideration of the said application. Further that now after pronouncing of the judgment of conviction, petitioner has only remedy to assail the said judgment, after determination of quantum of sentence, by filing an appeal and to raise all issues and contentions in the said appeal including grievance against rejection of applications filed under Sections 91 and 311 of Cr.P.C.

10. On the first date of hearing, considering the plea of the petitioner with respect to non-supply of copy of judgment and delay in uploading the judgment on the official website of the Court, Coordinate Bench of this Court had called explanation from the learned Special judge to explain reasons for not uploading the judgment on the official website of the Court, especially when the petitioner was sent in custody on the basis of the said judgment. In response thereto, learned Special Judge has submitted a detailed explanation, relevant portion whereof reads as under:-

> "xx xx xx xx 2. In this regard, I have the honour to submit that on 20.5.2019, accused Lakbir Singh has been convicted by this Court for offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985, and he had been sent to custody on the basis of judgment of conviction, being found in possession of commercial quantity of contraband. After announcing the judgment, the case was adjourned for 1.6.2019 for hearing the convict on quantum of sentence and the judgment

> without passing the quantum order was not complete and it was ordered to be continued. After hearing the convict on quantum of sentence, he was to be supplied a copy of the judgment and order free of costs. Therefore, the incomplete judgment was not uploaded on the official website of the Court on the date of pronouncement of the judgment. As a past practice, in case of a conviction, the judgment is uploaded only after hearing the convict on the quantum of sentence, being complete in all respect. However, it has now been uploaded on the website of the Court as per directions of the Hon'ble High Court. Therefore, the inconvenience caused is highly regretted and in future the orders of the Hon'ble high Court will be complied with in letter and spirit."

11. The issue with respect to the time for supplying the copy is no longer **res integra,** but has been finally determined by the Apex Court. The Apex Court in **Rama Narang Vs. Ramesh Narang and others, (1995) 2 Supreme Court Cases 513,** after considering various provisions of Chapter XVIII, XXXVII and XXIX of Cr.PC more particularly Section 235(2), 353, 354, 357, 359 and 360 Cr.P.C., has held that the trial comes to an end only after the sentence is awarded to the convict person and judgment in criminal case is not complete unless punishment which the accused person is sentenced is set out therein as under the provisions of the Cr.PC., there are two stages in a criminal trial before a Sessions Court i.e. the stage upto the recording of a conviction and the stage post conviction upto the imposition of sentence and a judgment becomes complete after both these stages are covered. (See Para 12,13 and 15)

12. The Apex Court in **YakubAbdul Razak Memon v. State of Maharashtra, (2013) 13 SCC 1**, after considering its own pronouncement in **Rama Narang's case** and judgment of the Andhra Pradesh High Court in**Lakdey Ashok Vs. Government of A.P., (2009) 6 AnLT 67** has concluded that conviction order is not a judgment as contemplated under Section 353 CrPC and that a judgment is pronounced only after the award of sentence. (See Para 104 to 106).

13. As a judgment in criminal trial is complete only after determination of the sentence to be imposed upon the accused and the accused is entitled for copy of judgment only after determination of quantum of sentence after hearing him and not at the time of announcing conviction order. Keeping in view the settled law of the land, I find that no further order or direction is required to be passed on this issue.

14. On perusal of record it is evident that application, preferred by the petitioner from Jail in April,2018 was received in the Court on 9.4.2018 and it was placed before the then Presiding Officer/Special Judge-II i.e. Additional Sessions Judge, Chamba on the very same day, who had ordered to put up it on 10.4.2018 and on 10.4.2018 he passed an order by exercising the Powers of Special Judge-II to put up the said application with main case file on date already fixed i.e. 4.6.2018. On 4.6.2018, the case was fixed for recording the evidence of prosecution. On that day, accused was produced in the Court in custody and was being represented by the counsel. On that date, statements of three PWs were recorded and the case was adjourned for 6.7.2018 for recording of statements of some more witnesses. On that day, neither counsel for the petitioner/accused nor accused himself had ever pointed out about the application preferred by the petitioner. Not only this, thereafter case was listed on 6.7.2018, 7.9.2018, 27.9.2018, 30.10.2018 for recording the evidence of the prosecution and on 30.10.2018 prosecution evidence was closed and case was adjourned for 24.11.2018 for recording of statement of the accused under Section 313 of Cr.P.C., where-after statement of the accused under Section 313 Cr.P.C. was recorded on 28.11.2018 and the case was ordered to be listed on 10.12.2018 for recording of evidence in

defence. Thereafter case was listed for recording the defence evidence on 3.1.2019, but on that day case was adjourned for 25.2.2019 as learned Presiding Officer i.e. Special Judge-II had been transferred. On 25.2.2019, case was transferred to the Court of Special Judge-I, i.e. present Presiding Officer. Thereafter on 29.4.2019 summon was ordered to be issued to defence witness for 7.5.2019. On 7.5.2019 after recording statement of one DW, evidence in defence was also closed and case was listed for final arguments on 10.5.2019, on which date, on request of counsel for accused(petitioner), it was again adjourned for 15.5.2019 for arguments. On 15.5.2019 an application i.e. Cr.MA No. 465 of 2019 was presented on behalf of petitioner/accused for leading additional evidence. At that time, learned Presiding Officer/Special Judge, on perusal of record, had noticed that there was another application, sent from the Jail by the accused for producing the CCTV Footage was also pending and accordingly he took the said application on record and listed the case on 16.5.2019 for filing replies to the applications.

15. As noticed herein-above, after filing of the application in April, 2018 till 15.5.2019 before learned Special Judge-II, neither petitioner/accused nor his counsel had ever pointed out about the pendency of the application preferred by the petitioner for production of CCTV Footage and it was, in fact, learned Special Judge-I, who had noticed this application on its own and had taken it for consideration. Therefore, it does not lie in the mouth of the petitioner that Presiding Officer has deliberately ignored the application filed by the petitioner. Undoubtedly the petitioner and his counsel were negligent in perusing the matter, however, it is also noticeable that on 10.4.2018, learned Special Judge-II had ordered to put up this application with main file on 4.6.2018. It is a matter of serious concern that said application was never listed either on 4.6.2018 or any other date fixed in case thereafter. It is a lapse on the part of official(s) concerned. Therefore, learned District and Sessions Judge, Chamba is directed to inquire into the matter and fix responsibility for such lapse for ensuring to avoid such mistake/lapse in future.

16. Plea of the petitioner that supply of the copy of impugned orders have been deliberately delayed in order to deprive him from exercising his right to further assail the said order, is also not substantiated on record, as the learned Special Judge had allowed his application for supplying the copy on 17.5.2018 itself and next two days i.e. 18.5.2018 and 19.5.2018 were holidays and thereafter it was diarized in the Copying Agency on 20.5.2019. In case plea of the petitioner, that it should have been diarized on 20.5.2019 itself, is accepted, then also it may or may not have been possible to supply the copy of the impugned order on the same day as it is evident from the record that the impugned orders were passed by learned Special Judge-I on the same day i.e. 17.5.2019 during post lunch session and there is possibility that on that evening during the Court hours this order may not have been ready or signed during Court hours. Further had there been deliberate delay in supply of the copy it would not have been prepared on the same very day on which date the application was presented in the Copying Agency, rather it was completed, attested and supplied on the same day i.e. 20.5.2019. Perusal of C.D.I Form submitted by and on behalf of petitioner-accused for obtaining copies of impugned orders passed in Cr.MA Nos. 465 and 466 of 2019, copy whereof has been placed on record as Annexure P-9 with petition, reveals that requirement of urgent copy was not mentioned therein. Therefore this application was to be considered as an application for supply of copy of order in ordinary manner and further court fee appended on CD Form is Rs. 5/- whereas for urgent or dasti copy requisite court fee is Rs6.50 and thus it was not an application for urgent or dasti copy nor any request for dasti copy has been claimed to have been made and despite all this, copy has been supplied promptly i.e. on next working day like a most urgent copy. Therefore plea of causing deliberate delay is not sustainable.

17. For want of necessary material on record establishing any malafide on the part of Presiding Officer, I find no ground to comment about rejection of application for adjournment of trial to enable the petitioner to assail impugned orders as such adjournment cannot be claimed as a matter of right.

18. So far as challenge to the impugned orders is concerned, I find that, at this stage, it would be a futile exercise to adjudicate the same, as the pre-conviction stage of trial is over and order of conviction has been announced and proceedings of post conviction have been stayed on application of petitioner wherein quantum of sentence is to be considered and even if the present petition is allowed, the order for restoring the status quo ante that of the stage prevailing before pronouncement of the order of conviction cannot be passed without setting aside order of conviction passed on 20.5.2019 and the said order has not been assailed in this petition nor could have been. There is statutory remedy of appeal available to the petitioner to assail the said order after completion of judgment on determination of sentence by the trial Court. The petitioner has a right and opportunity to assail the findings returned in the applications in main appeal itself, if any, preferred against conviction and sentence imposed upon him. The present petition has been filed on 25.5.2019, whereas the final verdict convicting the accused had been announced by the Trial Court on 20.5.2019. Even on the day of filing of the petition it was not maintainable.

19 Before parting the case, at this stage, it would also be relevant to observe that speedy trial is a right of accused but it should not be at the cost of right to fair trial and further justice should not only be done but also seems to have been done. Therefore, Officers/officials of the Judiciary associated with duties of imparting justice should be more careful and sensitive in performing their duties as they are representatives of judiciary not only to staff and litigants, but also in society and act and conduct on their part should not only confirm legal parameters but also require to facilitate and achieve public confidence in judiciary.

20 Therefore, with the aforesaid observations petition is dismissed. Record be sent back to the trial court forthwith along with copy of this judgment. Parties are directed to appear before trial court on 26th August, 2019.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE JYOTSNA REWAL DUA, J.

Sharwan Kumar & ors. ……Appellants.
Versus
The Financial Commissioner & ors. …….Respondents.

LPA No. 125 of 2010.
Decided on: 5.8.2019.

Himachal Pradesh Tenancy and Land Reforms Act, 1972– Section 104 (1) - **Himachal Pradesh Tenancy and Land Reforms Rules**, 1976 – Rule 24(2) – Resumption of land – Entitlement – Held, landowner is entitled to resume tenancy land from tenants only if on date of notification he holds less than one and half acres of irrigated land or three acres of unirrigated land for his personal cultivation so that area of land under his personal cultivation comes to one and half acres irrigated land or three acres of unirrigated land– In case tenancy land is partly irrigated and partly unirrigated and landowner intends to

resume land of both classes, he shall be entitled to do so in manner so prescribed by Land Reforms Officer - Orders of Revenue officers allowing landowner to resume land from tenant without determining land in his actual cultivating possession on date of notification and without affording right of selection of land to tenant are wrong – LPA allowed – Matter remanded to Land Reforms Officer for fresh disposal in accordance with law. (Paras 8 to 11)

For the appellant(s): Mr. K.D.Sood, Sr. Advocate with Mr. Mukul Sood, Advocate.
For the respondents: Mr. Vikas Rathore, Addl. AG for respondents No. 1 to 4.
Mr. Bhupinder Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate, for respondent No. 5.
Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate for respondents No. 9 to 12, 14 to 16.
Respondent No. 13 already deleted.
None for other respondents.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Appellants herein are successors-in-interest of one Krishan respondent No. 3 (since dead) in an application registered as case No. 1829 of 1975 filed under Section 104 of the H.P. Tenancy and Land Reforms Act by Ripu Daman Singh, respondent No. 5 herein before Land Reforms Officer (Tehsildar) Hamirpur, on the grounds inter alia that he is entitled to the resumption of land which was in the possession of said Krishnu in the capacity of tenant awal. The land of other tenants, namely, Gurbachhan Singh, Shiv Charan Singh, Hari Charan Singh, sons of Kapoor Singh (respondent No. 1 before learned Land Reforms Officer) and S/Sh. Jaisi Ram, Dev Raj sons of Pala, respondent No. 2 was also sought to be resumed. The resumption of the land by Ripu Daman Singh aforesaid, the landlord perhaps was sought on the grounds inter alia that the tenancy land to the extent he is entitled to retain for his self cultivation is not in his actual possession. Sh. Krishanu, the predecessor-in-interest of the appellants herein was represented before learned Land Reforms Officer by Prem Chand, his son who is predecessor-in-interest of the present appellants.

2. The Land Reforms Officer has allowed the application (case No. 1829/75) vide order dated 25.8.1977 with the observation that Sh. Ripu Daman Singh, the applicant has allowed the tenants including Krishanu to cultivate his land without rent as he was *jagirdar* and designated as Raja. The rent as per the entry in the revenue record qua the land in the possession of Krishnu tenant was "*Muaf*" (exempted), therefore, Sh. Krishanu was stated to be wrongly entered as tenant *awal* in revenue record. The order Annexure P-1 further reveals that the Land Reforms Officer when explained this position to Prem Singh who represented Krishnu and suggested that no Khasras to be given to the land owner as well as started recording the statements, said Sh. Prem Singh had left the spot without signing his statement on the advice of one Pratap Chand, a retired Government Servant. The Land Reforms Officer while making observations that this retired official is not doing good work even after his retirement, recorded further in the order Annexure P-1 that Kh. Nos. 470, 466 (whole) and area 8-0 kanals out of Kh. No. 471 allotted to some Thakur Dass was given to landlord Ripu Daman Singh and ownership rights to the extent of 13-17 kanals given to Krishanu, the predecessor-in-interest of the appellants herein. Similarly, the land was also sanctioned in favour of Gurbachhan Singh, Shiv Charan Singh, Hari Charan Singh, sons of Kapoor Singh, respondent No. 1 and in favour of S/Sh. Jaisi Ram, Dev Raj sons of

Pala, respondent No. 2 in the application. The remaining tenants of Ripu Daman Singh, the applicants were declared owners of whole of the tenancy land in their respective possession as according to Land Reforms Officer, the land he was allowed to resume vide Annexure P-1 plus the land previously under his self cultivating possession comes to 3 acres, the maximum sealing fixed for resumption.

3. The predecessor-in-interest of the appellants aggrieved by the order Annexure P-1 preferred in an appeal before SDO(C)-cum- Collector, Hamirpur, Sub Division Hamirpur registered as case No 49 of 1980 and 29 of 1980 on the grounds inter alia that the Land Reforms Officer has not followed the procedure prescribed in the matter of resumption of land by the land owner nor determined the area which on the day he applied for resumption in his actual physical and cultivating possession nor they were given the opportunity to select the land as per their choice before the area out of it is allowed to be resumed by the applicant-landlord etc. etc. However, the SDO(C)-cum- Collector, Hamirpur dismissed the appeal vide order dated 17.1.1981 (Annexure P-2 to the writ petition).

4. The Revision registered as Revision Petition No. 19 of 1981 (Annexure P-3) preferred against the order Annexure P-2 before the Divisional Commissioner, Dharamshala, also met the same fate because the same has also been dismissed vide order dated 20.6.1986 (Annexure P-4). The predecessor-in-interest of the appellants herein Sh. Prem Chand thereafter preferred the Revision Petition under Section 114 of the H.P. Tenancy and Land Reforms Act (Annexure P-5) against the order Annexure P-4 before the Financial Commissioner, Himachal Pradesh. The Financial Commissioner, has also dismissed the same vide order dated 31.3.1992 (Annexure P-7).

This has led in filing the writ petition registered as CWP No. 584 of 1992 in this Court. The same has also been disposed of by learned Single Judge vide judgment dated 5.7.2010 with the following directions:

> "(a). The findings with respect to the area of tenancy for which the predecessor-in-interest of the petitioner has acquired proprietary rights is confirmed as held by the Revenue Authorities.
>
> (b). The entitlement of Sh. Ripu Daman Singh as adjudicated by the Revenue Authorities is also not disturbed as these findings are based on facts properly determined by the Revenue Courts.
>
> (c). The Land Reforms Officer shall grant an opportunity to the petitioners in terms of Rule 24(2) to exercise their choice."

5. The appellants, however, aggrieved by the impugned judgment passed by learned Single Judge has questioned the legality and validity thereof in this Court on the grounds inter alia that there is non-compliance of Rule 24(2) of the Rules framed under H.P. Tenancy and Land Reforms Act. The mandatory provisions contained under Section 104 of the Act qua the right of choice of the tenant and the land which according to the appellants-tenants is more than 100 kanals cultivated/irrigated has not been taken into consideration. It is not the case that the applicant-landlord holding less than 1 ½ acres of irrigated land or 3 acres of un-irrigated land. On the other hand, he was having more than 100 kanals of cultivated and irrigated land in his actual and physical possession at the relevant time when he filed the application for resumption. However, the Land Reforms Officer has not determined the land in his actual possession and recorded the findings to the contrary arbitrarily, whimsically and contrary to the entries in the revenue record produced by the appellants-tenants on record. For that matter, the SDO(C)-cum-Collector, Divisional Commissioner, and Financial Commissioner, Himachal Pradesh have also not considered

the grounds raised in the appeal/Revision, particularly when no opportunity was given to the appellants-tenants to exercise their right of choice/selection guaranteed by Section 104 of the Act. The area in actual and physical possession of the applicant-landlord Ripu Daman Singh was not determined before passing the order qua resumption of land in the possession of Krishanu in the capacity of tenant by him. Further complaint as brought to appellate/Revisional Authorities below that the applicant-landlord failed to mention the land in his physical and actual possession in Form LR-V and the evidence showing that he had more than 3 acres of un-irrigated land in his cultivating possession at the relevant time, hence was not entitled to resume the land under Section 104 of the Act, has not been considered. The further case of the appellants-tenants that the procedure prescribed under Section 104 of the Act and the Rules framed there under has not been followed by the Land Reforms Officer and also the appellate/Revisional authorities. This aspect is also stated to be erroneously ignored. It has further been pointed out that the documents X-1 to X-18 placed on record of the writ petition by way of filing the applications CMP No. 846/2009 and Annexure A-1 to CMP No. 7663 of 2009 have not been considered at all. As a matter of fact, the pleadings i.e. reply, rejoinder etc. were complete in these applications, however, the same neither considered nor decided and to the contrary the writ petition was finally disposed of vide judgment under challenge. Therefore, the direction of learned Single Judge that the ownership of land conferred on the tenants as also the area resumed by the applicant-landlord Ripu Daman Singh should not be disturbed are without taking note of the material and subsequent developments having been brought on record of the writ petition by way of filing the applications hereinabove, hence not legally sustainable.

6. We have heard learned counsel representing the parties on both sides and also gone through the record of the case.

7. In the nature of the order we propose to pass in this matter, there is no need to advert to the facts and also the points in issue and the appeal can be disposed of after taking into consideration the provisions contained under Section 104 of the Act which provides for procedure required to be followed in the matter of conferment of proprietary rights upon the tenants other than occupancy tenants/resumption of the land by landlord. The relevant extract of Section 104 of the Act reads as follows:

> **[104. Right of tenant other than occupancy tenant to acquire interests of landowner.** - (1) Notwithstanding anything to the contrary contained in any law, contract, custom or usage for the time being in force, on and from the commencement of this Act, if the whole of the land of the landowner is under non-occupancy tenants, and if such a landowner has not exercised the right of resumption of tenancy land at any time since January 26, 1955 under any law as in force :-
>
> (i) such a landowner shall be entitled to resume before the date to be notified by the State Government in the Official Gazette and in the manner prescribed, either one and a half acres of irrigated land or three acres of unirrigated land under tenancy from one or more than one tenants for his personal cultivation and the right, title and interest (including contingent interest, if any) of the tenant or tenants, as the case may be, therefrom shall stand extinguished free from all encumbrances created by the tenant or tenants to that extent :
>
> x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x
>
> Provided further that the landowner shall not be entitled to resume from a tenant more than one half of the tenancy land;

(ii) in case the landowner holds less than one and a half acres of irrigated land or three acres of unirrigated land in his personal cultivation, he shall be entitled to resume tenancy land only to make up the land under his personal cultivation to the extent of one and a half acres of irrigated land, or three acres of unirrigated land, as the case may be, subject to the other conditions laid down in this section;

(iii) the right, title and interest in the rest of the tenancy land of the landowner, who is entitled to resume land under clauses (i) and (ii) shall vest in the tenant free from an encumbrances with effect from the date to be notified by the State Government in the Official Gazette;

(iv) in case the land under the tenancy is partly irrigated and partly unirrigated and the landowner intends to resume land of both these classes, he shall be entitled to do so in the ratio and manner to be prescribed;

(v) in the event of any dispute between the landowner and the tenant with regard to the selection of land for resumption, the first right of selection of the land shall be that of the tenant who may exercise this right in the prescribed manner and before the date to be notified by the State Government in this respect in the Official Gazette;

(vi) in case the tenant fails to exercise his right of selection of land by the date notified under clause (v), the Land Reforms Officer shall determine his share after giving the parties an opportunity of being beard. In such a case also, the tenant shall be given the first choice to select the land.

x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x"

8. What we could gather from the above quoted provision, in a nut shell, is that a landlord is entitled to exercise his right of resumption of tenancy in the eventualities; firstly if whole of his land is in the possession of non-occupancy tenants and secondly he has not exercised the right of resumption of tenancy land at any time since January 28, 1955 under any law in force. The conditions that the landlord shall only be entitled to resume the land before the day to be notified by the State Government in the official gazettee and in any other manner prescribed to the extent of either 1 ½ acres irrigated land or 3 acres un-irrigated land under tenancy from one or more than one tenants for his personal cultivation and on resumption the rights of tenant shall stand extinguished free from all encumbrances. It is thus seen that a land owner if holds less than 1 ½ acres of irrigated land or 3 acres of un-irrigated land in his physical and cultivating possession, only is entitled to resume tenancy land so that the land under his personal cultivation comes to 1 ½ acres irrigated land or 3 acres if it is un-irrigated. After allowing the landlord to resume the land in the manner as aforesaid, the remaining land shall vest in the tenant free from all encumbrances w.e.f. the day to be notified by the State Government. In case, the tenancy land is partly irrigated and partly un-irrigated and the land owner intends to resume the land of both classes, he shall be entitled to do so in the manner to be prescribed by the Land Reforms Officer. In the event of any dispute between the land owner and the tenant with regard to selection of land for resumption, the first right of selection will be that of the tenant who may exercise such right in the prescribed manner and before the day to be notified by the State Government in this regard in official gazettee. In case the tenant fails to exercise his right of selection of land within the stipulated period, the Land Reforms Officer shall determine his share after giving the parties an opportunity of being heard. In such case also, the tenant shall be given the first choice to select the land.

9. It would not be improper to conclude that no such procedure has been followed in the case in hand. As a matter of fact, the Land Reforms Officer has never

determined the question as to how much was the land in actual and physical possession of the applicant-landlord well before the date of notification published in the official gazettee. The landlord is thus entitled to exercise the right of resumption only in case having less than 1 ½ acres irrigated land or 3 acres un-irrigated land, as the case may be. The appellants-tenants having produced on record the documents showing that the applicant-landlord was in possession of more than 100 kanals of land, the same were not taken into consideration either by Land Reforms Officer or the statutory Appellate/Revisional Authorities. Even such record sought to be placed on record of the writ petition by way of filing CMP No. 846/2009 and CMP No. 7663 of 2009 could not be considered by learned Single Judge as both applications were not taken into consideration by learned Single Judge nor any order passed irrespective of reply/rejoinder having come on record thereof. The Land Reforms Officer has also not considered the question as to whether the applicant-landlord has exercised the right of resumption of tenancy land at any point of time since January, 1955 or not under any law in force, which is also a condition precedent to seek resumption of tenancy land in terms of Section 104 of the Act.

10. The appellants-tenants were never given an opportunity to exercise their right of selection/choice as envisaged under the provisions referred to hereinabove. The order Annexure P-1 passed by learned Land Reforms Officer on the other hand is not only evasive but vague also and makes no sense. The observations that the Land Reforms Officer explained certain facts to Prem Chand, the son of deceased Krishanu, however, the later left the spot without signing his statement at the advice of the so called retired mischievous employee, to us are absolutely meaningless and made to sidetrack the real point in controversy and also to give colour to the matter to avoid deciding the points in issue in accordance with the provisions contained under the Act and the Rules framed thereunder. Learned Land Reforms Officer, to our mind, has very cleverly tried to divert the attention of the Appellate/Revisional Authorities from the statutory provisions and the procedure under the Act and Rules framed thereunder required to be followed in the matter of resumption of land by the landlord. The Appellate/Revisional Authorities have also not appreciated the points in issue in its right perspective and to the contrary upheld the order passed by the Land Reforms Officer mechanically and without application of mind. Learned Single Judge has also not appreciated the question as to whether on the appointed day, the land in actual and physical possession of the applicant-landlord was less than 1 ½ acres irrigated land or 3 acres un-irrigated land. The legal right of the appellants-tenants to select/choose the land out of the land in their possession has also escaped the notice of learned Single Judge. Therefore, not only the impugned judgment but also the orders Annexure P-1 passed by Land Reforms Officer, Annexure P-2 by SDO(C)-cum-Collector, Hamirpur, Annexure P-4 passed by Divisional Commissioner, Dharamshala and Annexure P-7 passed by Financial Commissioner, Himachal Pradesh are neither legally nor factually sustainable. The same, as such, are quashed and set aside.

11. Consequently, the case is remanded to learned Land Reforms Officer, Hamirpur, H.P., for fresh disposal in accordance with law and in the light of the observations made hereinabove as well as taking into consideration the entire records including the documents which were sought to be placed on record of the writ petition by filing applications CMP No. 846/2009 and CMP No. 7663 of 2009. Since the matter is quite old, it is expected from learned Land Reforms Officer to decide the same at the earliest, however, not beyond 30th October, 2019. The parties through learned counsel representing them are directed to appear before the Land Reforms Officer on 2.9.2019. The appeal is accordingly disposed of so also the pending application(s), if any.

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

Mohan Lal Benal ....Petitioner.
Versus
National Highway Authority of India & others ...Respondents.

CWP No. 1841 of 2016
Reserved on 2.8.219
Date of decision: 13.8.2019

National Highways Act, 1956- Section 3(9)– ***Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act of 2013***– Section 105 (1) & (3) – Schedule IV- Held, Act of 2013 has limited application vis-a-vis acquisition of lands made for public purpose under Act of 1956. (Paras 3 & 4)

For the petitioner:	Mr. Sudhir Thakur, Sr. Advocate with Mr. Anirudh Sharma, Advocate, for the petitioner.
For the respondents:	Mr. K.D. Shreedhar, Sr. Advocate with Ms. Shreya Chauhan, Advocate, for respondents No. 1 and 2.
	Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs. for respondent No.3.
	Mr. V. B. Verma, CGC, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Through the instant writ petition, the, writ petitioner espouses, for, rendition qua him, the hereinafter extracted reliefs:-

"i) That the respondent No.3 may kindly be directed to entertain petition under Section 64 of the Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013and further respondent No.3 may kindly be directed to refer the same petition to the competent authority for redetermination of the compensation amount with respect to the acquired land belonging to the petitioner.

ii) That in addition to the other prayers inserted the petitioner prays that in case the Hon'ble Court comes to the conclusion that the redetermination of the compensation amount is only to be done by the Arbitrator appointed under the national Highway Act, 1956 in that eventuality respondents may kindly be directed to redetermine the amount of compensation by invoking the provisions of right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 as such respondents may kindly be directed by issuance of the appropriate direction in this regard".

2. Initially, vis-a-vis, the acquired land, of, the petitioner, an award, borne in Annexure P-4, stood rendered, hence on 21.4.2014, and, the afore award, wherethrough, compensation amount borne in a sum of Rs. 9,34,31,552/-stands passed, under Section (1), of, Section 3 (g), of, the National Highways Act, 1956. However, subsequently, through,

Annexure P-2, pronounced, on 31.3.2016, upon, recoursings being made, vis-a-vis, the mandate of Section 1 (3) (g), of, the National Highways Act, 1956, read with Section 23, of, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, hence, the compensation amount previously determined, vis-a-vis, the acquired lands of the petitioner, rather begetting diminution. The petitioner being aggrieved, therefrom, hence constituted, a, Land Reference Petition, borne in Annexure P-2, and, cast under the provisions of Section 64, of the Right, to, Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, wherethrough, a challenge, was, cast against the award, pronounced, on 31.3.2016. Since the petitioner espouses, for, the hereinabove extracted relief, and, when he, in the Land Reference Petition, cast, under the provisions of Section 64, of, the Right to Fair Compensation, and, Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, seeks enhancement, of, the compensation amount, as, determined, under, the award pronounced, on 31.3.2016, and, has not therein, reared, any challenge, qua, the award made prior thereto, on 21.4.2014, and, as embodied in Annexure P-4, nor canvasses therein qua, it, rather comprising, the, apt enforceable award, thereupon the petitioner is estopped, to, contend (i) that the compensation amount determined, under, the award, pronounced, on 31.3.2016, is, legally infirm nor can he contend, that, the Land Acquisition Collector concerned, who pronounced it, lacking the apt jurisdictional empowerment(s).

3. Even otherwise, the, Fourth Schedule, borne in the Right to Fair compensation and Transparency in Land Acquisition, rehabilitation and resettlement Act, 2013, commences, with the heading, 'list of enactments regulating land acquisition and rehabilitation and resettlement," wherein, one, amongst the specific enactments, as, enumerated therein, is, the National Highways Act, 1956, (i) thereupon, when undisputedly, the, acquisition of the petitioner's land, is, made, for, constructing thereon, a, national highway, and, whereto which acquisition, the apposite mandate, borne in, the, National Highways Act, 1956, is, applicable, (ii) thereupon in consonance, with, the occurrence, of, National Highways Act, in, the Fourth Schedule, of, the Right to Fair compensation and Transparency in Land Acquisition, rehabilitation and resettlement Act, 2013, rather make the provisions of the latter Act, to be, obviously applicable thereto, for, determining the compensation amount, for, acquisitions, made, under, the National Highways Act, 1956.

4. Be that as it may, even if the Fourth Schedule borne, in, the Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, mentions therein, the, statutes,wheretowhich, its mandate, is, applicable, and, whereamongst, apposite enactments, The National Highways Act, 1956, is, also enumerated therein (i) nonetheless, all the provisions, borne in the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, would not, hence *ipso facto* be applicable, vis-a-vis, acquisition of landmade through recoursing, the, mandate, of, the National Highways Act, 1956, (ii) and, the reason(s) wherefrom the afore inference is sparked, is, embodied, in, sub-section (1) of, Section 105, hence carrying a specific, and, explicit mandate, wherethrough, are rendered inapplicable all, the, provisions of the afore Act, qua acquisition made under the National Highways Act, and, also likewise, qua all enactments relating to land acquisition, as, specified, in, the, Fourth Schedule, (iii) reitretedly rendering all, the, land acquisition enactments wheretowhich, the, provisions of, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, are applicable, rather being forbidden, to, rely, upon the, requisite provisions thereof, (iv) however, given the existence of sub section (3), in Section 105, in the Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and, with the latter sub-section relaxing, and, diluting the rigors of sub-section (v) thereof, and, also operating, as, an exception thereto, and, when, a, reading,

of, its phraseology, unfolds qua, it, making, a, trite and candid postulation, qua, only vis-a-vis, the manner(s), of, determination, of, compensation, and, rehabilitation, and, resettlement, the, apposite therewith provisions, as, stand engrafted therein, rather comprising, the, recoursable thereof provisions, (vi) and, when thereafter there, is, no mandate hence embodied in sub-section (3), of, Section 105, qua, except, the, afore explicit limited manner, of, application(s), of, the mandate of the Right, to, Fair compensation and Transparency in Land Acquisition, Rehabilitation, and, resettlement Act, 2013, pointedly, vis-a-vis, the acquisitions made, for, construction, of, National Highways, through invocation, of, the provisions borne in The National Highways Act, 1956, (vii) and emphatically qua, after, the initial determination of compensation, by the collector concerned, under, Section 3 (g) of the National Highways Act, 1956, hence, the aggrieved therefrom, being leveraged, to, recourse the mandate, of, Section 64, as, embodied in, the, Right to Fair compensation and Transparency, and, Land Acquisition, rehabilitation and resettlement Act, 2013, (vi) nor when, vis-a-vis, an, aggrieved from the award initially rendered by the Land Acquisition Collector concerned, the, remedy contemplated, in, sub Section 5, of, Section 3 (g), of, the National Highways Act 1956, nor hence stands unenforceable, nor stands ousted, (vi) rather when sub-section 5 of section 3 (g), of, the National Highways Act, 1956, makes, a, specific statutory contemplation, vis-a-vis, an, aggrieved, from, the award initially rendered, by, the learned Land Acquisition Collector, rather being empowered, to, make a challenge thereto, through recoursing the mandate thereof, (viii) and, the afore special remed(ies), as, constituted, vis-a-vis, the aggrieved, from, an award, initially rendered, by the Land Acquisition Collector, under, Section 3 (g) of The National Highways Act, 1956, are, the only recoursable remedies. Nowat with the Right to Fair Compensation, and, Transparency in Land Acquisition, rehabilitation, and, resettlement Act, 2013, statutorily hence excepting, the, afore statutorily limited manner of application, of, its provisions, vis-a-vis, determination, of, amount, of, compensation, qua, acquisitions, of, land, made, through recoursing, the, mandate, of, of section 3 (g), of, the National Highways Act, 1956, does not either expand or adds, the requisite application thereof, (ix) hence the sway, of, the, limitation cast, in sub-section 3 of Section 105 of the Right, to, Fair compensation and Transparency in Land Acquisition, rehabilitation, and, resettlement Act, 2013, when is, confined, only, vis-a-vis, the apposite thereto provisions, borne in Section 24, of, Right to Fair compensation and Transparency in Land Acquisition, rehabilitation and resettlement Act, 2013, (x) and, is also confined, to, the stage, of, an award initially made by, the, Land Acquisition Collector, hence, its sway is to be revered, and, the thereafter further grievance, of, the landlord, vis-a-vis, insufficiency thereof, is rather reddressable, through recoursing the statutory hierarchy, as, enumerated, in, sub section 5, of, Section 3 (g). In aftermath the afore specific mandate, is, to be revered, and, the afore specific mandate obviously cannot, be supplanted, vis-a-vis, the mandate, enshrined in Section 64, of, The Right to Fair Compensation, and, Transparency in Land Acquisition, Rehabilitation, and, Resettlement Act, 2013, for, it being either recoursed or leveraged qua the land owner, (i) unless, a specific provision, is/was, embodied, in, the afore Act, hence making the provisions of Section 64 also applicable thereon, vis-a-vis, proceedings initially drawn, and, concluded, under, the apposite provisions, of, the National Highways Act, specific provisions whereof, is, amiss.

5. Since as is evident, on a, reading of the reply to the writ petition, filed by the contesting respondent, qua, the authorities concerned, upon being aggrieved, from, a, pronouncement, occurring, in Annexure P-4, it making, a, motion under sub-section 5, of, the Right to Fair Compensation and Transparency in Land Acquisition, rehabilitation and resettlement Act, 2013, before the learned Arbitrator, (i) hence when the afore constitutes the apt remedy, thereupon, it is, permissible for the petitioner, to, make an address before the learned Arbitrator, vis-a-vis, the deficiency or insufficiency, of, compensation amount

determined, through Annexure P-2, (ii) and, it is also permissible for the petitioner, to, make a espousal, qua the relevant principles of law or the relevant statutory parameters, coming, to be ignored by the authority, hence rendering Annexure P-2. Moreover, the petition cast under Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, rehabilitation and resettlement Act, 2013, be treated, as, a reference, to, the arbitrator, under sub-section (5), of, Section 5 of the National Highways Act, and, it shall be, in accordance with law, decided alongwith, the, reference, already made, to, the arbitrator, by the authority concerned.

6. In view of the above observations, the writ petition stands disposed, of, and obviously, the afore reliefs, espoused by the petitioner are not grantable to the writ petitioner. All pending applications, also stand disposed of.

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

Vinod Kumar & another ....Appellants
Versus
Subhash Chand & another ....Respondents.

FAO No. 3 of 2019
Reserved on : 9.8.2019
Date of decision: 13th August, 2019

Code of Civil Procedure, 1908– Order XLI Rules 23 A and 25– Remand of suit– Justifiability – Held, additional issues framed by first appellate court closely inter connected with issues initially framed by trial court– Findings on additional issues one way or other affecting findings on issues already recorded by trial court– Therefore order of wholesale remand of suit after setting aside decree of trial court not unwarranted– Appeal dismissed. (Paras 2 & 3)

For the appellants: Mr. Ajay Sharma, Sr. Advocate with Mr. Rakesh Chaudhary, Advocate.
For the respondents: Mr. Mr. Anand Sharma, Sr. Advocate with Mr. Karan Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The plaintiff's suit, for, rendition of, a, decree of declaration, qua, the, suit khasra numbers, and, against the defendants, was hence dismissed, by the learned trial Court, and, in, an, appeal made therefrom, before the learned First Appellate, the latter Court, after, striking, the, hereinafter extracted issues:-

"12 (a). Whether father of plaintiff Jai Ram is not heard for the last 20 years and now he is dead, if so its effect?

12 (b) Whether Sh. Bishan Dass has executed valid Will dated 4.2.2004 in favour of defendants? OPD.

proceeded, to, in the operative part of the verdict, allow the appeal, in its entirety, and, also made, a, wholesome remand, vis-a-vis, the remandee Court, hence to decide afresh, Civil Suit No. 94 of 2008.

2. The learned counsel appearing for the aggrieved defendants, contended with much vigor before this Court, qua, the order, of, wholesome remand, made by the learned First Appellate Court, vis-a-vis, the learned Trial Court, is, stained with, a, gross illegality, (i) as, it infracts the trite expostulation, of, law qua a wholesome remand, of the lis, being impermissible. However, the afore submission has no merit, as the issues initially struck, by the learned trial Judge, upon, the contentious pleadings, do not obviously, enumerate the afore issues, hence struck by the learned first Appellate Court, (ii) whereas they, were, enjoined to be imperatively struck, given the APT contested pleadings being embodied in the plaint, and, in the written statement,and, appertaining, vis-a-vis, the father of the plaintiff, remaining missing for 20 years, prior to the institution of the suit, and, when hence, the, mandate, of, Section 107, and, of Section 108 of the Evidence Act, became enlivened, (a) conspicuously also when hence, upon, either of the contesting litigants, leading cogent evidence, vis-a-vis issue No. 12 (a), struck hence, by the learned First Appellate Court, rather, thereon the fate of Civil Suit, stands hinged, (b) and, upon cogent evidence holding leanings, vis-a-vis, the contentions, reared by the defendants, rather standing adduced, before the learned First Appellate Court, (c) thereupon it may spark, an inference qua given the plaintiffs' father being alive, whereupon his alone holding, the capacity, to, make, a, challenge, upon, the Will executed, by the grand-father of the plaintiff, vis-a-vis, the defendants, and, thereupon obviously an inference also being sparked, vis-a-vis, the plaintiff holding, no, locus standi, to, institute, the suit.

3. Be that as it may, even issues preceding the issues, as stood initially struck, by the learned First Appellate Court, are rather closely interconnected, and, making, of, findings thereon, are, dependent, vis-a-vis, the findings, made, by the remandee Court, upon, the issues, struck by the learned First Appellate Court, (i) as, upon the father of Subhash Chand being proven to be alive, hence, uptill, his demise, he may, under the rule appertaining, to, co-parcenary property, and, if the suit property, is, proven, to, imbibe the, afore traits, his hence acquiring, the, right to be arrayed, as, a co-plaintiff, (ii) or upon the suit property being proven, to, be the self acquired property, of, the deceased testator, and, upon, the plaintiffs' father being proven to be alive, and, the will being proven, not, to be validly executed hence by the deceased testator, (iii) thereupon, the plaintiffs' father, would under the general rules, of, succession, acquire rights along with his son, the plaintiff, to, succeed to the suit property, and, whereupon also his jointly suing along with the plaintiff or his being entitled, to, solitarily hence sue, was, the trite conundrum, ensuing therefrom, and, also obviously warranting adjudication, (iv) it, devolving upon, the maintainability, of, the suit.

4. For the foregoing reasons, there is no merit in the appeal filed, by the defendants, and, is hence dismissed, and, the impugned order, is, maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Ashok Kumar and others ....Petitioners

Versus

State of H.P. ....Respondent

Cr.MMO No. 37 of 2019
Date of Decision 20th August, 2019

Code of Criminal Procedure, 1908–Sections 320 & 482– Inherent powers– Exercise of– Quashing of FIR– Circumstances– FIR was registered and charge sheet filed for abetment to commit suicide against husband, father-in-law, mother-in-law and sister-in-law– Parties filing petition in High Court and seeking quashing of FIR on ground that father of deceased got registered FIR under misconception of facts and investigation revealed that it was a suicide and accused had no role in it– State resisting petition on ground that offence is not compoundable– Held, jurisdiction vested in High Court under Section 482 of Code is exercisable for quashing criminal proceedings in cases having overwhelming and predominantly civil flavour particularly offences arising from matrimonial disputes or where wrong is basically private or personal in nature and parties have mutually resolved their dispute- In such cases, limitation of Section 320 of Code would not inhibit powers of High Court under Section 482– Material not suggesting that accused had caused abetment to commit suicide– Parties admitting compromise before High Court– Trial if continues is going to face situation of a case of no evidence– Petition allowed- FIR quashed with all consequential proceedings. (Paras 9 to 15)

Cases referred:
Gian Singh vs. State of Punjab and Ors. (2012) 10 SCC 303
Narinder Singh and others vs. State of Punjab and others (2014)6 SCC 466
State of Madhya Pradesh vs. Laxmi Narayan and others (2019)5 SCC 688

For the Petitioners:	Mr. Rakesh Chauhan and Mr.Parveen K.Chauhan, Advocates. Petitioners No. 1 to 5 present in person along with Ms.Surbhi Sharma, daughter of petitioner No.1.
For the Respondent:	Mr.S.C.Sharma, and Mr.Desh Raj Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

This petition under Section 482 Cr.P.C., has been filed, on the basis of compromise between the parties, for quashing of FIR No. 86 of 2015 dated 8.5.2015 lodged by complainant Ashok Kumar and consequential proceedings, arising therefrom i.e. Case No. 218/2 of 2015 pending before Additional Sessions Judge, Solan camp at Nalagarh against petitioners No. 2 to 5.

2 Petitioner No.1 is father of deceased Vandana, whereas petitioner No.2 is her husband and petitioners No.3, 4 and 5 are her father-in-law, mother-in-law and sister-in-law respectively. FIR in present case was lodged after death of Vandana by her father/petitioner No.1 and Ms. Surbhi Sharma is real sister of deceased Vandana who has been cited as a material witness of prosecution to establish commission of offence by petitioners No. 2 to 5.

3. Petitioner No. 1, complainant along with his daughter Surbhi Sharma as well as petitioner No.2 to 5 are present in person. Statements of petitioner No.1, petitioner No.2

and Ms. Surabhi Sharma have been recorded on oath today separately and placed on the file.

4. Petitioner No.1, complainant, has stated that he is complainant in the present case and FIR No. 86 of 2015 dated 8.5.2015 was lodged by him in P.S. Nalagarh after the unnatural death of his daughter on the basis of information and impression gathered by him from surroundings and at that time, he was not able to understand as to whether his daughter had committed suicide or had been killed by her in-laws. He has further stated that during investigation of case, it had come in the light that she had committed suicide. He has also stated that before her death on 7.5.2015 at about 2.30 am, deceased Vandana had also sent SMS to her sister Surbhi Sharma, on account of which they had doubted that some quarrel was going on in the family of in-laws of his deceased daughter Vandana, but now after going through the contents of SMS, he had found that she had not expressed any desire to commit suicide therein but had communicated general behaviour of her in-laws which was not liked by her and therefore, these SMS which were considered by them as a message about her desire to commit suicide on account of ill-treatment of her in-laws were wrongly interpreted by them whereas it was not so.

5 It is also stated by complainant that children i.e. son and daughter of his deceased daughter Vandana, are also residing with their father and grandparents i.e. petitioners No. 2 to 4 and are studying in 3rd and 1st class respectively and are being looked after by them very well and in these circumstances, he is not able to understand the cause for which deceased Vandana had committed suicide and that FIR was lodged by him on account of suspicion which had arisen at that time on the basis of impression which now appears to be wrong impression. He has also deposed that he has decided not to pursue the criminal proceedings against in-laws of his deceased daughter Vandana, who are co-petitioners with him and therefore he has filed present petition jointly with accused persons for quashing of FIR and closing criminal proceedings and stated that he has made statement out of his free will, consent and also without any threat, coercion or pressure etc.

6 Ms. Surabhi Sharma daughter of complainant in her deposition has stated that she is younger sister of deceased Vandana, who had sent SMS to her about her family life, on the basis of which, she had considered that she had committed suicide on account of ill-behaviour of her in-laws and that after receiving SMS, but before commission of suicide, she had talked with her deceased sister on telephone, whereupon she had told her that she was in tension and therefore, she had sent those SMS to her, but deceased had also told that there was nothing to worry. She has further stated that she does not know the exact cause of commission of suicide by her deceased sister Vandana. She has endorsed the statement of her father to be true and correct and stated that she is in agreement with her father. She has also stated that she has deposed in Court today out of her free will, consent and without any threat, pressure or coercion of any kind.

7. Petitioner No.2/accused also, in his statement, by endorsing the deposition of complainant/petitioner No.1 and complainant’s daughter Ms.Surabhi Sharma, has stated that his children are residing with him and he is taking their care to the best of his resources and ability and he had also tried to the best of his abilities to keep his wife happy, but unfortunately, she had committed suicide and he is able to understand the exact reason for commission of suicide by her. He has also stated that he undertakes to take care of his children in future also as it is his duty. He has further stated that he has deposed today in the Court, out of his free will, consent and also without any threat, coercion or pressure and prayed for allowing the present petition by quashing the FIR as well as consequential proceedings arisen in pursuance thereto.

8. It is contended on behalf of respondent-State that accused are not entitled to invoke inherent jurisdiction of this Court to exercise its power on the basis of compromise arrived at between the parties with respect to an offence not compoundable under Section 320 Cr.PC.

9 Three Judges Bench of the Apex Court in ***Gian Singh Vs. State of Punjab and Ors.***reported in ***(2012) 10 SCC 303***, explaining that High Court has inherent power under Section 482 of the Code of Criminal Procedure with no statutory limitation including Section 320 Cr.PC, has held that these powers are to be exercised to secure the ends of justice or to prevent abuse of process of any Court and these powers can be exercised to quash criminal proceedings or complaint or FIR in appropriate cases where offender and victim have settled their dispute and for that purpose no definite category of offence can be prescribed. However, it is also observed that Courts must have due regard to nature and gravity of the crime and criminal proceedings in heinous and serious offences or offence like murder, rape and dacoity etc. should not be quashed despite victim or victim family have settled the dispute with offender. Jurisdiction vested in High Court under Section 482 Cr.PC is held to be exercisable for quashing criminal proceedings in cases having overwhelming and predominatingly civil flavour particularly offences arising from commercial, financial, mercantile, civil partnership, or such like transactions, or even offences arising out of matrimony relating to dowry etc., family disputes or other such disputes where wrong is basically private or personal nature where parties mutually resolve their dispute amicably. It was also held that no category or cases for this purpose could be prescribed and each case has to be dealt with on its own merit but it is also clarified that this power does not extend to crimes against society.

10 The Apex Court in case ***Narinder Singh and others vs. State of Punjab and others*** reported in ***(2014)6 SCC 466*** and also in ***State of Madhya Pradesh vs. Laxmi Narayan and others (2019)5 SCC 688*** has summed up and laid down principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercise its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with criminal proceedings.

11 No doubt Section 306 of IPC is not compoundable under Section 320 Cr.P.C., however, as explained by Hon'ble Supreme Court in **Gian Singh's, Narinder Singh's and Laxmi Narayan's cases supra,** power of High Court under Section 482 Cr.PC is not inhibited by the provisions of Section 320 CrPC and FIR as well as criminal proceedings can be quashed by exercising inherent powers under Section 482 CrPC, if warranted in given facts and circumstances of the case for ends of justice or to prevent abuse of the process of any Court, even in those cases which are not compoundable where parties have settled the matter between themselves.

12. In present case, complainant/petitioner No.1 is father of deceased Vandana. Vandana was married to petitioner No.2 and out of wedlock couple was blessed with two children. After four years of marriage, Vandana has committed suicide. One day before committing suicide, Vandana, through phone of her husband, had sent SMS to her sister related to habits of in-laws and certain norms of the said family which were felt by deceased wrong and unwarranted restrictions on her movement and day-to-day activities of her life. She had complained that mother-in-law usually remained in temples and for her, before going to temple, it is mandatory to take separate permission from not only father-in-law and mother-in-law but also telephonic permission from her husband which was being considered by her restriction rigour than jail and she was considering these restrictions as punishment

for some sin. In one SMS she had conveyed that for her visit to parlour after a month, her husband used to say that she was visiting parlour very frequently.

13. In another message she had disclosed that even after taking liquor, her husband had not been sleeping properly, whereas kid had been annoying her during day time. She had also commented that since long time, there was no quarrel but she was feeling light after communicating these circumstances to her sister. In one message, she had conveyed that she had seen large number of deaths in dreams and her brother Ajay. Except SMS, statements of petitioner No.1 and Ms. Surabhi Sharma, there is no other tangible evidence on record to support the allegations levelled in FIR. There is nothing in SMS as to construe that accused had abetted deceased to commit suicide or were subjecting her to cruelty as defined under Section 498-A IPC. Statements of petitioner No.1 and Surabhi Sharma recorded on oath today are also not supporting the prosecution case.

14. In such a situation, prosecution case in the trial is going to face a situation of a case of no evidence. Children of deceased are also living with their father/petitioner No.2 who is residing with his parents petitioners No. 3 and 4. Petitioner No.1 is also satisfied from conduct of petitioners No. 2 to 5 after death of his daughter Vandana. In these peculiar facts and circumstances, I find that it is a fit case to exercise power under Section 482 Cr.P.C. and further even otherwise if criminal proceedings are allowed to continue, no fruitful purpose is going to be served.

15 Considering facts and circumstances of the case in entirety, I am of the opinion that present petition deserves to be allowed for ends of justice and the same is allowed accordingly and FIR No.86 of 2015 dated 8.5.2015 registered at Police Station, Nalagarh, District Solan, H.P. is quashed. Consequent to quashing of FIR, criminal proceedings i.e. Criminal Case No. 218/2 of 2015 pending before Additional Sessions Judge, Solan, Camp at Nalagarh are also quashed.

16 Petition stands disposed of in above terms, also pending application, if any.

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

Rajvinder Sharma …Petitioner
Versus
State of H.P. & another …. Respondents

Cr.MMO No. 117 of 2019
Date of Decision 21st August, 2019

Code of Criminal Procedure, 1973– Section 190 (b)– Cognizance of offence(s)– Duty of court– Held– Magistrate is not supposed to act as a post office– He is expected to apply his judicial mind to facts and circumstances of case– At time of taking cognizance he though not supposed to evaluate evidence or material on record but it is his duty to see as to whether some evidence against accused is available on record or not. (Para 10)

Case referred:
Rakhi Mishra vs. State of Bihar and others, (2017)16 SCC 772

For the Petitioner: Mr. Anup Rattan, Advocate.

For the Respondents: Mr.Desh Raj Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

Present petition has been preferred under Section 482 Cr.P.C. for quashing of FIR No. 146 of 2018 dated 14.6.2018, registered at P.S. Sadar Chamba, District Chamba under Sections 279, 337 and 304-A IPC on the grounds that accident has not taken place on account of rash and negligent act of petitioner and the complainant has been lodged on the basis of statement of a witness, who is not an eye witness, and none of statements, recorded by police under Section 161 Cr.P.C., discloses the rash and negligent act on the part of petitioner in driving the car at the time when accident had taken place and, therefore, there was no evidence before the Magistrate for taking cognizance against the petitioner and in the light of evidence trial is likely to culminate into acquittal of petitioner and thus, for want of evidence, the FIR as well as consequential proceedings arising thereto deserve to be quashed.

2 Petition has been opposed by respondent/State on the grounds that in the present case wife of petitioner has expired in accident and therefore, petitioner has committed a grave offence, as made out prima facie on the basis of evidence collected by Investigating Officer and thus, petition deserves to be dismissed.

3 Copy of challan along with evidence collected by Investigating Officer, presented in Court, has also been produced by the respondent/State.

4 Scrutiny of challan and evidence relied upon by Investigating Officer against the petitioner reveals that FIR has been registered on the basis of statement of one Pawan Kumar, recorded under Section 154 Cr.P.C., wherein he has stated that on the day of incident, at about 5.30 PM, when he was driving his vehicle on Chamba-Khajjiar road and had reached near Hanuman temple Bhatalwan, he had seen a white coloured car falling from cliff, whereupon, he parked his vehicle on the side of road and went in gorge along with his brother Kewal Krishan, who was accompanying him in his car, and found that a damaged white coloured Swift car was lying there and a lady and one gentleman were in the car, whereas two children were lying outside of said vehicle. He along with others had taken the injured to hospital. According to him, the lady had already succumbed to her injuries on the spot. In the last, he has stated that accident had taken place on account of rash and negligent driving of driver Rajvinder.

5 Other witnesses relied upon by prosecution are Kewal Krishan and Paras whose statements were recorded by Investigating Officer under Section 161 Cr.P.C. Kewal Krishan is brother of witness Pawan Kumar and he has deposed in identical manner as has been stated by witness Pawan Kumar in his statement under Section 154 Cr.P.C., whereas Paras is 13 years old son of petitioner. In his statement as recorded by Investigating Officer under Section 161 Cr.P.C.. in relevant portion thereof with respect to accident, he has stated that he along with his brother was sitting on the back seat, whereas his mother Asha Rani was sitting on front seat and she had used seat belt when they reached near Bhatalwan temple, name of which place came to his knowledge later on, there was a curve where speed of car was increased suddenly and at that time, the car firstly struck with inner side of road but could not be controlled and with the same speed, it fell down in gorge and later on he came to know that local people had rescued them in unconscious state and in the last, he has stated that he did not know the cause of accident.

6 Remaining evidence relied upon by Investigating Agency is statement of other witnesses, who were associated during investigation for completing the investigation, such as taking photographs of vehicle and dead body of Asha Rani and obtaining of MLCs of injured, postmortem of deceased and taking in possession the damaged vehicle or documents thereof including driving licence of petitioner etc. and their statements will be relevant only if there is prima facie evidence available on record for taking cognizance of case for establishing the allegation or even to suspect that petitioner is involved in commission of offence as reported in challan presented in Court.

7 Perusal of statements of witnesses Pawan Kumar and Kewal Krishan, as have been recorded by police and presented along with challan, clearly indicates that both of them are not eye witnesses to the initial stage of occurrence and they had seen the car falling from cliff in gorge and their versions in the last that accident had taken place on account of rash and negligent driving of driver of car is not based upon the knowledge which was gained by them witnessing the accident, but it appears to be their assumption based on nature of accident, as in the beginning of their statements, they have clearly stated that when they were going towards Mangla from Chamba they had seen a car falling down from cliff, but nothing more or nothing less than that.

8 Another witness is Paras who has clearly stated that he did not know the cause of accident. In his statement, he has referred about increase of speed of car while he was sitting on the rear seat of car, but cause of increase of speed is not known to him. In absence of evidence of actual speed of vehicle, statement of this witness with respect to increase in speed as experienced or noticed by him while sitting in the rear seat of car, is of no relevance. There is no other oral or documentary evidence on record to indicate rash and negligent driving on the part of petitioner. Therefore, in fact, it is case of no evidence with regard to alleged rash and negligent driving of petitioner.

9 It is settled that at the time of taking the cognizance of offence, it is not necessary for the Magistrate, to find out as to whether the trial is clearly going to culminate into conviction of accused or not, but the Magistrate has only to see whether there is prima facie evidence on record so as to construe that there is possibility of commission of offence by the accused and even if there is evidence raising the suspicion of commission of offence by accused, the cognizance can be taken by the Magistrate and thereafter the accused has a right to put his version before the Court, on the basis of evidence on record at the time of framing of charge. ***(See Rakhi Mishra vs. State of Bihar and others***reported in ***(2017)16 SCC 772).***

10 No doubt, the evidence or materials placed before the Magistrate, at the time of taking cognizance, is not to be evaluated on merit, but definitely it is duty of the Court to see as to whether some evidence is available on record or not. In case, there is no evidence on record to indicate commission of alleged offence(s), the Magistrate is not supposed to act as a Post Office, but is expected to apply his judicial mind according to facts and circumstances of the case for accepting or rejecting the challan/report filed before him under Section 173 Cr.P.C.

11 But in the present case, as discussed supra, it is a case where no evidence with respect to rash and negligent driving is available. But learned Magistrate appears to have acted in mechanical manner without application of mind much less judicial mind. Hence the present petition is allowed and FIR No. 146 of 2018 dated 14.6.2018, under Section 279, 337 and 304-A IPC registered at P.S. Sadar Chamba is quashed and consequential proceedings arising thereto pending before the concerned Court are also quashed. All pending miscellaneous application(s), if any, also stand disposed of.

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

Collector LAC and another ....Appellants
Versus
Narayan Singh and others ....Respondents

RFA Nos. 129 of 135 of 2011
Date of Decision : 22nd August, 2019

Land Acquisition Act 1894 – Sections 23 & 25 – Acquisition of land for public purpose – Market value – Determination – Sale deed(s) – Relevancy – Held, sale deed(s) on basis of which value of land becomes less than the highest value of land determined by Land Acquisition Collector are not relevant in view of Section 25 of Act. (Para 8)

For the Appellant(s): Mr. Desh Raj Thakur, Additional Advocate General.
For the Respondent(s): Mr. Naveen K. Bhardwaj, Advocate in all appeals.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (oral)

All these appeals, preferred by the Land Acquisition Collector/State, arising out of common award dated 27.8.2010 passed by learned District Judge, Kullu (hereinafter referred to as 'the Reference Court') in Land Reference Petitions No. 3 of 2008, titled Fagnu vs. Collector, Land Acquisition, 4 of 2008 titled Jagat Ram vs. Collector, Land Acquisition, 5 of 2008 titled Tolu vs. Collector, Land Acquisition, 6 of 2008 titled Narayan Singh and others vs. Collector, Land Acquisition, 7 of 2008 titled Lot Ram and another vs. Collector, Land Acquisition, 8 of 2008 titled Bhupender Singh and others vs. Collector, Land Acquisition and 9 of 2008 titled Sarla Devi and others vs. Collector Land Acquisition, involving common question of facts and law, are being decided vide this common judgment on the basis of common evidence led in lead case i.e. Reference Petition No. 3 of 2008 titled Fagnu vs. Collector, Land Acquisition.

2. State of H.P. had acquired land situated in village Phati Kashwari, Kothi Kais, Tehsil and District Kullu for construction of National Highway-21 Kullu Bye Pass road by invoking the provisions of Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') after issuing notification dated 25.8.2003 under Section 4 of the Act, which was published on 1.9.2003. On completion of formalities under the Act, the Land Acquisition Collector had announced Award No. 2 of 2005 dated 22.11.2005 determining the value of land on the basis of classification of land ranging from Rs.8382/- to 68,580/- per bigha.

3. The land owners being aggrieved by value determined by the Land Acquisition Collector had preferred Land Reference Petitions under Section 18 of the Act for further enhancement of compensation wherein the Reference Court has enhanced the value of land at uniform rate of Rs.30,000/- per biswa irrespective of kind and quality of acquired land.

4. Aggrieved by enhancement determined by the Reference Court, the appellant/State has preferred present appeals on the ground that the Reference Court has

committed mistake by ignoring the evidence placed on record on behalf of appellant/State, more particularly, sale deeds Ext.R1, Ext.R3, Ext.R5 and Ext.R7.

5. Land owners have examined three witnesses. PW1 Joginder and PW2 Jagar Nath are purchasers of land in respective sale deeds Ext.PW1/B and Ext.PW2/B relied upon by land owners for enhancement. PW3 Lot Ram has been examined as representative of land owners in support of claim put-forth for enhancement. Appellant/State has not examined any witness, but has placed on record sale deeds Ext.R1, Ext.R3, Ext.R5, Ext.R7.

6. Sale deed Ext.PW1/B relied upon by land owners is dated 8.9.2003, which has been executed after issuance and publication of notification issued under Section 4 of Act and when there is other evidence on record, reliance cannot be put on this sale deed for determining the value of land. In this sale deed, land has been transferred at the rate of Rs.2 lac per biswa but being a sale deed of period of post notification under Section 4 of the Act, it has been rightly discarded by the Reference Court.

7. Sale deed Ext.PW2/B was executed on 29.11.2001 whereby one biswa of land was transferred for Rs.50,000/-. This sale deed is also beyond the period of 12 months from the date of issuance/publication of notification under Section 4 of the Act. However, this sale deed is prior in time to notification under Section 4 of the Act.

8. In sale deed Ext.R1 dated 14.10.2002, 6 biswas 12 biswansi land was transferred for Rs.13,000/- which gives value of land at the rate of Rs.1969.69/- per biswa. As per sale deed Ext.R3 dated 24.5.2003 whereby 7 biswa 10 biswansi land was transferred for Rs.16,500/-, value of land becomes Rs.2200/- per biswa. According to sale deed Ext.R5 dated 25.8.2003 whereby 9 biswas land was sold for Rs.20,000/-, value of land becomes Rs.2222/- per biswa. Sale deed Ext.R7 dated 27.12.2002 wherein 10 biswa land has been sold for Rs.22,000/-, gives value of land at the rate of Rs.2200/- per biswa. All these values are less than the highest value of land determined by the Land Acquisition Collector and therefore, Reference Court has rightly discarded these sale deeds in view of provisions of Section 25 of the Act.

9. Now only relevant evidence on record is Ext.PW2/B wherein one biswa land was sold for Rs.50,000/-. The sale deed pertains to the year 2001, whereas the land has been acquired in the year 2003. There is possibility of increase in the value of land by the passage of time and therefore, value of land in the year 2003 in comparison to the value of land in 2001 must be higher. However, it is also a fact that in sale deed Ext.PW2/B, a small chunk of land i.e. one biswa was under consideration. Therefore, for arriving at just and fair value in the year 2003, some deduction was necessary in said value. For gap of time between the execution of sale deed and acquisition of land, some enhancement from 10 to 12% was to be given in favour of land owners and at the same time, for a transaction of small chunk of land, a deduction was necessary in value of land arriving at on the basis of said sale deed.

10. If 10% enhancement is given then value of land would be Rs.55,000/- per biswa and just and fair value of land in the year 2003 is to be determined after making reasonable deduction in the said amount. Reference Court has determined the value at the rate of Rs.30,000/- per biswa, which is Rs.25,000/- lesser than Rs.55,000/- and Rs.20,000/- lesser than Rs.30,000/- which is a deduction at the rate of 40 to 45%. Therefore, value arrived at by the Reference Court is 40% lesser than the value arrived at on the basis of sale deed Ext.PW2/B, which, in my opinion, is just and fair value of acquired land.

11. In view of above, I find no reason for interference in the impugned award passed by the Reference Court. Accordingly, the appeals preferred by State are dismissed being devoid of merit. All pending miscellaneous application(s), if any, also stands disposed of.

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

State of H.P. ….Appellants

Versus

Mehtab Singh & others ….Respondents

RFA Nos. 145 of 2009

Date of Decision 22nd August, 2019

Land Acquisition Act 1894 – Sections 23 & 25 – Acquisition of land for public purpose – Market, value – Determination – Sale deed(s) – Relevancy – Held, sale deed(s) on basis of which value of land becomes less than the highest value of land determined by Land Acquisition Collector are not relevant in view of Section 25 of Act (Para 6)

For the Appellants: Mr. Desh Raj Thakur, Additional Advocate General.

For the Respondents: Mr. Vinod Gupta, Advocate, for respondents No.1, 2(a) to 2(c) and 3 to 12.
Respondents No.1(a) to 1(d) already ex-parte

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (oral)

This appeal has been preferred by the State of H.P. against impugned award dated 16.4.2009 passed by learned District Judge, Hamirpur (hereinafter referred to as 'the Reference Court') in Land Reference Petition No. 1 of 2006 titled Mehtab Singh and others vs. Land Acquisition Officer and another,whereby value of land acquired by State for construction of Bhota-Hamirpur-Nadaun road in village Khairi, Tehsil Nadaun, District Hamirpur has been enhanced and determined from Rs.7000/- per marla to 28,500/- per marla.

2. It is undisputed fact that appellants have acquired the land of respondents/land owners situated in village Khairi for construction of road by invoking the provisions of Land Acquisition Act (hereinafter referred to as 'the Act') by issuing notification dated 30.5.2000, last publication whereof was on 6.6.2001. After completing the codal formalities under the Act, Land Acquisition Collector has passed award No. 17 of 2003 on 9.5.2003 determining the value of land as Rs.7000/- per marla. As in award passed by Land Acquisition Collector, benefit of Section 23(1)(A) of the Act was given from wrong date, therefore, the award was modified on 9.6.2006.

3. In reference petition, preferred by respondents/land owners, under Section 18 of Act for enhancement of compensation, value of land has been re-determined at Rs.28,500/- per marla.

4. Aggrieved by said enhancement by the Reference Court, appellants/State has preferred present appeal on the ground that Reference Court has wrongly relied upon sale deed Ext.PW1/A and has committed a mistake by discarding the evidence led by appellant/State particularly one year average value Ext.R3 to Ext.R5 and Ext.RW2/A and also sale deeds Ext.R1 and Ext.R2.

5. In the Reference Court, land owners have examined four witnesses. PW1 Kuldeep Singh, Registration Clerk, has proved on record the registration of sale deed Ext.PW1/A, whereas, PW2 Deep Kumar, an official of office of Registrar, has produced the record of said sale deed. PW3 Rajmal is son of land owner Mehtab Singh and also holder of Power of Attorney on behalf of his father. PW4 Bhagwan Dass is resident of Rangas, an area adjacent to which land under acquisition was situated. Land owners have relied upon sale deed dated 19.11.1999 Ext.PW1/A pertaining to village Khairi, whereby one marla of land was sold for Rs.50,000/-. Reliance has also been placed by land owners on one year average value Ext.PW2/B wherein highest value of land has been determined as Rs.35,000/- per marla. Maps Ext.PW3/B and Ext.PW3/C have also been placed on record by land owners indicating the prime location of land under acquisition.

6. Sale deeds Ext.R1 and Ext.R2 relied upon by appellants/State are dated 1.5.1995 and 26.2.1997 respectively. In sale deed Ext.R1 two kanal land was sold for Rs.2500/- which gives the value of land at the rate of Rs.62.50 Ps. per marla. In sale deed Ext.R2 one kanal and one marla was sold at Rs.1000/-, whereby value of land comes to less than Rs.50/- per marla. These sale deeds pertain to the period beyond 12 months from the date of notification and value of land arrived at in these sale deeds is much less than the value determined by the Land Acquisition Collector. Therefore, these sale deeds have rightly been ignored by the Reference Court.

7. In one year average value Ext.R4, highest value of land has been determined at the rate of Rs.350/- per marla, whereas, according to five years average value Ext.R5 and Ext.RW2/A highest value of land in the same village has been determined as Rs.2647/- per marla. These average values are also less than the value of land as determined by Land Acquisition Collector at the rate of Rs.7000/- per marla and average value Ext.R4 is for a period of 1.3.1997 to 28.2.1998, which is again not relevant because it is also for the period which is beyond 12 months from the date of notification under Section 4 of the Act. Otherwise also average value cannot be sole basis for determining value of land under the Act.

8. Now only evidence, produced by appellant/State, available on record is one year average value Ext.R3 wherein highest value of land has been determined at the rate of Rs.35,000/- per marla whereas sale deed Ext.PW1/A, relied upon by land owners, which was executed within the period of consideration from the date of notification under Section 4 of the Act gives the value of land at the rate of Rs.50,000/- per marla.

9. Reference Court has taken into consideration the value determined by Land Acquisition Collector i.e. Rs.7000/- per marla and value arrived at on the basis of sale deed Ext.PW1/A i.e. Rs.50,000/- per marla and determined the value of land on the basis of means of these two values. Where there is a considerable huge difference between two values, the method of determining the value on the basis of mean of those values does not give the just and fair value of land and further, the average value is also a mean value of different transaction in the area and that cannot be added to the value of sale deed for carrying out the exercise of calculating the value on the basis of mean of average value and value of land arrived at on the basis of sale deed.

10. In sale deed Ext.PW1/A, there is transfer of small chunk of land i.e. one marla. Therefore, some deduction is necessary from the value of land arrived at on the basis of this sale deed. The value of land by Reference Court has been determined at Rs.28,500/- and therefore, there is difference of Rs.21,500/- in the value of land on the basis of Ext.PW1/A and value determined by the Reference Court and if it is considered the deduction, then it comes about 43% deduction in value of land determined on the basis of sale deed Ext.PW1/A. Otherwise also, the only relevant evidence produced by appellants/State is average value Ext.R3 according to which highest value of land is Rs.35,000/- and value of land determined by the Reference Court at the rate of Rs.28,500/- is lesser than that. Land owners have not filed any appeal for further enhancement and they are satisfied with the value of land at Rs.28,500/-. Therefore, no interference is warranted in the award passed by the Reference Court.

11. In view above discussion, since I find no ground for interfering in the impugned award, the appeal preferred by the State is dismissed being devoid of merit. Record be sent back. All pending miscellaneous application(s), if any, also stands disposed of.

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BEFOREHON'BLE MR. JUSTICE SANDEEP SHARMA, J.

State of Himachal Pradesh ……Appellant
Versus
Gauri Ram …..Respondent

Cr. Appeal No: 414 of 2010
Date of Decision: 30.07.2019

Indian Penal Code, 1860- Section 325 - Grievous hurt– Proof – Appeal against acquittal of trial court by State on ground of wrong appreciation on its part– Held, parties though closely related to each other yet highly inimical on account of property of father- in- law of accused which accused was possessing and managing – Complainant being nephew of deceased father- in -law of accused wanted to get that property – Independent witnesses admitting of hurling of abuses by accused but denying any assault by him on injured – Previous litigation interse parties pending – Case of prosecution doubtful – Acquittal upheld – Appeal dismissed. (Paras 15, 18 & 21)

Case referred:
C. Magesh and others vs. State of Karnataka, (2010) 5 SCC 645

For the Appellant : Mr. Sudhir Bhatnagar, Additional Advocate General, with Mr. Kunal Thakur, Deputy Advocate General.
For the Respondent: Mr. Ajay Sharma, Senior Advocate with Mr. Ajay Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant Criminal Appeal having been filed by the appellant-State, is directed against the judgment of acquittal dated 9.4.2010, passed by learned Judicial Magistrate, 1st Class (II), Kangra, District Kangra, Himachal Pradesh, in Criminal case No. 4-II/2004, whereby learned trial Court held respondent ***(hereinafter referred to as the 'accused')*** not guilty of having committed of offence punishable under Section 325 of IPC and accordingly acquitted him.

2. Briefly stated facts, as emerged from the record are that on 31.12.2002, complainant Sher Singh (PW-1) lodged a complaint at police Station, Kangra, District Kangra,H.P., alleging therein that on 31.12.2002, at about 8:15 PM, accused came to the courtyard (jointly owned by the victim and the accused) and started hurling abuses. Complainant Sher Singh and his son Vijay Kumar (PW-11) came to the courtyard and Vijay Kumar asked the accused to refrain from using abusive language. Accused after listening aforesaid request of Vijay Kumar, got infuriated and took a stick in his hand and tried to assault Vijay Kumar. Complainant Sher Singh intervened with a view to save his son, but the blow of the stick injured his right arm. Thereafter, accused inflicted another blow on the head of the complainant, as a consequence of which, blood started oozing out from his head. Subsequently, Onkar Singh (PW-2) came to the spot, but accused also inflicted 2-3 blows of stick on his person. Vikram Singh (PW-6) and Sher Singh (PW-4), who happened to be neighbours of the accused as well as the complainant, reached the spot and got the dispute settled down. On the basis of aforesaid complaint, formal FIR Ex.PW10/A came to be lodged at police Station, Kangra, District Kangra,H.P. Thereafter, police got the complainant medically examined and procured MLC Ex.PW7/A. As per MLC, injury No.1 was found to be grievous in nature caused by blunt weapon. After completion of the investigation, police presented the challan in the Court of learned Judicial Magistrate, 1st Class (II) Kangra, District Kangra, Himachal Pradesh, who being satisfied that a prima-facie case exists against the accused, framed charge against him for the commission of offence punishable under Section 325 IPC, to which he pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case examined as many as 12 witnesses, whereas accused in his statement recorded under Section 313 Cr.P.C. denied the case of the prosecution in toto. However, he did not lead any evidence in his defence. He stated that complaint came to be lodged against him because of prior enmity between the parties. He also alleged that there was a case against the complainant, wherein he had deposed as a witness and as such, present case has been filed to take revenge.

4. Learned trial Court on the basis of the evidence collected on record by the prosecution, held accused not guilty and accordingly acquitted him vide judgment dated 9.4.2010. In the aforesaid backdrop, appellant-State has approached this Court in the instant proceedings, seeking conviction of the accused after setting aside the impugned judgment of acquittal recorded by the learned trial Court.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds no illegality and infirmity in the impugned judgment of acquittal recorded by the learned trial Court and as such, same does not call for any interference.

6. Close scrutiny of the evidence led on record by the prosecution, nowhere compel this Court to agree with the contention raised by learned Deputy Advocate General that learned Court below has failed to appreciate the evidence in its right perspective, rather this Court finds that prosecution miserably failed to prove beyond reasonable doubt that on the date of alleged incident accused gave beatings with the aid of the stick to the complainant and other person namely, Onkar Singh (PW-2) and as such, judgment of

acquittal recorded by learned trial Court appears to be based upon the proper appreciation of the evidence.

7. Leaving everything aside, version put forth by the material prosecution witnesses, clearly reveals that they are closely related to the complainant and had prior animosity with the accused, who is otherwise related to the complainant as well as other material prosecution witnesses.

8. PW-1, Sher Singh (complainant) deposed that on 31.12.2002, at about 7:30 -8:00 PM, accused, who was drunk, started hurling abuses in his courtyard. Complainant's son Vijay Kumar, Vikram and Onkar came to the spot and asked the accused to stop using such language. He deposed that accused got infuriated and inflicted a blow of stick on his head and arm, as a result of which, he has suffered fractured. He also stated that he also suffered injuries on the head. He stated that he had signed as an identifier on the seizure memo vide which the stick was taken into possession, however, he failed to identify the stick in the Court. During cross-examination, this witness stated that accused is his sister's husband and couple is staying in the sister's maternal house. He admitted that the accused takes care of the family. He also admitted that there is a case pending against him in the Court. He denied the suggestion put to him that he wants to inherit the property of his Uncle Punnu Ram, giving rise to enmity between the parties. He also denied the suggestion that he was drunk on the fateful day and all his associates gathered and went to the house of the accused with a view to assault him and his family members. He also admitted that police came to the spot on 1.1.2003, but stated that he is unaware about the investigation conducted by the police. He feigned his ignorance in respect of the date on which he signed the seizure memo and nor he remember the place where the seizure memo was signed and neither he remember the names of other persons gathered there. Most importantly, this witness stated that stick (weapon of offence) was not produced in his presence.

9. PW-2, Sh. Onkar Singh supported the aforesaid version put forth by PW-1, but contradicted the version put forth by PW-1 with regard to arrival of the police at the alleged spot of incident. He stated that police came to the spot within a span of 1-2 hours on the same day and recorded their statements. He also failed to identify the weapon of offence. During his cross-examination, he stated that complainant is his brother and his house is situated at a distance of 100-150 meters from the house of the complainant and the accused. He also stated that there are 15-20 houses in between the house of the accused and the house of PW-1. He stated that when he reached on the spot many people (around 10-15 in number) had gathered there including Vikram Singh (PW-6), Sher Singh (PW-4), Bihari Lal and Ranjeet Singh. He admitted that accused is his Uncle's son-in-law and his Uncle is having no son. He admitted that the accused takes care of the family of his Uncle as well as his property. He also admitted that the family of the complainant is not in good terms with the accused, but he denied the specific suggestion put to him that dispute keeps on cropping up between them because of the property. In his cross-examination, he reiterated that police came to the spot and prepared the site map on the same day. He also admitted that a case is pending against them in the present Court. He denied the suggestion that the complainant was drunk on that day and they all gathered and went to the house of the accused to beat him.

10. Sh. Sher Singh (PW-4), who is an independent witness deposed that the accused and PW-2 were quarreling among themselves in the courtyard of the accused in the year, 2002 at about 8:15-8:30 PM, whereafter he went to the spot and saw the accused holding a stick in his hand. Though, this witness identified the stick, but in his cross-examination stated that when he reached the spot only abuses were being exchanged and he did not witness the assault. He admitted that PW-1 & PW-2 were drunk. He also stated that

he had left the spot after the dispute was resolved. He also admitted that there is a dispute between the complainant and the accused in respect of the fact that accused stays in the house of his father-in-law, who is the complaint's Uncle. He also admitted that accused takes care of the property of his father-in-law and the complainant wants that they should get the property of their uncle. This witness admitted in his cross-examination that on the fateful day, a dispute arose between the parties because of the aforesaid reason. He admitted that there is a case pending against PW-1 and PW-2.

11. PW-6, Vikram Singh i.e. another independent witness though declared hostile, but during his cross-examination by learned APP, admitted that on 31.12.2002, the accused was hurling abuses in the courtyard. He admitted that the complainant alongwith his son Vijay Kumar came to the spot and Vijay Kumar told him to refrain from doing so. He also stated that complainant intervened and suffered injuries on his hand while protecting his son. This witness deposed that complainant also suffered injuries on his head and the blood started oozing out from his head, but no injuries were sustained by PW-2. He stated that he did not intervene in the dispute and came back from the spot. During his cross-examination by learned defence counsel, he stated that there were 10-15 people gathered on the spot before his arrival. He also admitted that complainant and PW-2 told him about the injuries suffered by them. This witness like another witness admitted that the accused is staying in his father-in-law's house and there is a dispute between the complainant, PW-2 and the accused in respect of the property. He also admitted that complainant and PW-2 want that the accused should leave the house of his father-in-law and this is the basic reason behind the institution of the case by the complainant. Most importantly, this witness admitted that no assault took place in his presence.

12. PW-11, Vijay Kumar, who was allegedly attacked by the accused deposed that due to the assault given by the accused, his father got his right arm fractured. During his cross-examination, this witness stated that police came to the spot on 2.1.2003. He also stated that stick was presented by his father to the police at the police station. This witness admitted that accused has filed a case against his father under Section 326 of IPC.

13. PW-5, Hari Singh, who is witness of seizure memo was declared hostile because he nowhere supported the case of the prosecution. During his cross-examination by learned APP, he stated that he had signed the memo on the direction of the Investigating Officer in the police station and the stick was also lying in the police station. He categorically stated that he was not present on the spot on the fateful day, rather he was in Kangra. During his cross-examination by learned defence counsel, he stated that he is known to PW-1 and PW-2. He stated that accused is staying in the house of his father-in-law and he is taking care of his estate.

14. Careful perusal of the statements having been made by the aforesaid prosecution witnesses, clearly suggest that there are material contradictions and inconsistencies in their version put forth before the court below with regard to arrival of the police on the date of alleged incident. Complainant, Sher Singh (PW1) though in his cross-examination categorically admitted that the police came to the spot on 1.1.2003, but PW-2 not only in his examination-in-chief but in cross-examination reiterated that police came to the spot on 31.12.2002 and recorded their statements.

15. So called independent witnesses Sher Singh (PW-4) and Vikram Singh (PW-6) associated by the prosecution though corroborated the version put forth by PW-1 and PW-2 with regard to hurling of abuses by the accused on the date of alleged incident, but these witnesses specifically denied or feigned ignorance with regard to assault, if any, made by the accused to PW-1 and PW-2 in their presence. Most importantly, these independent

witnesses categorically stated/ admitted that there is prior animosity *inter se* complainant and the accused on account of the property. These witnesses have categorically admitted that complainant and PW-2 want that the accused should leave the house of his father-in-law. These witnesses in so many words have also stated that complainant, who otherwise happened to be nephew of the father-in-law of the accused want to inherit the property of their Uncle namely Sh. Punnu Ram, who has no son. This witness as well as PW-2 in their statements categorically stated that many people had gathered on the spot of alleged incident, but it is not understood that why investigating agency failed to associate independent witness from the locality, especially when they were available in abundance. No doubt, version put forth by closely related witnesses cannot be brushed aside solely on account of non-association of independent witnesses, but definitely their version is required to be relied upon with utmost caution, especially when there is evidence available to the fact that there is prior animosity *inter se* parties. In the case at hand, as has been observed, there is overwhelming evidence available on record that there is previous litigation pending between the accused and the complainant and PW-1 and PW-2 do not want accused, who happened to be son-in-law of their Uncle, to live in the house of their Uncle, so that property is grabbed by them.

16. No doubt, version put forth by Dr. Gurdarshan Gupta(PW-7), who proved the copy of MLC Ex.PW7/A, suggests that though injury No.1 was found to be simple in nature, but injury No.2 was found to be grievous in nature. But that may not be sufficient to prove the guilt of the accused, especially when there is no evidence to connect the accused with the alleged injuries suffered by the complainant. During his cross-examination, this witness stated that no weapon was shown to him at the time of medical examination and such injuries can be caused by fall on a hard surface.

17. PW-12, SI Suresta Thakur, who happened to be Investigating Officer, during her cross-examination feigned ignorance in respect of the pending case against the complainant under section 326 IPC. She also pleaded her ignorance in respect of the property dispute between the complainant and the accused. She denied the suggestion put to her that the stick was given by the complainant at the police Station. She also pleaded ignorance to the suggestion that the complainant has filed this case in order to defend himself.

18. Having carefully scanned the evidence led on record by the prosecution, this Court has no hesitation to conclude that prosecution has miserably failed to prove its case against the accused and as such, learned Court below has rightly held the accused not guilty of having committed of offence punishable under Section 325 of IPC.

19. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)

> ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***

46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.

20. In the case at hand, there are material contradictions and inconsistencies in the statements of the prosecution witnesses and as such, no conviction can be based upon the same.

21. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment of acquittal passed by the learned court below, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the present appeal is dismissed being devoid of any merit alongwith pending applications, if any.

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BEFOREHON'BLE MR. JUSTICE SANDEEP SHARMA, J.

State of Himachal Pradesh ……Appellant
Versus
Ashish Sangrai …..Respondent

Cr. Appeal No: 530 of 2009
Date of Decision: 2.8.2019

Indian Penal Code 1860 – Sections 323 & 325 – Grievous hurt – Proof – Appeal against acquittal –Held, on facts, in FIR, complainant alleged of incident having taken place at Main Chowk, Palampur – In evidence, saying that incident happened inside shop of accused – Site plan also shows alleged incident having taken place inside shop of accused – Visit to shop of accused also admitted by complainant – Investigating officer admitting of accused having told him that complainant was blackmailing him – No person from bazar was

associated in investigation – Case of prosecution doubtful – Appeal dismissed – Acquittal upheld. (Paras 9 to 11 & 16)

For the Appellant : Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.

For the Respondent: Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, is directed against the judgment of acquittal dated 1.8.2009, passed by learned Judicial Magistrate, 1st Class (I), Palampur, District Kangra, Himachal Pradesh, in Criminal case No. 191-II/2007, whereby learned trial Court held respondent ***(hereinafter referred to as the 'accused')*** not guilty of having committed of offence punishable under Sections 325 and 323 of IPC and accordingly acquitted him.

2. Precisely, the facts of the case as emerged from the record are that on 3.9.2007, complainant Rachna Devi (PW-5) got her statement recorded under Section 154 Cr.P.C., at police Station, Palampur, alleging therein that on 3.9.2007, at about 5:00 PM, at place called Main Chowk, Palampur, when she asked the accused why he had been abusing her then accused attacked her and caused grievous hurt by giving her fist and kick blows. On the basis of aforesaid complaint lodged by the complainant, FIR Ex.PW4/A came to be lodged against the accused under Sections 323 and 325 IPC. After completion of the investigation, police presented the challan in the competent Court of law, who being satisfied that a prima-facie case exists against the accused, framed charge against him for the commission of offence punishable under Section 323 and 325 IPC, to which he pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case examined as many as 7 witnesses, whereas accused in his statement recorded under Section 313 Cr.P.C. denied all incriminating evidence led against him by claiming himself to be innocent. However, he did not lead evidence in his defence.

4. Learned trial Court on the basis of the evidence collected on record by the prosecution, held accused not guilty and accordingly acquitted him vide judgment dated 1.8.2009. In the aforesaid backdrop, appellant-State has approached this Court in the instant proceedings, seeking conviction of the accused after setting aside the impugned judgment of acquittal recorded by the learned trial Court.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court sees no reason to differ with the well reasoned judgment of acquittal passed by the learned court below. Bare perusal of the evidence, be it ocular or documentary, led on record vis-a-vis impugned judgment of acquittal, nowhere compel this Court to agree with the contention raised by Mr. Kunal Thakur, learned Deputy Advocate General that learned Court below while ascertaining the guilt, if any, of the accused has failed to appreciate the evidence in its right perspective, rather this Court finds from the record that both the material prosecution witnesses PW-5, Rachna and PW-6, Abhaya, who are closely related to each other, nowhere corroborated the version put forth by each other and as such, learned Court below rightly arrived at a conclusion that no much

reliance can be placed upon the statements made by these witnesses on account of mere contradictions and inconsistencies.

6. PW-5, Rachna deposed that accused started abusing her and when she asked why he is abusing her and she will make complaint to his father, accused came outside and started beating her, as a consequence of which, she sustained injuries on her person. She further stated that she reported the matter to the police and at that time Abhaya Devi (PW-6) was also accompanying her. In her cross-examination, this witness admitted that shop of the complainant is situated in the main Bazar, Palampur. She also admitted that she had not purchased any article from the shop of the accused and at that time accused was inside his shop. She also admitted that on the date of alleged incident, she had gone inside the shop of accused. She categorically denied the suggestion put to her that she asked the accused to marry with her otherwise she will make complaint against him.

7. PW-6, Abhaya Devi, who happened to be niece of the complainant, corroborated the version put forth by PW-5 that she was given beating by the accused on her objecting to the abuses hurled at her. However, in her cross-examination, she admitted that her Bua (PW-5) had told the accused that she will make complaint against him. She admitted that accused was inside his shop and her Bua had also gone inside the shop. This witness denied the suggestion put to her by defence that complainant was asking the accused for marriage with her and when the accused refused to marry her she had lodged the false complaint.

8. Statements of remaining prosecution witnesses PW-2, HHC Dharam Chand, who proved the copy of rapat Ex.PW2/A, PW-4, SI Ashok Kumar, who proved the copy of FIR Ex.PW4/A and PW-7, Dr. Sunil Sood, who examined the injured Rachna Devi(PW-5) on the date of alleged incident, may not be very relevant for the determination of the guilt, if any, of the accused, assuch **s**ame are not required to be taken notice of.

9. Careful perusal of the statements having been made by PW-5 and PW-6, certainly compels this Court to agree with the findings returned by the learned Court below that there are material contradictions in their statements and as such, no much reliance could be placed upon the same while ascertaining the guilt, if any, of the accused. Perusal of FIR Ex.PW4/A reveals that at first instance PW-5 had disclosed to th**e** police **t**hat when near the main Chowk, Palampur she asked accused why he is abusing her, the accused voluntarily caused hurt to her by giving fist blows, however, such version of her never came to be corroborated by her in her deposition made before the Court, wherein she stated that she had gone inside the shop, where accused gave her beatings, as a result of which, she suffered injuries. Apart from above, perusal of site plan Ex.PW3/A reveals that investigator had shown the place of occurrence inside the shop of accused near the counter lying in the shop. PW-6 categorically stated that complainant went inside the shop of the accused and asked accused why he is abusing her and only then accused attacked the complainant. If the contradictions, as have been pointed out hereinabove, are taken into consideration, it certainly create serious doubt about the place of alleged occurrence.

10. PW-5, Rachna and her niece PW-6, Abaya Devi though denied that complainant was black mailing the accused by saying that she will make complaint against accused, if he did not marry her, but PW-3, ASI Narottam Chand has categorically stated that during investigation the accused had disclosed him that complainant is black mailing him.

11. On the top of everything, there is dispute with regard to place of occurrence because as per prosecution story, occurrence allegedly took place at Palampur Bazar, but

interestingly, no person from the Bazar ever came to be associated by the investigator during the investigation, rather he for the reason best know to him opted to associate only the niece of the complainant during the investigation and there is no plausible explanation rendered on record by the Investigating Officer(PW-3) that why he failed to associate independent witness from the locality, when they were available in abundance.

12. True, it is version put forth by closely related witnesses cannot be brushed aside solely on account of non-association of independent witnesses, but certainly version put forth by such witnesses are required to be taken into consideration while determining the guilt, if any, of the accused with utmost caution. In the case at hand, as has been pointed out that there are material contradictions and inconsistencies in the statements of aforesaid witnesses,who are otherwise related to each other and as such, version put forth by them rightly came to be discarded by the learned Court below in the absence of corroboration, if any, by independent witnesses.

13. Having carefully scanned the evidence led on record by the prosecution, this Court has no hesitation to conclude that prosecution has miserably failed to prove its case against the accused and as such, learned Court below has rightly held the accused not guilty of having committed of offence punishable under Sections 323 and 325 of IPC.

14. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)***
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> > ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
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> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the***

evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.

15. In the case at hand, there are material contradictions and inconsistencies in the statements of the prosecution witnesses and as such, no conviction can be based upon the same.

16. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment of acquittal passed by the learned court below, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the present appeal is dismissed being devoid of any merit alongwith pending applications, if any.

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

Yoginder Singh …….. Petitioner
Versus
State of Himachal Pradesh …….. Respondent.

Cr. MP(M) No. 1472 of 2019
Date of Decision: 8th August, 2019

Code of Criminal Procedure, 1973 –Section 439 – Regular bail– Grant of in a rape case– Circumstances– On facts, held, accused and victim known to each other since when they were in class nine– Victim frequently meeting accused and had intimate relationship with him– FIR registered after five months of last episode of alleged sexual assault– No reason is given for such delay– Prosecutrix major and capable of understanding consequences of her being in company of accused– Petition allowed– Bail granted subject to conditions. (Paras 16 & 13)

Cases referred:
Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the Petitioner: Mr. K.S.Thakur & Mr. Jagdish Thakur, Advocates.
For the Respondent: Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(oral):

Bail petitioner namely, Yoginder Singh, who is behind the bars since 24.7.2019, has approached this Court in the instant proceedings filed under Section 439 of the Code of Criminal Procedure, praying therein for grant of regular bail in case FIR

No.32/2019, dated 23.7.2019, under Sections 376 and 323 of IPC, registered at Women Police Station, Solan District Solan, Himachal Pradesh.

2. Sequel to order dated 5.8.2019, ASI Sanjeev Kumar has come present alongwith the record. Mr. Sanjeev Sood, learned Additional Advocate General, has also placed on record status report, prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

3. Close scrutiny of the record/status report, reveals that on 23rd July, 2019 victim-prosecutrix ***(hereinafter referred to as the prosecutrix', name withheld to protect her identity)*** aged 20 years, lodged a complaint at Women Police Station, Solan, District Solan, H.P., alleging therein that bail petitioner, who was known to her for the last 5-6 years, sexually assaulted her against her wishes and thereafter also blackmailed her. She also alleged that bail petitioner asked for 30,000-40,000/- from her, failing which he would upload the photographs of the prosecutrix on the Internet. She further alleged that petitioner repeatedly used her on the pretext of marriage and as such, appropriate action be taken against him. On the basis of aforesaid complaint, formal FIR, as detailed hereinabove, came to be lodged against the petitioner under Sections 376 and 323 of IPC on 23.7.2019and since then he is behind the bars.

4. Mr. Sanjeev Sood, learned Additional Advocate General, on instructions states that though investigation in the case is yet to be completed, but nothing remains to be recovered from the bail petitioner. He states that keeping in view the gravity of offence alleged to have been committed by the bail petitioner, he does not deserve any leniency and as such, prayer for grant of bail made on behalf of the bail petitioner may be rejected. He further contended that in the event of petitioner's being enlarged on bail, he may not only cause harm to the prosecutrix, but besides tampering with the prosecution evidence may also dissuade the prosecution witnesses from deposing against him.

5. Mr. K.S.Thakur, Advocate duly assisted by Mr. Jagdish Thakur, Advocate, while refuting the aforesaid contentions raised by learned Additional Advocate General, contended that bare perusal of the record/status report reveals that no case much less under Section 376 of IPC is made out against the bail petitioner. While making this Court to travel through the record/status report, learned counsel strenuously argued that there is nothing on record suggestive of the fact that bail petitioner ever compelled/forced the prosecutrix to join his company, rather she of her own volition remained in the company of the bail petitioner. Learned counsel further contended that as per own statement of the prosecutrix, last incident of forcible sexual intercourse allegedly happened on 22.2.2019 and there is no explanation rendered on record that why FIR came to be lodged after approximately five months of the alleged incident. While referring to medical evidence led on record, learned counsel also made an attempt to make this Court to agree with his contention that there is no corroborative medical evidence suggestive of the fact that prosecutrix was subjected to forcible sexual intercourse and as such, bail petitioner deserve to be enlarged on bail. Lastly, learned counsel representing the bail petitioner contended that there is nothing adverse available on record suggestive of the fact that bail petitioner is habitual offender and as such, he being first offender deserves to be enlarged on bail, especially when his guilt, if any, is yet to be proved, in accordance with law.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that the prosecutrix and bail petitioner were known to each other since class 9th. It has specifically come in the statement of the prosecutrix recorded under Section 164 Cr.P.C that she had been frequently meeting the bail petitioner and they had developed intimate relationship. Interestingly, though in the

statement of the prosecutrix there is mention with regard to repeated sexual intercourse allegedly made by the bail petitioner against the wishes of the prosecutrix, but no explanation has come forth from the prosecutrix that why she kept mum for quite considerable time. Though, prosecutrix in her statement made under Section 164 Cr.P.C, stated that since bail petitioner had agreed for marriage, she did not lodge any complaint. However, as per own statement of the prosecutrix last incident happened on 22.2.2019, whereafter bail petitioner allegedly refused to perform marriage, but there is no explanation that why FIR came to be lodged after five months of the alleged incident. This Court cannot loose sight of the fact that the prosecutrix is major and as such, it can be safely presumed that prosecutrix is/was fully capable of understanding the consequences of her being in the company of bail petitioner, to whom she knew for the last so many years.

7. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court on the basis of totality of evidence to be collected on record by the prosecution, but having noticed aforesaid glaring aspects, this Court sees no reason to allow the bail petitioner incarcerate in jail for an indefinite period, especially when guilt, if any, of him is yet to be proved, in accordance with law.

8. It has been repeatedly held by Hon'ble Apex Court as well as this Court that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law. Apprehension expressed by learned Additional Advocate General with regard to petitioner fleeing from justice in the event of his being enlarged on bail, can be best met by putting bail petitioner to stringent conditions, as has been fairly admitted by the learned counsel representing the bail petitioner.

9. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, ***Dataram Singh vs. State of Uttar Pradesh & Anr***.,decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court

further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons

10. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time,

> ***necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."***

11. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which arepeculiar to the accused involved in that crime.

12. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

- ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
- ***nature and gravity of the accusation;***
- ***severity of the punishment in the event of conviction;***
- ***danger of the accused absconding or fleeing, if released on bail;***
- ***character, behaviour, means, position and standing of the accused;***
- ***likelihood of the offence being repeated;***
- ***reasonable apprehension of the witnesses being influenced; and***
- ***danger, of course, of justice being thwarted by grant of bail.***

13. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing personal bond in the sum of Rs. 1,00,000/- (Rs. One lakh) with one local surety in the like amount each, to the satisfaction of the learned trial Court, with following conditions:

- ***He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***
- ***He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***

- ***He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to the Court or the Police Officer; and***
- ***He shall not leave the territory of India without the prior permission of the Court.***

14. It is clarified that if the petitioner misuses his liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

The bail petition stands disposed of accordingly.

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

State of Himachal Pradesh …..Appellant
Versus
Mansha Ram & others …..Respondent

Cr. Appeal No: 366 of 2008
Date of Decision: 13.08.2019

Indian Penal Code, 1860 –Sections 323 & 427, 452, 506 read with 34 – Criminal house trespass, causing hurt, mischief etc., - Proof - Appeal against acquittal by State on ground of wrong appreciation of evidence on part of trial court –Held, parties litigating with each other for last 18-20 years – Statements of complainant 'BR' and his son 'SK' contradictory to each other – 'BR' denying his son having received injuries in said incident whereas 'SK' claiming to have received such injuries – Witnesses to recovery of shirt of complainant and stones from spot not supporting prosecution case – Investigating officer himself denying smashing of window panes by accused though case in charge sheet is otherwise – Injuries possible by fall – Case of prosecution is doubtful – Appeal dismissed – Acquittal upheld. (Paras 7 to 15)

Cases referred:

C. Magesh and others vs. State of Karnataka, (2010) 5 SCC 645
State of UP vs. Ghambhir Singh & others, AIR 2005 (92) SC 2439

For the Appellant : Mr.Sanjeev Sood, Additional Advocate General, with Mr. Kunal Thakur, Deputy Advocate General.
For the Respondents: Mr. Vijay Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, lays challenge to judgment of acquittal dated 18.1.2008, passed by learned Judicial Magistrate 1st Class, Court No.1, Ghumarwin, District Bilaspur, Himachal Pradesh, in Case No.244/I of 2001 whereby learned trial Court held respondents ***(hereinafter referred to as the 'accused')*** not guilty of having committed offences punishable under Sections 427, 452, 323, 506 read with Section 34 of IPC and accordingly acquitted them.

2. Precisely, the facts of the case as emerged from the record are that on 23.5.2001, complainant Bansi Ram(PW-1) got his statement recorded at police Station, Bharari, alleging therein that at about 9:30 AM when he came back from his shop, he found that accused Mansha Ram(A-1) and Sonu son of Mansha Ram (A-2), Jasodha Devi, daughter of Mansha Ram (A-3), Kamla Devi wife of Mansha Ram (A-4) and Saraswati Devi sister-in-law of Mansha Ram(A-5) were arguing with his son, Sanjeev Kumar (PW-3) with regard to cutting of the trees. Complainant Bansi Ram (PW-1) requested accused persons not to do any altercation, however wife of accused Mansha Ram i.e. Kamla Devi (A-4) started pelting stones in the house of the complainant. Complainant as well as his son went inside their house, but accused Sonu and his father Mansha Ram allegedly entered in the house of the complainant having a Darat and Axe in their hands. Accused Sonu hit the complainant on his head with the Darat, whereas accused Mansha Ram hit the hands and wrist of the complainant with Axe. Having heard the hue and cry raised by the complainant and his son Sanjeev Kumar (PW-3), Surjit Singh and Kashmir Singh (PW-4) visited the spot, but accused Mansha Ram and his son Sonu fled away from the spot, whereas wife of the accused as well as sister-in-law kept on pelting stones towards the complainant party. Accused Mansha Ram and Sonu also started pelting stones after going outside, as a result of which, glasses of the window were broken. On the basis of aforesaid complaint lodged by the complainant Bansi Ram (PW-1), formal FIR Ex.PW1/A came to be lodged against the accused persons. After completion of the investigation, police presented the challan in the competent Court of law, who being satisfied that a prima-facie case exist against the accused persons, framed charges against them for the commission of offences punishable under Sections 427, 452, 323, 506 read with Section 34 of IPC, to which they pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case examined as many as 11 witnesses, whereas accused in their statements recorded under Section 313 Cr.P.C. denied the case of the prosecution in toto and claimed themselves to be innocent. Accused in support of their defence also tendered in evidence Ex.D-1, copy of order dated 26.6.1998 passed by Hon'ble High Court of H.P., in RSA No.235 of 1998, titled as Kamla Devi versus Kaushalya Devi, Ex.D-2 i.e. compromise dated 2.8.1995 entered between the parties and mark-X i.e. a copy of compromise.

4. Learned trial Court on the basis of the evidence collected on record by the prosecution, held accused not guilty and accordingly acquitted them vide judgment dated 18.1.2008. In the aforesaid backdrop, appellant-State has approached this Court in the instant proceedings, seeking therein conviction of the accused persons after setting aside the impugned judgment of acquittal recorded by the learned trial Court.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court sees no reason to differ with the well reasoned judgment of acquittal passed by the learned court below. Bare perusal of the evidence, be it ocular or documentary, led on record vis-a-vis impugned judgment of acquittal, nowhere compel this Court to agree with the contention raised by Mr. Kunal Thakur, learned Deputy Advocate General that learned Court below while ascertaining the guilt, if any, of the accused has failed to appreciate the evidence in its right perspective.

6. Close scrutiny of the evidence, be it ocular or documentary led on record by the respective parties, compels this Court to agree with the findings returned by the learned Court below that there are material contradictions and inconsistencies in the statements having been made by the prosecution witnesses and as such, no reliance, if any, could be placed upon the same for holding the accused guilty. Though, in the case at hand, prosecution has examined 11 witnesses, but statements of PW-1, PW-3, PW-4 and PW-8 may be relevant.

7. Complainant Bansi Ram (PW-1) while deposing before the learned Court below though reiterated the same story as put forth by him at the time of lodging the complaint, but he categorically admitted that Kashmir Singh (PW4) had given evidence in support of his case in a civil case. Kashmir Singh is owner of adjoining land. He stated that accused Mansha Ram attacked him first and his son did not receive any injury in the alleged incident.

8. PW-3, Sanjeev Kumar, who happened to be the son of complainant Bansi Ram, though made an attempt to support the version put forth by PW-1, but careful perusal of cross-examination conducted on this witness, nowhere supports the case of the prosecution. In his cross-examination, this witness admitted that accused persons were working in the field, which was situated below their house. He admitted that both the parties have shares in that field. This witness contradicted the version put forth by PW-1, Bansi Ram that house of the complainant is at the elevation of five feet from the field. It has specifically come in his cross-examination that house is at the elevation of two feet. This witness also admitted that they are litigating with the accused for the last 18 to 20 years. He also admitted that there are about 200 houses and Abadi of 5000-6000. This witness deposed that police reached the spot on the same day of incident at about 1:00 PM. Most importantly, this witness admitted that he was not present at the time of recovery of Darat and Axe. Though, this witness admitted that in the alleged incident he received injuries, but such version put forth by him is in total contradiction of the statement given by his father Bansi Ram (PW-1), who stated that his son did not receive any injury in the alleged incident.

9. PW-4, Kashmir Singh, so called independent witness stated that he was present on the spot at the time of incident. He stated that he saw accused persons pelting stones, but he did not see accused persons carrying Darat and Axe. This witness was declared hostile, but careful perusal of cross-examination conducted on this witness nowhere suggests that prosecution was able to extract something advantageous to its case. This witness totally denied that the accused were having any Darat and Axe. He also denied that the accused persons did not extend threat to the complainant. This witness also denied the suggestion put to him that he is deposing falsely as he has taken money from the accused persons.

10. PW-2, Sohan Singh, who happened to be the witness of memo Ex.PW1/B and Ex.PW1/C alongwith other witness Rajesh Kumar (PW-9) turned hostile and not supported the case of the prosecution. He specifically denied that in his presence as well as in the presence of Sohan Singh, complainant Bansi Ram has handed over his shirt. This witness further denied that no stones were taken into possession by the police in his presence. PW-3, Sanjeev Kumar while deposing before the learned Court below stated that police came on the spot on the same day of incident, whereas PW-2 stated that police has taken into custody the stones on the next day of incident.

11. PW-5, Sanjay Kumar, photographer, though allegedly took photographs Ex.PA to Ex.PH, but at no point of time negatives of the aforesaid photographs came to be placed on record. This witness categorically stated that negatives were handed over by him

to the police, but such negatives neither came to be seen in the Court, nor the same were placed in the police file. Aforesaid omission on the part of the prosecution gains significance in view of the admission made by PW-5 that photograph Ex.PA to Ex.PH were taken at the instance of the complainant, Bansi Ram.

12. PW-7, Nirmla Devi i.e.independent witness was also declared hostile. Cross-examination of this witness nowhere suggests that the prosecution was able to extract something advantageous to its case.

13. PW-6, Prithi Pal, Investigation Officer, though reiterated the story as put forth by the prosecution, but version put forth by this witness is not worth lending any credence because he specifically denied that the houses of Rup Singh, Brahmi Devi, Dharam Singh, Gian Chand and Gian Singh are situated near the place of occurrence because on the other hand all the prosecution witnesses have categorically stated that houses of above named persons are adjacent to the house of the complainant. Moreover, it has specifically come in the statement of the Investigating Officer that he did not take any demarcation of the place of occurrence in order to know, who is the owner of the property in question. Admission made by this witness in his cross-examination that no glasses of window were broken completely demolishes the case of the prosecution. This witness stated that no glasses of the window were broken as no glasses were on the spot, however, such version put forth by him is in total contradiction to the case of the prosecution because as per the prosecution witnesses, accused persons broke the window panes of the complainant . It is also admitted by the Investigating Officer that there is no identity mark over the stones Ex.PA to Ex.PE. He also admitted that no weapon is used in this case except stones and as such, he completely demolished the case of the prosecution because admittedly as per the case of the prosecution, accused persons gave beatings to the complainant party using Darat and Axe. However, this witness admitted that accused persons also filed a complaint with the SHO, Bharari, but such complaint never came to be placed in the file and there is no reference of the same in the prosecution case.

14. PW-8, Dr. Vivek Modgil though proved the MLC Ex.PW7/A, but in his cross-examination this witness admitted that all the injuries can be caused by fall. Moreover, mere proving of MLC, as referred hereinabove, may not be sufficient to hold accused guilty, especially when there is no evidence to connect the accused persons with the offences alleged to have been committed by them.

15. Having carefully perused the statements made by aforesaid material prosecution witnesses juxtaposing each other, this Court is in complete agreement with the findings returned by the learned Court below that there are material contradictions and inconsistencies in the statements made by the prosecution witnesses, prosecution story appears to be doubtful and untrustworthy. Though, as has been taken note hereinabove, all the prosecution witnesses have given all together different version with regard to infliction of injuries on the person of complainant and his son. Moreover, factum with regard to infliction of injury, if any, on the person of PW-3, who happened to be son of the complainant is seriously doubtful on account of the admission made by PW-3 himself that he did not receive any injury. Moreover, it is quite apparent from the evidence led on record by the respective parties that dispute, if any, *inter se* parties arose on account of civil litigation pending *inter se* them. Recovery, if any, of Darat and Axe allegedly used by the accused persons for inflicting injuries on the person of complainant and his son also never came to be proved, in accordance with law.

16. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex

Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)***
>
> > ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.***

17. In the case at hand, there are material contradictions and inconsistencies in the statements of the prosecution witnesses and as such, no conviction could be based upon the same.

18**.** Having carefully scanned the evidence led on record by the prosecution, this Court has no hesitation to conclude that prosecution has miserably failed to prove its case against the accused and as such, learned Court below has rightly held the accused not guilty of having committed of offence punishable under Sections 427, 452, 323, 506 read with Section 34 of IPC.

19. After perusing the statements of the prosecution witnesses as well exhibits placed on record, two views are possible in the present case and as such, the petitioners-accused are entitled to the benefit of doubt. The learned counsel for the petitioners-accused has placed reliance on the judgment passed by Hon'ble Apex Court reported in ***State of UP*** *versus* ***Ghambhir Singh & others***, *AIR 2005 (92) Supreme Court 2439*, wherein the Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> ***"6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that***

while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, his evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred."

20. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment of acquittal passed by the learned court below, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the present appeal is dismissed being devoid of any merit alongwith pending applications, if any.

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BEFOREHON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Vinod .... Petitioner

Versus

State of Himachal Pradesh ....Respondent

Cr.MP(M) No.1405 of 2019 a/w
Cr.MP(M) Nos. 1406 & 1407 of 2019
Date of Decision: 19.8.2019

Code of Criminal Procedure, 1973– Section 439– Regular bail– Grant of in a case of attempted murder and criminal intimidation– Held, injuries on person of complainant and his brother simple in nature– Qua same incident, cross FIR was also registered against complainant party– Allegations of use of sharp edged weapons by accused not borne out from CCTV footage– Investigation is complete and nothing is to be recovered from accused– Parties also compromising dispute– Accused ordered to be admitted on bail subject to conditions. (Paras 7 & 9)

Cases referred:

Maulana Mohammed Amir Rashadi vs. State of U.P., (2012) 2 SCC 382
Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the petitioner(s): Mr. N.K.Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.

For the respondent: Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of above captioned petitions filed under Section 439 of the Code of Criminal Procedure, prayer has been made on behalf of the bail petitioners, namely, Vinod, Rajender and Vicky for grant of regular bail in case FIR No.135/19 dated 1.7.2019, under Sections 307, 341, 323, 147, 148, 149 and 506 of IPC, registered at police Station, Sadar Shimla, District Shimla, Himachal Pradesh.

2. Sequel to orders dated 24th/29th July, 2019, HC Kishore Kumar, has come present alongwith the record. Mr. Sudhir Bhatnagar, learned Additional Advocate General, has also placed on record fresh status report prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

3. Close scrutiny of the record/status report, reveals that on 1.7.2019, complainant Vikas lodged a complaint at police Station, Sadar, District Shimla, H.P., alleging therein that on 30.6.2019, at about 10:30 PM, when he had come to cart road for purchasing Ice cream, persons namely, Karan and Suraj stopped him and extended threats. He further alleged that after having heard noise, his younger brother Vikrant also came on the spot. On seeing his brother Vikrant, Karan and Suraj fled away from the spot at that moment, but subsequently they came alongwith persons namely, Raju, Karan, Suraj, Rahul, Vicky and Vinod and gave merciless beatings to him as well as his brother with the help of beer bottle and chopper, as a result of which, they suffered serious injuries. Allegedly, the bail petitioners before this Court also gave beatings to the persons namely, Bunty and Vipin, who had come to the spot to rescue Vikas and his brother Vikrant. Police got the complainant medically examined at DDU Hospital, Shimla and subsequently on the basis of the aforesaid statement made by the complainant, lodged formal FIR , as has been taken note hereinabvoe, against the bail petitioners under Sections 307, 341, 323, 147, 148, 149 and 506 of IPC. Bail petitioners are behind the bars since 1st July, 2019. Co-accused Suraj, who earlier absconded, has been already granted bail by the Co-ordinate Bench of this Court vide order dated 5th August, 2019.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General though on the instructions of Investigating Officer, who is present in Court, fairly admitted that investigation in the case is complete, but contended that keeping in view the gravity of offence alleged to have been committed by the bail petitioners, they do not deserve any leniency and as such, prayer for grant of bail made on behalf of the bail petitioners may be rejected out rightly. He further contended that record reveals that all the bail petitioners are habitual offender and in past numerous cases have been registered against them. He further contended that in the event of petitioners' being enlarged on bail, they may not only flee from justice, rather they may tamper with the prosecution evidence or dissuade the prosecution witnesses from deposing against them.

5. Mr. N.K.Thakur, learned Senior counsel representing the bail petitioners while inviting attention of this Court to the medical opinion rendered on record by the Medical Officer, contended that no case much less under Section 307 of IPC is made out against the bail petitioners. Mr. Thakur, further contended that it is apparent from the record that cross FIR's came to be lodged against each other because in the alleged incident bail petitioners also suffered grievous as well as simple injuries. Mr. Thakur, further contended that as per own story of the prosecution, no evidence with regard to use of blunt weapon such as sword, chopper and Khokhari came to be established and as such, bail petitioners, who are behinds the bars for more than 1 ½ months deserve to be enlarged on bail. He further contended that during investigation complainant as well as bail petitioners have entered into the compromise, whereby they have resolved to settle their dispute amicably inter se them and as such, prayer made in the present petitions may be considered sympathetically.

6. Before adverting to the factual matrix of the case, it may be noticed that this Court having taken note of the compromise arrived *inter se* parties, specifically directed the Investigating Officer to verify the genuineness and correctness of the compromise. Investigating Officer after verifying the facts, have fairly stated that two complainants namely, Vikas and Vikrant have fairly acknowledged the factum with regard to compromise placed on record. Statements of other complainants, who are behind the bars in connection with cross-FIR lodged by the bail petitioners, could not be recorded, but careful perusal of compromise placed on record reveals that during pending investigation, complainants have resolved to settle their dispute amicably with the accused. Question whether cases registered against each other can be quashed or not on the basis of the compromise cannot be considered in the instant proceedings and as such, same is left open to be decided in the appropriate proceedings in the appropriate court of law.

7. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that on the date of alleged incident, bail petitioners allegedly gave beatings to the complainants, named hereinabove, as a consequence of which, they suffered multiple injuries, but having carefully perused the MLC placed on record, this Court is in agreement with the arguments advanced by Mr. N.K.Thakur, learned counsel that no grievous injuries ever came to be inflicted and as such, it is not understood how case under section 307 of IPC is sustainable.All the injuries allegedly suffered by the complainants have been termed to be simple in nature. Apart from above, this Court find that qua the same incident,cross FIR came to be lodged at police Station,Sadar, Shimla. In the FIR lodged by the bail petitioners,two persons, who are complaints in the present case, came to be arrested,whereas remaining two were released on bail by the learned Sessions Judge, Shimla. Moreover, allegation with regard to using sword, khokari and chopper at the time of alleged incident is highly doubtful because as per status report C.C.T.V. footage, nowhere reveals that at the time of alleged offence bail petitioners were carrying sharp edged weapon, as mentioned hereinabove.

8. No doubt, record/status report suggests that bail petitioners have been indulging in illegal activities in past also and numbers of cases have been registered against them in past, but that cannot be a ground to reject their bail. It has been held by Hon'ble Apex Court in ***Maulana Mohammed Amir Rashadi v. State of U.***P .(2012) 2 SCC 382 that merely on the basis of criminal antecedents, the claim of the bail petitioner cannot be rejected. Hon'ble Apex Court has observed as under:

> "10.It is not in dispute and highlighted that the second respondent is a sitting Member of Parliament facing several criminal cases. It is also not in dispute that most of the cases ended in acquittal for want of proper

> witnesses or pending trial. As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court etc."

9. Moreover, this Court finds from the record that in majority of cases registered against the bail petitioners, they have been either fined or acquitted. Since investigation in the case is complete and nothing remains to be recovered from the bail petitioners coupled with fact that complainants have resolved to settle their dispute amicably, this Court sees no reason to allow the bail petitioners incarcerate in jail for indefinite period during the trial.

10. Hon'ble Apex Court as well as this Court in number of cases have repeatedly held that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law. Guilt, if any, of the bail petitioners are yet to be established on record by the Investigating Agency by leading cogent and convincing evidence. Apprehension expressed by learned Additional Advocate General with regard to petitioners fleeing from justice in the event of their being enlarged on bail, can be best met by putting bail petitioners to stringent conditions, as has been fairly admitted by the learned counsel representing the bail petitioners.

11. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has categorically held that freedom of an individual is of utmost importance and same cannot be curtailed merely on the basis of suspicion. Hon'ble Apex Court has further held that till the time guilt of accused is not proved, in accordance with law, he is deemed to be innocent. The relevant paras No.2 to 5 of the judgment are reproduced as under:-

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the***

evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons

12. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

13. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be

> ***quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."***

14. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

- ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
- ***nature and gravity of the accusation;***
- ***severity of the punishment in the event of conviction;***
- ***danger of the accused absconding or fleeing, if released on bail;***
- ***character, behaviour, means, position and standing of the accused;***
- ***likelihood of the offence being repeated;***
- ***reasonable apprehension of the witnesses being influenced; and***
- ***danger, of course, of justice being thwarted by grant of bail.***

15. Consequently, in view of the above, present bail petitions are allowed. Petitioners are ordered to be enlarged on bail subject to their furnishing personal bond in the sum of Rs. 1,00,000/- (Rs. one lakh) with one local surety in the like amount each, to the satisfaction of the learned trial Court, with following conditions:

- ***they shall make themselves available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***
- ***they shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***
- ***they shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or the Police Officer; and***
- ***they shall not leave the territory of India without the prior permission of the Court.***

16. It is clarified that if the petitioners misuse their liberty or violates any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

17. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of these application alone.

The bail petitions stand disposed of accordingly.

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

Kalyan Chauhan ....DH/Plaintiff
Versus
The Executive Engineer & others ....JD/Respondents.

Execution Petition No.3 of 2017
Date of Decision: 22.08.2019

ArbitrationandConciliationAct,1996 (Act)– Section 34– **Code of Civil Procedure, 1908**– Order XXI Rule 11– Execution of award– Filing of objections to award under Section 34 of Act– Effect– Held, mere filing of objections to award under Section 34 of Act would not amount to staying of execution of said award– Specific order in this regard is required to be passed. (Para 5)

Case referred:
Board of Control for Cricket in India vs. Kochi Cricket Private Limited and others, (2018) 6 SCC 287

For the DH/Petitioner	Mr. C.N.Singh, Advocate.
For the JD/Respondents:	Mr. B.C.Negi, Senior Advocate with Mr. Nitin Thakur, Advocate, for the Judgment debtors. Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Add. Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(oral):

By way of instant Execution Petition filed under Order XXI Rule 11 of the Code of Civil Procedure, prayer has been made on behalf of the petitioner ***(hereinafter referred to as the Decree Holder),*** for execution of award dated 16.6.2016, passed by the learned Arbitrator.

2. As per the detail furnished in the execution petition, as referred hereinabove, a sum of Rs.31,09,963/- is payable by the respondents ***(hereinafter referred to as the Judgment Debtors)*** on the date when execution petition came to be filed. Decree Holder has also claimed a sum of Rs.939/- per day, apart from aforesaid amount till realization of the entire award amount. Since learned Arbitrator also awarded a sum of Rs. 1,50,000/- on

account of cost of litigation and expenses, Decree Holder has also claimed the same by way of instant execution petition.

3. Despite repeated opportunities, Judgment Debtors failed to file the reply/objection, if any. Record reveals that case at hand though was initially taken on 29.5.2017, but thereafter came to be adjourned 17 times on the request having been made by the Judgment Debtors, but till date no reply/objection has been filed.

4. True, it is that during the pendency of the case, this Court was informed that objection under Section 34 of the Arbitration and Conciliation Act, laying therein challenge to the award sought to be executed in the present proceedings, stands filed, but till date no order staying the operation of award, if any, passed by the Court in arbitration proceedings has been made available. Today, during the proceedings of the case, it has been informed that a sum of Rs. 17,98,553/- vide cheque No.376105, dated 22.9.2018 and Rs. 19,03,405/- vide cheque No.000014, dated 4.4.2019, have been deposited in the Registry of this Court in terms of the award sought to be executed in the instant proceedings. Neither any plausible explanation has been rendered on record by the Judgment Debtors for not releasing the aforesaid amount in favour of the Decree Holder nor order, if any, staying the operation of the award has been placed on record and as such, this Court has no option, but to release the award amount lying deposited in the Registry of this Court in favour of the Decree Holder.

5. The Hon'ble Apex Court in ***Board of Control for Cricket in India versus Kochi Cricket Private Limited and others,*** (2018) 6, Supreme Court Cases, 287, has held that mere filing of objection under Section 34 of the Arbitration and Conciliation Act ,would not amount to stay of the award, rather specific order in this regard is required to be passed.

6. Mr. C.N.Singh, learned counsel representing the Decree Holder states that in case amount lying deposited in the Registry of this Court is ordered to be released in favour of the Decree Holder, present execution petition filed by Decree Holder can be ordered to be disposed of, being fully satisfied. He further fairly states that though no stay order till date has been passed in the Arbitration Case No.96 of 2016 filed by the Judgment Debtors, but still Decree Holder is ready and willing to furnish bank guarantee in favour of the Registrar General of this Court qua the aforesaid amount, which offer is otherwise acceptable to learned counsel representing the Judgment Debtors.

7. Consequently, in view of the above, present execution petition is disposed of, being fully satisfied. The award amount lying deposited in the Registry of this Court is ordered to be released in favour of the Decree Holder, subject to his furnishing bank guarantee in favour of the Registrar General of this Court for a period of two years, which may be further renewed subject to the orders passed in the Arbitration case filed under Section 34 of the Arbitration and Conciliation Act, by remitting the same in the bank account of the Decree Holder, details whereof are given in para 5 of the application(CMP No.265 of 2019), subject to verification by the Accounts Branch. Pending application(s), if any, also stands disposed of.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Tarun Mahindroo ….Petitioner

Versus

H.P. Power Corporation Limited ….Respondent

Arbitration Case No. 71 of 2017
Reserved on:16.08.2019
Decided on: 23.08.2019.

Arbitration and Conciliation Act, 1996– Section 34– Objections to award– Claimant alleging loss of profits and overheads on account of prolongation of contract– 'Hudson formula'– Whether can be applied without claimant leading any evidence qua loss? Contractor could not initiate construction work for years together because of non-handing over of site to him on account of ownership issues of land– Finally department abandoning work and intimating contractor about it– Arbitrator denying his claim toward loss of profits and overheads on account of prolongation of contract– Objections thereto– Claimant contending that once prolongation of contract is admitted , he is entitled for loss of profits and overheads and he was not required to prove actual damage– Held, construction site could not be handed over to claimant because approach to site was through land of BBMB– Dispute arose within a month of award of work to contractor– No evidence adduced regarding deployment of men and machinery at spot by contractor– No proof of damage suffered by him on account of prolongation of contract– No such claim without any proof of actual damage can be granted merely on basis of 'Hudson formula'– Petition dismissed. (Para 5)

Cases referred:
Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49
Food Corporation of India vs. Chandu Constructions, (2007) 4 SCC 697
Mcdermott International Inc. vs. Burn Standard Co. Ltd. and others, (2006) 11 SCC 181
Oil and Natural gas Corporation vs. Wig Brothers Builders and Engineers Private Limited, (2010) 13 SCC 377
Rajasthan Mines & Minerals Ltd. vs. Eastern Engineering Enterprises, (1999) 9 SCC 283

For the petitioner : Mr. Suneet Goel, Advocate.
For the respondent : Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

Feeling aggrieved against the award passed by the learned Arbitrator, instant petition under Section 34 of the Arbitration & Conciliation, Act 1996, has been preferred by the petitioner/claimant.

The main point to be adjudicated in this case is:- whether loss of profits and over heads on account of prolongation of the contract, can be awarded merely on the basis of Hudson formula without the claimant leading any evidence, be it oral or documentary in respect of loss, damages suffered by him.

2. The factual position of this case, can be summarized as under:-

2(i) The respondent awarded construction work of 'Bachelor Accommodation at Sunder Nagar, District Mandi (Civil Work, Internal WS, SI and Electrical Installation)' to the petitioner/claimant vide letter of award dated 25.07.2011 (Annexure C-1). The contracted value of the work was Rs.1,96, 03,299/-. The work was to be completed within 18 months

from 21st day after issuance of letter of award dated 25.07.2011. Annexure C-2, contained the terms and conditions governing the contract duly executed by the parties.

2(ii) Various representations of claimant, addressed to the respondent, in respect of the contract work have been enclosed at Annexure C-3 (colly). The details of the same can be summed up hereunder:-

I) Letter dated 31.08.2011 to the effect that work at site has been stopped by BBMB, on the ground that land belongs to BBMB. Request was made for revised handing over of the site to the claimant/contractor.

II) Letter dated 07.11.2011 is a reminder of previous letter dated 31.08.2011, with respect to handing over the possession of the site to the claimant.

III) Letter dated 09.2.2012, written in continuation to the previous letters that site had still not been handed over to the contractor, resultantly, huge loss on account of setting of cement, payments of chowkidars for watch and ward of material stacked at site stores and indirect losses due to prolongation is being caused to the claimant/contractor. Request was made for handing over the possession of the site for starting and completing the work in time.

IV) Letter dated 09.04.2012, to the effect that the possession of the site had still not been handed over to the contractor. Therefore, extension in time by nine months was requested by the claimant. This was followed by representation dated 07.01.2013 on the same lines.

V) Letter Dated 15.09.2014, intimating that the extension of time for completion of the project granted by the respondent up to 15.08.2014, had lapsed, however, the site had still not been handed over to the claimant. Therefore, the second extension to time from 15.08.2014 to 14.02.2016, i.e. for a period of 18 months, was sought for.

VI) Letter dated 04.10.2014, to the effect that despite repeated requests, second time extension had not been granted and accordingly, prayer was made for extending the time period for completing the work.

VII) Letter dated 23.06.2016, requesting the respondent either to appoint the Arbitrator under Clause-33 of the Contract or to provide the site for construction of the building.

2(iii) On 16.12.2016, notice (Annexure C-4), under Clause 36 of the agreement, was issued by the respondent to the claimant, intimating that despite best efforts of the respondent, the land ownership issues for undertaking the construction of the project work, could not be resolved, therefore, it was decided by the respondent to abandon the work.

2(iv) The Arbitrator was appointed by the order of this Court on 08.03.2017. Claimant preferred his claim before learned Arbitrator under following heads:-

Sr. No.	**Heads**	**Amount claimed**
1.	**Loss of profit and over heads on account of prolongation of contract.**	**Rs. 29,40,495/-**
2.	**Refund of security.**	**Rs. 10,000/-**
3.	**Refund of earnest money.**	**Rs. 3,43000/-**
4.	**Cost of Arbitration Proceedings.**	**Rs. 1,00,000/-**

5. Interest. 18% per annum.

2(v) The respondent contested the claim and denied that contractor was put to any loss or harassment and that he had been intimated and was aware regarding non-availability of land for construction from the very beginning. It was denied that claimant continued to deploy its labour and machinery at site.

2(vi) On consideration of the pleadings and the material available on the record, learned Arbitrator passed impugned award on 29.07.2017. The award in tabulated form is :-

Sr. No.	**Heads**	**Amount claimed**	**Amount awarded**
1.	**Loss of profit and over heads on account of prolongation of contract.**	**Rs.29,40,495/-**	**-nil-**
2.	**Refund of security.**	**Rs.10,000/-**	**Rs.10,000/-**
3.	**Refund of earned money.**	**Rs.3,43,000/-**	**Rs.3,43,000/-**
4.	**Cost of Arbitration Proceedings.**	**Rs.1,00,000/-**	**Rs.1,11,565/-**
5.	**Interest**	**18% P.A.**	**9%**

Thus, learned Arbitrator passed an award of Rs. 5,54,565/- @ 9% interest payable within one month from the date of the award, failing which, the respondent had to pay enhance rate of interest @ 12% till the actual payment.

3. Learned Arbitrator having not find favour with the claim of Rs. 29,40,495/- regarding alleged loss of profit and over heads on account of prolongation of the contract, the claimant has preferred instant objections under Section 34 of the Arbitration & Conciliation Act.

4. **<u>Contentions</u>:-**

4(i) The main plank of the contentions of Mr. Suneet Goel, learned counsel for the petitioner/claimant is that the claim under this head was based purely on Hudson formula, where-under, claimant was not required to prove any actual damage having been caused to him; he was only required to show that the contract was prolonged, but not because of any fault on part of the claimant; he is only required to prove that the contract was extended and could not be completed because of lapses, actions, inactions on part of the respondent or reasons, which were attributable and could be sorted out only by the respondent.

His further contentions is that the learned Arbitrator, while deciding proposition No.1, in the impugned award, had already held that the prolongation of the contract period was due to the fact that though the land on which the site was located, was owned and possessed by the respondent, but the adjoining land required as a passage to reach the site, was not owned by the respondent. The adjoining land was owned and possessed by the BBMB and it is on account of this fact that the construction work at site remained blocked and could not be carried out. Accordingly, the contention of learned counsel for the petitioner/claimant is that after having come to the conclusion that project work was prolonged on the site because of non-availability of the adjoining site, which was required as a passage by the claimant for starting the construction work at site, it was not

open for the learned Arbitrator to have rejected his claim of loss of profit and over heads on account of prolongation of the contract.

Learned counsel for the petitioner/claimant, in this regard has relied upon ***(2006) 11 SCC 181***, titled as ***Mcdermott International Inc.*** *v.* ***Burn Standard Co. Ltd. and others*** and ***(2015) 3 SCC 49***, titled as ***Associate Builders*** *v.* ***Delhi Development Authority*** to contend that Hudson formula is an accepted formula by the Hon'ble Apex Court, for awarding loss of profit and over heads on account of prolongation of the contract.

4(ii). Per contra, Mr. Sunil Mohan Goel, learned counsel for the respondent, has argued that the claimant had executed certain site development works, for which due and admissible amount of Rs. 1,02,654/- stands released to him.

He further submitted that the land where the building was to be constructed by the claimant under the awarded work, belonged to the State Government and was in possession of the respondent, however, the approached road to the site was from the land owned and possessed by BBMB, which objected to carrying out of the construction work vide their (BBMB) letter dated 24.08.2011 (Annexure-III). Copy of this objection of BBMB, had been supplied to the contractor and he was made aware about the site problems; and it is on account of this objection of BBMB that the work had to be stopped at the site at very initial stage. The work could have been undertaken only after resolving the land dispute. It was denied that contractor deployed any labour or machinery at the site after August, 2011; the land disputes could not be resolved, therefore, the work was foreclosed vide letter dated 16.12.2016 (Annexure C-4), as per Clause 36 of contract agreement. Learned counsel further contended that no loss was suffered by the contractor on account of prolongation of contract due to any reason whatsoever. Hudson formula, without proof of any actual damage suffered by the claimant, cannot advance the case of the petitioner for his claim of profit and over heads on account of prolongation of contract.

Learned counsel for the respondent relied upon ***(2010) 13 SCC 377***, titled as ***Oil and Natural gas Corporation*** Vs. ***Wig Brothers Builders and Engineers Private Limited***, ***(2007) 4 SCC 697***, titled as ***Food Corporation of India*** *vs.* ***Chandu Constructions***, ***(1999) 9 SCC 283***, titled as ***Rajasthan Mines & Minerals Ltd.*** *v.* ***Eastern Engineering Enterprises***, in support of his contentions.

5. **Observations:-**

5(i) **Stopping of Work:-** It is seen from the record that vide Annexure-III dated 24.08.2011, BBMB, had asked the respondent to stop the ongoing construction work. It is not in dispute that this letter was forwarded by the respondent to the petitioner/claimant. This is also apparent from the fact that petitioner/claimant had himself written a letter to the respondent as early as on 31.08.2011, regarding stopping of work by BBMB Authorities on account of the fact that the adjoining land required as passage by the contractor for carrying out awarded construction work at site, belonged to BBMB, where-under, the petitioner/claimant had also requested the respondent for revised handing over of the site to him. The dispute, thus, had arisen in just over a period of one month from the date of execution of the contract agreement. The work had come to stand still in a period little over one month from the date of execution of the contract agreement and contractor was very well aware about the stopping of the work, reasons for stopping of the work.

5(ii) **Hudson Formula**:-

5(ii)(a) No proof of actual damage suffered by the petitioner/claimant has been placed on record. The claimant on 29.06.2017, stated before the learned Arbitrator that but

for the documents appended along with his claim petition, he did not want to lead any oral or documentary evidence in support of his statement of claim. There is no proof available on record that claimant deployed men and machinery etc. at the site. No proof whatsoever has been furnished by the claimant of having suffered any actual loss due to prolongation of contract.

5(ii)(b) In my considered view, learned Arbitrator was justified in turning down the claim of Rs. 29,40,495/- for alleged loss of profits and over heads on account of prolongation of contract for want of proof of any actual damage having been suffered by the claimant/contractor.

Hon'ble Apex Court in ***(2006) 11 SCC 181*** titled as ***Mcdermott International Inc. v. Burn Standard Co. Ltd. and others,*** relied upon by learned counsel for the claimant, has not held that in a case of instant nature, without there being any proof of any actual damage having been caused to the claimant/contractor, in absence of any oral or documentary evidence in this regard, he has to be held entitled to 15% of the contracted amount on the basis of Hudson formula. The present is the case wherein just over a period of one month from the date of execution of the contract agreement, the work had admittedly come to stand still. Whatever work was done by the claimant, during this period of little over one month, has been duly paid for by the respondent. There is no proof of any deployment of any men or machinery or material to suggest that claimant suffered any loss of profit and over heads. Formula has to be applied to facts of a case; on the basis of the evidence led by the claimant. Merely on the basis of an abstract formula, without furnishing any evidence, any proof whatsoever of any loss or damage having been suffered by the claimant, claim for loss of profits and overheads cannot be allowed to him on the ground that contract period was prolonged.

5(ii)(c) In ***(2015) 3 SCC 49*** titled as ***Associate Builders v. Delhi Development Authority***, after adverting to an earlier judgment in ***Mcdermott International Inc. v. Burn Standard Co. Ltd. and others, (2006) 11 SCC 181,*** Hon'ble Apex Court reiterated that decision of Arbitrator in applying Hudson formula in construction contracts for awarding claim for loss of profit and over heads, cannot be interfered with, in exercise of jurisdiction under Section 34 of Arbitration & Conciliation Act. However, present is the case where neither there is any oral nor documentary evidence to show any loss, or any damage having been caused to the petitioner by prolongation of contract on part of the respondent. Hudson formula cannot be applied in vacuum. No details of any men, any machinery deployed on site after August, 2011, is available. No details of any material loss has been provided. No books of accounts are there. No details of any watch and ward staff, supervisors etc. has been given. No material was produced with respect to nature of practice in the trade. Claim for loss of profits has been based on abstract Hudson formula and 15% value of contracted work has been claimed as loss of profits and over heads on account of prolongation of contract. Learned Arbitrator was justified in not applying Hudson formula for awarding alleged loss of profits and over heads in absence of any evidence. In Kalash Nath Associates vs. Delhi Development Authority & Anr., (2015) 4 SCC 136, it has been held by Hon'ble Apex Court that while considering the claim under Sections 73 & 74 of Contract Act, where it is possible to prove actual damage or loss, such proof cannot be dispensed with. Monetary compensation in lieu of loss prayed for by claimant cannot be awarded in negation of Section 73 of Contract Act by penalizing the respondent even though claimant had not proved any loss suffered by him. Reference can also be made in this regard to a judgment passed by Bombay High Court in ***Case No. 470 of 2012***, tilted as ***Essar Procurement Services Ltd.*** vs. ***Paramount Constructions***:-

*“**101.** The question that arises for consideration of this court is whether the respondent who had made claim for overhead on the basis that the respondent had considered 10% towards overhead for the work in question at the time of finalization of the contract and had incurred such amount during the contractual period ought to have proved the said claim by leading evidence including oral evidence or could have simplicitor rely upon the Hudson formula and whether in absence of any evidence of the actual expenditure incurred by the respondent, the arbitral tribunal could have allowed the claim for overhead by considering the claim on rough and ready basis by applying Hudson formula by dispensing with the proof of the overhead expenditure or not.*

***103.** It is held that the different formula can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator. Supreme Court noticed that the witness examined by the contractor had applied the Emden Formula while calculating the amount of damages having regard to the books of account and other documents maintained by the contractor. The learned arbitrator did not insist that sufferance of actual damages must be proved by bringing on record books of account and other relevant documents. In these circumstances, Supreme Court held that if the learned arbitrator applied the Emden Formula in assessing the amount of damages, he could not be said to have committed an error warranting interference by this Court. The learned arbitrator had also referred to other formulae but opined that the Emden Formula was widely accepted one.*

***105**. Division Bench of this court in case of Edifice Developers and Project Engineers Ltd. (supra) after adverting to the judgment of Supreme Court in case of McDermott International INC. (supra) and in case of M/s.A.T.Brij Paul Singh and Bros. vs. State of Gujarat, AIR 1984 SC 1703 which judgments were relied upon by the arbitral tribunal has held that the appellant in that case had produced no evidence in support of the claim for loss of overhead and profit and award of claim was on the misconceived basis that Hudson Formula must be applied despite there being no evidence. The Division Bench also held that no material was produced before the arbitral tribunal on the nature of the practice in the trade and claim for loss of profits was based on pure conjecture and in the absence of any evidence and was thus rightly set ppn 49 arbp-470.12(j).doc aside by the learned Single Judge. The Division Bench upheld the conclusion drawn by the learned Single Judge that the award of arbitrator proceeded on the manifestly misconceived notion that a contractor is entitled to claim overhead losses even in the absence of evidence on the basis of Hudson's Formula.*

***106**. In my view the impugned award rendered by the arbitral tribunal allowing the claim for overhead merely on the basis of the Hudson Formula and not based on any evidence is contrary to the principles of law laid down by this court in case of Edifice Developers and Project Engineers Ltd. (supra) and shows patent illegality and is in conflict with public policy.”*

No fault can thus be found in the award passed by the learned Arbitrator in rejecting the claim of the petitioner for loss of profits and over heads on account of prolongation of contract. The point is answered accordingly.

6. **Rejection of Claim viz-a-viz Terms of Contract:-**

6(i) There is yet another reason for rejecting the claim of loss of profits and over heads on account of prolongation of contract. The terms of the contract are significant in the instant case. The contract which has been executed by both the parties and in terms of Clause-33 of which, learned Arbitrator was appointed, also contains Clause-36. This being relevant for purpose of adjudication of the present petition, is being reproduced hereinafter:-

> ***"36.1*** *If at any time after acceptance of the tender the Employer decides to abandon or reduce the scope of the works for reason whatsoever and hence does not require the whole or any part of the works to be carried out, the Engineer-in-Charge shall give notice in writing to that effect to the contractor, and the Contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from th execution of the works in full but which he could not derive in consequence of the fore-closure of the whole or part of the works.*
>
> *The Contractor shall be paid at contract rates for full amount of the works executed at site and, in addition,a reasonable amount as certified by the Engineer-in-Charge for the items hereunder mentioned which could not be utilized on the works t the full extent because of the foreclosure:*
>
> *(a) Any expenditure incurred on preliminary works, e.g. temporary access roads, temporary labour, huts, staff quarters and site office; storage accommodation, workshop, installation and dismantling of Construction Equipment (batching plant, crushing plant) and water storage tanks.*
>
> *(b) i) The Employer shall have the option to take over Contractor's materials or any prt thereof, either brought to site or of which the Contractor is legally bound to accept delivery from suppliers (for incorporation in or incidental to the Work), provided, however, the Employer shall be bound to take over the material or such portions thereof as the Contractor does not desire to retain. The cost shall, however, taken into account purchase price, cost of transportation and deterioration or damage which may have been caused to materials whilst in the custody of the Contractor.*
>
> *ii) For Contractor's materials not retained by the Employer, reasonable cost of transporting such material from Site to Contractor's permanent stores or to his other Works, whichever is less. If materials are not transported to either of the said places, no cost of transportation shall be payable.*
>
> *(c) If any materials issued by the Employer are rendered surplus, the same except normal wastage for the materials used in the works shall be returned by the Contractor to the Employer.*
>
> *(d) Reasonable compensation for transfer of T&P from Site to Contractor's permanent stores or to his other works whichever is less. If T&P are not transported to either of the said places, no cost of outward transportation shall be payable.*
>
> ***36.2*** *The Contractor shall, if required by the Engineer-in-charge, furnish to him books of accounts, wage books, time sheets and other relevant documents*

as may be necessary to enable him to certify the reasonable amount payable under this condition."

6(ii) The above Clause empowers the respondent to abandon or reduce the scope of the work for any reason whatsoever. The contractor will have no claim, in terms of this Clause, to any compensation on account of any payment of compensation, on account of any profit or advantage which he might have derived from the execution of the works in full, but which he could not derive on account of fore-closure either of part or whole works.

Clause 36.1, when read in its entirety, though provides that in case of fore-closure of the contract, the contractor has to be paid at the contract rates for full amount of the works executed at the site and in addition, reasonable amount certified by the Engineer-in-Charge for the items, which could not be utilized on the works to full extent because of the fore-closure. The items mentioned in this Clause are in respect of preliminary works, i.e. temporary access roads, temporary labour huts, staff quarters, site office, storage accommodation workshop, installation and dismantling of construction equipment and water storage tanks etc. Clause also provides for materials in similar way.

6(iii) Thus, in terms of Clause 36.1 of the agreement duly executed by the parties, claimant cannot have any claim for payment of compensation for any profit which he couldn't derive because of foreclosure of the work. Claimant is though entitled to amount for works actually carried out at contract rates and for items mentioned therein lying unused and expenditure incurred over them as provided in contract. However, in the instant case, there is no evidence whatsoever available on record that the above said works were actually carried out, which are yet to be paid for. Therefore, claim for loss of profit and over heads on account of prolongation of contract could not be allowed, in view of specific provision of contract agreement.

6(iv) Reference in this regard can also be made to ***(2010) 13 SCC 377***, titled as ***Oil and Natural Gas Corporation*** *v.* ***Wig Brothers Builders and Engineers Private Ltd***., in which, Hon'ble Apex Court has held as under:-

> ***"4.*** *It is now well settled that a court, while considering a challenge to an award under sections 30 and 33 of Arbitration Act, 1940, does not examine the award, as an appellate court. It will not reappreciate the material on record. An award is not open to challenge on the ground that the arbitrator had reached a wrong conclusion or had failed to appreciate some facts. But if there is an error apparent on the face of the award or if there is misconduct on the part of the arbitrator or legal misconduct in conducting the proceedings or in making the award, the court will interfere with the award. Keeping the said principles in view, we will consider the challenge.*
>
> ***6.*** *The arbitrator has observed that there is no provision in the contract by which the contractor can be estopped from raising a dispute in regard to the said claim. But clause 5A of the contract pertains to extension of time for completion of work and specifically bars any claim for damages. The said clause is extracted below :*
>
> > *"In the event of delay by the Engineer-in-Charge to hand over to the contractor possession of land/lands necessary for the execution of the work or to give the necessary notice to the contractor to commence work or to provide the necessary drawing or instructions or to do any act or thing which has the effect of delaying the execution of the work,*

> *then notwithstanding anything contained in the contract or alter the character thereof or entitle the contractor to any damages or compensation thereof but in all such cases the Engineer-in-Charge may grant such extension or extensions of the completion date as may be deemed fair and reasonable by the Engineer-in Charge and such decision shall be final and binding."*

7. *In view of the above, in the event of the work being delayed for whatsoever reason, that is even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs.9.5 lakhs. This aspect is covered by several decisions of this Court. We may refer to some of them.*

8. *In Associated Engineering Co. v. Government of A.P. - 1991 (4) SCC 93, this Court observed :*

> *"24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. ..."*

9. *In Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises – this Court held: (SCC pp. 300 & 310, paras 22-23 & 44)*

> *"22.....The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may be tantamount to mala fide action.*
>
> *23. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose, agreement is required to be considered. ....*
>
> *44.. (h)........he cannot award an amount which is ruled out or prohibited by the terms of the agreement."*

10. *In Ramnath International Construction (P) ltd. v. Union of India, a similar issue was considered. This Court held that clause 11(C) of the General Conditions of Contract (similar to clause 5A under consideration in this case) was a clear bar to any claim for compensation for delays, in respect of which extensions had been sought and obtained. This Court further held that such a clause amounts to a specific consent by the contractor to accept extension of*

time alone in satisfaction of claims for delay and not to claim any compensation; and that in view of such a bar contained in the contract in regard to award of damages on account of delay, if an arbitrator awards compensation, he would be exceeding his jurisdiction.

11. *In view of the above, the award of the arbitrator in violation of the bar contained in the contract has to be held as one beyond his jurisdiction requiring interference. Consequently, this appeal is allowed in part, as follows :*

(a) The judgment of the High Court and that of the civil court making the award the rule of the court is partly set aside in so far as it relates to the award of Rs.9.5 lakhs under claim No.(1) and the award of interest thereon.

(b) The judgment of the civil court as affirmed by the High Court in regard to other items of the award is not disturbed."

In ***(2007) 4 SCC 697***, titled as ***Food Corporation of India v. Chandu Construction and Another,*** the Hon'ble Apex Court, held that the arbitrator being a creature of the agreement between the parties, has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. Arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action.

It is apt to refer to ***(2015) 3 SCC 49***, titled as ***Associate Builders v. Delhi Development Authority:-***

"**31**. *The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:-*

(i) a finding is based on no evidence, or

(ii) an Arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse."

In the instant case, learned Arbitrator justly turned down the claim in view of clear stipulation contained in Clause 36 of the contract agreement.

7. In view of the above discussion, looking from any angle, this Court does not find any infirmity in the impugned award passed by the learned Arbitrator. Hence, the present petition being devoid of any merit, is dismissed. Pending application(s), if any, also stand disposed of.

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

Dev Khattri .... Petitioner
Versus
State of Himachal Pradesh .....Respondent.

Cr. MP(M) No. 1393 of 2019
Date of Decision: 6th August, 2019

Code of Criminal Procedure, 1973– Section 439– Regular bail in case registered for offences of kidnapping, rape and under Protection of Children from Sexual Offences Act, 2012– Circumstances– Held, prosecutrix giving statement to investigating officer as well before Magistrate under Section 164 of Code and denying accused of having done anything wrong with her– Also refusing to undergo medical examination– Medical age of prosecutrix found around 16 years– No concrete material suggesting commission of aforesaid offences with her by accused– No allegation that accused may flee if released on bail– Accused in custody since long– Custody not required by police as investigation is complete– Petition allowed– Accused admitted on bail subject to conditions. (Paras 6 to 8 & 12)

Cases referred:
Dataram Singh vs. State of Uttar Pradesh & Anr., Criminal Appeal No. 227/2018, decided on 6.2.2018
Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the Petitioner: Mr. Abhishek Negi, Advocate.
For the Respondent: Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(oral):

Bail petitioner namely, Dev Khattri, who is behind the bars since 4.4.2019, has approached this Court in the instant proceedings filed under Section 439 of the Code of Criminal Procedure, praying therein for grant of regular bail in case FIR No.27/2019, dated 3.4.2019, under Sections 363, 366-A 376 of IPC and Section 4 of the Protection of Children from Sexual Offences Act, registered at police Station, Jubbal District Shimla, Himachal Pradesh.

2. Sequel to order dated 24.7.2019, ASI Sohan Lal has come present alongwith the record. Mr. Sudhir Bhatnagar, learned Additional Advocate General, has also placed on record status report, prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

3. Close scrutiny of the record/status report, reveals that on 3.4.2019, complainant namely, Sh. Rattan Bahadur lodged a complaint at police Station, Jubbal, District Shimla, H.P., alleging therein that her minor daughter***(hereinafter referred to as the prosecutrix', namewithheld to protect her identity)*** aged 13 years has gone missing

since 1.4.2019 and he has suspicion that bail petitioner namely, Dev Khattri has eloped with her on the pretext of marriage. On 4.4.2019 police recovered the prosecutrix from the room of the bail petitioner at village Ratoh, Post office Luhari, Tehsil Anni, District Kullu, H.P. Police after recording the statement of the prosecutrix recorded under Section 161 Cr.P.C, registered the case against the bail petitioner under Sections 366 and 376 of IPC and Section 4 of the Protection of Children from Sexual Offences Act, and since than bail petitioner is behind the bars. Police also got recorded the statement of the prosecutrix under Section 164 Cr.P.C in the Court of learned Additional Chief Judicial Magistrate, Rohru, wherein prosecutrix specifically denied the allegation of her being sexually assaulted by the bail petitioner against her wishes. She stated before the Magistrate that since nothing wrong has been committed by the bail petitioner, no action may be taken against him. Prosecutrix also refused to undergo the medical test and as such, there is no corroborative medical evidence available on record suggestive of the fact that prosecutrix was subjected to forcible sexual intercourse by the bail petitioner.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly stating that the challan stands filed in the competent Court of law, contended that keeping in view the gravity of offence alleged to have been committed by the bail petitioner, he does not deserve any leniency. Mr. Bhatnagar, further contended that though there is ample evidence available on record that bail petitioner taking undue advantage of innocence of the prosecutrix made her to run away from her house and thereafter sexually assaulted her against her wishes, but even otherwise, consent, if any, of the prosecutrix is immaterial keeping in view of her age and as such, present bail petition may be rejected.

5. Having heard learned counsel representing the parties and perused the material available on record, though this Court finds that the prosecutrix was 16 years of age at the time of alleged commission of the offence, as is quite evident from the age determination test conducted at DDU Hospital, Shimla, but keeping in view the conduct of the prosecutrix, which stands duly reflected from her statements given to the police as well as Magistrate under Section 161 and 164 Cr.P.C, respectively, it can be safely inferred that the prosecutrix is/was fully capable of understanding the consequences of her being in the company of bail petitioner. She has categorically stated that since bail petitioner has not committed any illegal act with her, no appropriate action may be taken against him. Moreover, prosecutrix has already refused to undergo medical test and as such, at this stage there is no concrete evidence, if any, on record to connect the bail petitioner with the offence alleged to have been committed by him.

6. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court on the basis of totality of evidence to be collected on record by the prosecution, but having noticed aforesaid glaring aspects, this Court sees no reason to allow the bail petitioner to incarcerate in jail for an indefinite period, especially when guilt, if any, of him is yet to be proved, in accordance with law.

7. It has been repeatedly held by Hon'ble Apex Court as well as this Court that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law. Investigation in the case is complete and there is no material placed on record by the investigating Agency suggestive of the fact that in the event of petitioner's being enlarged on bail, he may flee from justice and as such, prayer made on behalf of the bail petitioner deserves to be considered.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, ***Dataram Singh vs. State of Uttar Pradesh & Anr***.,decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence,

meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court

further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the***

deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons

9. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which arepeculiar to the accused involved in that crime.

11. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

(a) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(viii) nature and gravity of the accusation;

(ix) severity of the punishment in the event of conviction;

(x) danger of the accused absconding or fleeing, if released on bail;

(xi) character, behaviour, means, position and standing of the accused;

(xii) likelihood of the offence being repeated;

(xiii) reasonable apprehension of the witnesses being influenced; and

(xiv) danger, of course, of justice being thwarted by grant of bail.

12. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing personal bond in the sum of Rs. 50,000/- (Rs. Fifty thousand) with one local surety in the like amount each, to the satisfaction of the learned trial Court, with following conditions:

e. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

f. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

g. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to the Court or the Police Officer; and

h. He shall not leave the territory of India without the prior permission of the Court.

13. It is clarified that if the petitioner misuses his liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

The bail petition stands disposed of accordingly.

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

Abhishek Sharma .....Petitioner

Versus

State of H.P. and another .....Respondents

Cr. MMO No. 341 of 2019
Reserved on: 01.07.2019
Decided on: 09.07.2019

Code of Criminal Procedure 1973–Sections 320 & 482– Inherent powers – Exercise of - Quashing of FIR – Pursuant to compromise – Held, if for purpose of securing ends of justice quashing of FIR becomes necessary, then Section 320 of Code would not be a bar to exercise of power of quashing – Powers under Section 482 of Code have no limits but utmost care and caution must be exercised while invoking such powers. (Para 6)

Cases referred:
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another,(2013) 4 SCC 58
Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others vs. State of Gujarat and another, (2017) 9 SCC 641
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667

For the petitioner: Mr. P. S. Goverdhan, Advocate.
For the respondents: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Addl. AGs, for respondent No. 1.
Respondent No. 2 in person with Mr. Anirudh Sharma, Advocate.

The following judgment of the Court was delivered:

<u>Chander Bhusan Barowalia, Judge</u>

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as “the Code”), has been maintained by the petitioner for quashing of F.I.R No. 129/18, dated 29.09.2018, under Section 67(A) of Information and Technology Act, 2008 (hereinafter to be called as “the Act”) registered at Police Station Parwanoo, District Solan, H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned trial Court.

2. Briefly stating the facts, giving rise to the present petition are that on 29.09.2018, respondent No. 2 filed a complaint against the petitioner with the police of Police Station Parwanoo, wherein it has been alleged that the petitioner has posted some obscene posts on her facebook account, consequently, F.I.R No. 129/18, dated 29.09.2018, came to be registered against the petitioner. Since the petitioner and respondent No. 1 are relative, now they have entered into a compromise **(Annexures P-2 and P-3)** and in order to maintain their relation cordial, they 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 **(Annexures P-2 and P-3)**, no purpose will be served by keeping the proceedings alive, hence the FIR, alongwith consequent proceedings, arising out of the same, pending before the learned trial Court may be quashed and set aside.

4. Learned counsel appearing on behalf of respondent No. 2 has argued that the present petition may be allowed, in view of the compromise arrived at between the parties.

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

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

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

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

> **[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined**

the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

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

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

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

8. Their Lordships of the Hon'ble Supreme Court in **Jitendra Raghuvanshi and others**vs. **Babita Raghuvanshi and another,**(2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate

cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

> **[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.**
>
> **[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.**
>
> **[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.**
>
> **[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the**

administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.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. Similarly, Hon'ble Supreme Court in **Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others***vs.***State of Gujarat and another, (2017) 9 Supreme Court Cases 641,** wherein it has been held as under :

"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

16.5 The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to

continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9 In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

Even if, the trial is allowed to be continued, as the parties have compromised the matter, there are bleak chances of conviction to secure the ends of justice.

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice would be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise **(Annexures P-2 and P-3)**, placed on record.

11. Accordingly, looking into all attending facts and circumstances, this Court finds that present is a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code and, therefore, the present petition is allowed and F.I.R No. 129/18, dated 29.09.2018, under Section 67(A) of the Act, registered at Police Station Parwanoo, District Solan, H.P., is ordered to be quashed. Since F.I.R No. 129/18, dated 29.09.2018, under the aforesaid Section has been quashed, consequent proceedings, arising out of the said F.I.R., pending before the learned trial Court are thereby rendered infructuous.

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

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

Beas Valley Power Corporation Ltd. .....Applicant/Respondent

Versus

M/s Continental Construction Projects Ltd. .....Non-applicant/Claimant

OMP No. 389 of 2018 in

Arb. Appeal No. 2 of 2014
Reserved on: 03.07.2019
Decided on: 09.07.2019

Code of Civil Procedure, 1908– Section 151– Inherent powers- Extension of time to conclude arbitration proceedings– Justification– Held, proceedings pending before Arbitrator since long– Time to conclude proceedings extended twice in past– Arbitrator also not examining evidence of one of party though present and fixing matter for arguments– His conduct created doubt with respect to his impartiality– Application seeking extension of time dismissed with liberty to parties to initiate process for appointment of another arbitrator. (Paras 9 & 11)

Case referred:
S.P. Sangla Constructions Private Limited vs. State of H.P. and another, (2019) 2 SCC 488

For the applicant/respondent: Mr. Sunil Mohan Goel, Advocate.
For the non-applicant/claimant: Mr. J.S. Bhogal, Senior Advocate with Mr. Suneet Goel and Tarun Jeet Singh Bhogal, Advocates.

The following judgment of the Court was delivered:

<u>Chander Bhusan Barowalia, Judge</u>

The present application, under Section 151 of the Code of Civil Procedure, has been maintained by the applicant-respondent for extension of time for concluding the arbitration case. As per the applicant, the non-applicant has preferred an appeal against the interim award passed by the learned Arbitrator, which was disposed of by this Court with a direction to decide the dispute within six months. However, the award could not be pronounced within six months, consequently, an application being OMP No. 210/2017 for extension of time was filed, the application was disposed of by extending the time by another six months. The matter is at the final stage of adjudication and arguments on the part of the claimant are complete, whereas the respondent is in midway of the arguments and as the extended time of six months had also lapsed, the present application may be allowed and further six months time may be granted in order to enable the learned Arbitrator to complete the proceedings.

2. Reply to the application stands filed, wherein it has been averred that present application is not maintainable as the same was filed on 08.03.2018 and the objections were notified on 12.03.2018 by the Registry of this Court. The applicant removed the objections on 20.07.2018, after four months, which is patently beyond the time prescribed under the Original Side Rules framed by this Court. Consequently, the application deserves to be dismissed with exemplary costs.

3. In rejoinder thereto, the applicant denied the averments made in the reply filed by the non-applicant and reiterated the contents of the application. On merits, it has been averred that as the case is at the verge of final decision, present application may be allowed and time be extended.

4. Mr. Sunil Mohan Goel, learned counsel for the applicant has vehemently argued that the application is required to be allowed, as the arbitration proceedings are going on since 2010 and now they are at the final stage. He has further argued that if six

months more time is given to learned Arbitrator, no prejudice will be caused to the non-applicant.

5. On the other hand, Mr. J.S. Bhogal, learned Senior Counsel appearing on behalf of the non-applicant, has argued that time cannot be extended any further, as this Court has already granted six months time to the Arbitrator vide order dated 21.06.2017, which has expired on 21.12.2017 and thereafter the present application has been filed on 08.03.2018, which remained under objections for approximately 133 days. He has further argued that even otherwise also the Arbitrator has lost the faith of the non-applicant for the simple reason that he started the evidence of the claimant on 13.03.2014 and continued with it till 25.09.2017 and on 25.09.2017, he gave one opportunity to the non-applicant to lead its evidence by 25.10.2017 and the case was fixed for 19.11.2017, however, on 13.11.2017, learned Arbitrator passed an order in the file and listed the case for arguments on 19.11.2017. He has argued that non-applicant has also lost faith in the learned Arbitrator, as on 27.10.2017 only the affidavits were seen, but learned Arbitrator has refused to accept the evidence, so in these circumstances, time is not required to be extended. Lastly, it has been vehemently argued that the present Arbitrator cannot act, but the parties may initiate the process for the appointment of another Arbitrator.

6. In rebuttal, Mr. Sunil Mohan Goel, learned counsel for the applicant, has argued that at this stage, the objections with regard to the conduct of the Arbitrator cannot be taken, as there is separate course and procedure for that and the present application is only for extension of time in making the award. He has further argued that once the Arbitrator is appointed, the only recourse available is to raise objections before the learned Arbitrator or to seek appropriate remedy under the law. In support of his contentions, Mr. Sunil Mohan Goel, learned counsel has relied upon the decision rendered by Hon'ble Apex Court in ***S.P. SanglaConstructions Private Limited*** vs. ***State of H.P. and another***, (2019) 2 SCC 488, relevant extracts of the judgment read as under:

> ***"10. A perusal of clause (65) makes it apparently clear that it was permissible to appoint a person by designation and this will be evident from clause (65), in particular the sentence "the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Chief Engineer is to appoint another person....". If appointments were only to be made by name and not by designation there could be no question of further appointment on the Arbitrator vacating his office. It is only when an Arbitrator is appointed by designation that the question of a vacancy upon the incumbent vacating office could arise thereby enabling the Chief Engineer to appoint another person to act as arbitrator. The Superintendent Engineer, Arbitration Circle appointed as the Arbitrator is from the very arbitration circle, HPPWD and such appointment is only as per clause (65) of the contract and we find no merit in the objection raised by the appellant.***
>
> ***11. Likewise, there is no merit in the contention of the appellant-contractor that the appointed arbitrator is an employee in service of the HPPWD which the provision of Section 12(5) of the 1996 Act (as amended w.e.f. 23.10.2015) bars at the threshold itself. In a catena of judgments, the Supreme Court held that arbitration clauses in government contracts providing that an employee of the department will be the sole arbitrator are neither void nor unenforceable. [Indian***

Oil Corporation Limited and others v. Raja Transport Private Limited (2009) 8 SCC 520, Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Limited (2007) 5 SCC 304, Union of India and another v. M.P. Gupta (2004) 10 SCC 504] The fact that a named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or lack of independence on his part. The arbitration agreements in government contracts providing that an employee of the department or a higher official unconnected with the work or the contract will be the arbitrator are neither void nor unenforceable.

....

21. In the present case, the arbitrator has been appointed as per Clause (65) of the agreement and as per the provisions of law. Once, the appointment of an arbitrator is made at the instance of the Government, the arbitration agreement could not have been invoked for the second time.

....

23. Section 25 of the Arbitration Act, 1996 deals with the situation where the parties commit default without showing sufficient cause and consequent termination of the proceedings. Section 25 provides three situations where on account of the default of a party, the arbitral tribunal shall terminate the proceedings which are as under:-

(i) Under Section 25(a) where the claimant fails to communicate his statement of claim in accordance with sub-section (1) of Section 23;

(ii) Under Section 25(b) continue the proceedings on the failure of the respondent to communicate his claim of defence in accordance with sub-section (1) of Section 23;

(iii) Under Section 25(c) continue the proceedings, and make the arbitral award on the evidence before it, in the event of a party failing to appear at an oral hearing or produce documentary evidence.

24. Section 25(a) provides that the Arbitral Tribunal shall terminate the proceedings where the claimants failed to communicate his claim in accordance with sub-section (1) of Section 23 of the Act. In the present case, the appellant has failed to file his statement of claim; and only sent the communication to the arbitrator seeking adjournment on the ground that the appellant has approached the High Court by filing petition under Section 11(6) of the Act. When the parties have specifically agreed for appointment of sole Arbitrator of the person appointed by the Engineer-in-Chief/Chief Engineer, HPPWD,

the appellant was not right in approaching the High Court seeking appointment of an independent Arbitrator.

25. Inspite of extension of time, since the appellant-contractor had not filed statement of claim, the arbitrator terminated the proceedings under Section 25(a) of the 1996 Act by proceedings dated 06.08.2014. The appellant-contractor did not file his statement of claim before the arbitrator since the appellant had approached the High Court by filing petition under Section 11(6) of the 1996 Act, probably under the advice that the appellant can get an independent arbitrator appointed. The appellant had been writing letters to the arbitrator before the hearing seeking adjournment. However, on the fourth occasion, proceedings were simply terminated since no hearings were held on earlier occasions, he expected that his request might be accepted. The arbitrator could have issued a notice warning the appellant that no adjournment would be granted under any circumstances. Since, no such warning was given, we deem it appropriate to set aside the order of termination. Appellant had made a claim on account of delay as indicated in his letter dated 18.10.2013 under various heads. In the interest of justice, in our considered view, an opportunity is to be afforded to the appellant to go before the departmental arbitrator (as agreed by the parties in clause (65) of the general conditions of contract) and the proceedings of the arbitrator dated 06.08.2014 terminating the proceedings is to be set aside. We are conscious that after the Amendment Act, 2015, there cannot be a departmental arbitrator. As discussed earlier, in this case, the agreement between the parties is dated 19.12.2006 and the relationship between the parties are governed by the general conditions of the contract dated 19.12.2006, the provisions of the Amendment Act, 2015 cannot be invoked.

....”

7. To appreciate the arguments of learned counsel for the parties, this Court has gone through the records in detail.

8. On 21.06.2017, this Court passed the following order in OMP No. 210 of 2017:

“The present application has been maintained by the applicant/respondent under Section 151 of the Code of Civil Procedure, for extension of time to complete the proceedings. As per the applicant, the aforesaid appeal was decided by this Hon’ble Court on 06.07.205, with the direction to the then Arbitrator, Sh. R.K. Sharma to decide the arbitration proceedings within six months from the date of passing of the order. However, the learned Arbitrator could not decide the matter due to his ill health and on 30.11.2016, he passed away. Thereafter, Sh. K.D. Sharma, Chief Engineer (Retd.) has

> ***been appointed as substitute Arbitrator and has to take over the proceedings where it was left and since the proceedings are at the stage of recording the evidence, thus learned Arbitrator is praying for one year more time to complete the proceedings. The application is duly supported by an affidavit. No reply to the application has been filed.***
>
> ***Heard. Taking into consideration the fact that earlier Arbitrator has passed away and new Arbitrator needs some more time to complete the proceedings, this Court finds that interest of justice would be met, in case, time to complete the proceedings is further extended by six months. Accordingly, the present application is allowed and time to complete the proceedings is further extended by six months. The application stands disposed of."***

9. The record shows that on 13.03.2014, the evidence by way of affidavit was tendered by the non-applicant/claimant and thereafter the evidence of the non-applicant continued till 25.09.2017. The learned Arbitrator has given time to the non-applicant to lead evidence by 25.10.2017 by way of affidavit. On 13.11.2017, learned Arbitrator passed an order an listed the matter for arguments on 19.11.2017. On 19.11.2017, when the evidence of the non-applicant appeared before the learned Arbitrator, learned Arbitrator shown ignorance with respect to receipt of examination-in-chief by way of affidavit sent to the learned Arbitrator through E-mail. The learned Arbitrator has not examined the witness, when the witness was present on the first date, after closure of the evidence of the applicant. The learned Arbitrator has granted four years to the applicant for leading evidence and the evidence of the non-applicant was not examined, even when he was present on the first date fixed, after closure of the evidence of applicant, which created doubt in the mind of the non-applicant with respect to the impartiality of the Arbitrator and for these reasons the non-applicant is showing its lack of faith in the Arbitrator and wants that extension in time may not be granted to the learned Arbitrator.

10. Admittedly, the proceedings are pending before the learned Arbitrator since long and inspite of last extension, the same are yet to be concluded and the manner in which learned Arbitrator has acted, raised reasonable suspicion in the mind of the non-applicant/claimant. This Court finds that in these circumstances, no further extension can be granted to learned Arbitrator, even otherwise also, the application has been moved much after the last extension is over. As far as the law cited by learned counsel for the applicant (supra), the same is not applicable to the facts of the present case, as the case cited was with respect to the Arbitrator being employee of one of the party, which contention is not accepted by Hon'ble Apex Court, however, the facts of the present case are totally different.

11. So, in view of the above discussion, the present application, which is devoid of merits, deserves dismissal and is accordingly dismissed. The parties to bear their own costs. However, if there is still any dispute inter se the parties, the parties may initiate process for appointment of another Arbitrator, as per law.

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

Baljesh Rai @ Brijesh Kumar …….Petitioner

Versus

State of H.P. ……Respondent

Cr. MMO No. 322 of 2017
Reserved on: 15.07.2019
Decided on: 25.07.2019

Arms Act, 1959– Section 2(1) (b)– Ammunition– 'Cartridges', whether is an ammunition? Held, cartridge is an ammunition within meaning of Section 2(1) (b) of Act– Therefore, sale of cartridges by licenced Arms dealer without verifying licence of purchaser amounts to offence under Section 25 of Act. (Para 9)

For the petitioner: Mr. Tara Singh Chauhan, Advocate.
For the respondent: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Addl. AGs.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code"), has been maintained by the petitioner for quashing of F.I.R No. 71/15, dated 11.05.2015, under Sections 25, 54 and 59 of the Arms Act (hereinafter to be called as "Arms Act") registered at Police Station Nadaun, District Hamirpur, H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned trial Court.

2 As per the prosecution case, the main accused, who has expired now, was having a stolen pistol and the petitioner sold cartridges to him without verifying his license, so the petitioner has committed an offence under the Arms Act. Conversely, as per the petitioner, he is innocent, hence, the present petition for quashing the proceedings against him.

3 Mr. Tara Singh Chauhan, learned counsel for the petitioner has argued that the cartridges are not arms and no case under Arms Act is made out against the petitioner. He has further argued that there is no evidence that the petitioner has sold the cartridges, as no one has given such a statement and the case made out by the police is a false case and after appreciating the evidence and documents on record, the proceedings may be quashed.

4 On the other hand, Mr. Shiv Pal Manhans, learned Additional Advocate General, has argued that the definition of arms in Section 2 of the Arms Act makes the possession/sale of the cartridges an offence, as ammunition under Section 2 (1) (b) of the Arms Act, 1959, provides as under:

"(b) "ammunition" means ammunition for any firearm, and includes-

(i) rockets, bombs, grenades, shells [and other missiles],

(ii) articles designed for torpedo service and submarine mining,

(iii) other articles containing, or designed or adapted to contain, explosive, fulminating or fissionable material or noxious liquid, gas or other such thing, whether capable of use with firearm or not,

(iv) charges for firearms and accessories for such charges,

(v) fuses and friction tubes,

(vi) parts of, and machinery for manufacturing, ammunition, and

(vii) such ingredients of ammunition as the Central Government may, by notification in the Official Gazette, specify in this behalf;

...."

So, the cartridges are ammunition. He has argued that the clear statements of the witnesses are there, which makes out a case that the petitioner without verifying license or even looking at the license, sold the cartridges to the person, who was having revolver, which was found to be stolen. Lastly, he has argued that as *prima facie* case is made out against the petitioner, the present petition deserves dismissal.

5 In rebuttal, Mr. Tara Singh Chauhan, learned counsel for the petitioner has relied upon the judgments rendered by Hon'ble Delhi High Court in ***Golap Saikia*** vs. ***State (NCT of Delhi) & anr***. and ***Gaganjot Singh*** vs. ***State's*** case.

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

7 Admittedly, as per the case of the petitioner, the main accused was arrested by the police with pistol and seven rounds were found in the polythene bag and one round in magazine alongwith other material and during investigation the accused stated that he has purchased the cartridges from the present petitioner, who is a dealer of arms and ammunition in the name of Nand Lal & Company at Dharamshala.

8 As per the statement of PW-1, recorded before the police, he has stated that the main accused was found with pistol, eight kartoos and two key rings. PW-2 has stated that the accused Vikram alias Virzoo was apprehended, but he ran away by leaving behind his purse, shoes and bag and when his bag was searched, one pistol alongwith cartridges and two key rings were found, which were taken into possession by the police. However, now as per the death certificate placed on record, Vikran alias Virzoo has expired.

9 After going through the record in detail, this Court finds that there is sufficient evidence on record to proceed against the petitioner, as he has himself admitted that he sold the cartridges to some person. It has also come on record that the person, who purchased the cartridges, was not having valid license to purchase the cartridges. In these circumstances, the definition of ammunition, as given hereinabove, makes out a case under the Arms Act against the present petitioner. The case is yet at the initial stage and this Court finds that the learned Court below, while framing the charge, has applied its mind and found that *prima facie* case is made out against the petitioner, as during the year, 2015, he sold out 12 cartridges of 32 bores to the main accused, in contravention of the provisions of Sections 5 and 6 of the Arms Act and thereby committed an offence under the Arms Act.

10 This Court finds that in the instant case, provisions of Sections 5 and 6 of the Arms Act *primefacie* seems to be violated. The only basic question is that "whether there was sufficient material to proceed against the petitioner or not ?", the answer is "yes". So, under these circumstances, the petitioner has failed to make out a case for quashing the proceedings against him. As far as the judgments (supra) cited by learned counsel for the petitioner, are not applicable to the facts of the present case, as facts of the present case are totally different.

11 So, in the given facts and circumstances of the case, the present petition, which is devoid of merits, deserves dismissal and is accordingly dismissed. Pending

applications, if any, also stands disposed of. Parties to appear before the learned trial Court on **21st August, 2019**.

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

Ashwani Kumar ……Petitioner
Versus
State of H.P. and others ……Respondents

Cr. MMO No. 403 of 2019
Reserved on: 26.07.2019
Decided on: 01.08.2019

Code of Criminal Procedure, 1973 –Sections 320 & 482 – Inherent powers – Exercise of – Quashing of FIR, pursuant to compromise – Guiding principles – Held, if for purpose of securing ends of justice quashing of FIR becomes necessary, Section 320 of Code would not be a bar to exercise of power of quashing- Powers under Section 482 of Code have no limits but such powers must be exercised with utmost care and caution. (Para 6)

Cases referred:
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another,(2013) 4 SCC 58
Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others vs.State of Gujarat and another, (2017) 9 SCC 641
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667

For the petitioner: Mr. Vinay Thakur, Advocate
For the respondents: Mr. P.K. Bhatti, Addl. AG, for respondent No. 1.
Mr. Brij Chauhan, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as “the Code”), has been maintained by the petitioner for quashing of F.I.R No. 87/13, dated 01.05.2013, under Sections 363, 366, 376 of the Indian Penal Code and Section 6 of POCSO Act, registered at Police Station Dehra, District Kangra, H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned trial Court.

2. Briefly stating the facts, giving rise to the present petition are that complainant/respondent No. 3 filed a complaint against the petitioner, stating therein that on 30.04.2013, respondent No. 2 (prosecutrix) alongwith her grandmother had gone to attend the marriage and did not return back. As per the complainant, her daughter was kidnapped by the present petitioner. Consequently, FIR No. 87/2013, dated 01.05.2013, under Sections 363, 366, 376 of IPC and Section 6 of POCSO Act, came to be registered against the petitioner. However, as per the case of the prosecution, the petitioner and

respondent No. 2 had fled away and solemnized marriage and came back home in the month of August, 2014. Now the parties have compromised the matter and as per the complainant, who is mother of the prosecutrix, she had lodged the report inadvertently and do not want to pursue the case against her son-in-law/petitioner, since her daughter alongwith her three children are living happily with the petitioner and in this regard, her statement has also been sworn in by way of affidavit, **Annexure P-5**. Hence, the present petition.

3. Learned counsel for the petitioner has argued that as the parties have compromised the matter and the complainant has sworn in by way of affidavit that she has inadvertently lodged the complaint against the petitioner, no purpose will be served by keeping the proceedings alive, since the petitioner alongwith respondent No. 2 (prosecutrix) and his three children is living happily, hence, the FIR, alongwith consequent proceedings arising out of the same, pending before the learned trial Court, may be quashed and set aside.

4. Learned counsel appearing on behalf of respondents No. 2 and 3 has argued that the present petition may be allowed, in view of the compromise arrived at between the parties.

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

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

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

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

> **[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-**
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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.**
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> **[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.**
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> **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.**
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> **[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. Similarly, Hon'ble Supreme Court in **Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others***vs.***State of Gujarat and another, (2017) 9 Supreme Court Cases 641,** wherein it has been held as under :

"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

16.5 The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9 In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

Even if, the trial is allowed to be continued, as the parties have compromised the matter, there are bleak chances of conviction to secure the ends of justice.

10. Thus, taking into consideration the law as discussed hereinabove and the material which has come on record, i.e. Annexures P-4 and P-5 (affidavits sworn in by respondents No. 2 and 3), including their statements recorded before learned trial Court and the fact that all three children, who are present in the Court alongwith respondent No. 2 and 3 (the prosecutrix and the complainant), are being brought up well by the petitioner, I find that the interest of justice would be met, in case, the proceedings are quashed, as the parties have compromised the matter, living happily with each other and do not want to proceed further with the case in order to maintain their relation cordial.

11. Accordingly, looking into all attending facts and circumstances, this Court finds that present is a fit case to exercise jurisdiction vested in this Court, under Section

482 of the Code and, therefore, the present petition is allowed and F.I.R No. 87/13, dated 01.05.2013, under Sections 363, 366, 376 of the Indian Penal Code and Section 6 of POCSO Act, registered at Police Station Dehra, District Kangra, H.P., is ordered to be quashed. Since F.I.R No. 87/13, dated 01.05.2013, under the aforesaid Sections has been quashed, consequent proceedings, arising out of the said F.I.R., pending before the learned trial Court are thereby rendered infructuous.

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

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

Rajinder Prashad ……Petitioner
Versus
State of H.P. and others ……Respondents

Cr. MMO No. 373 of 2019
Reserved on: 25.07.2019
Decided on: 01.08.2019

Code of Criminal Procedure, 1973– Sections 320 & 482– Inherent powers – Exercise of– Quashing of FIR, pursuant to compromise– Guiding principles– Held, if for purpose of securing ends of justice quashing of FIR becomes necessary Section 320 of Code would not be a bar to exercise of power of quashing- Powers under Section 482 of Code have no limits but such powers must be exercised with utmost care and caution. (Para 6)

Cases referred:

B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675

Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others vs.State of Gujarat and another, (2017) 9 SCC 641

Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667

For the petitioner: Mr. Ajay Shandil, Advocate, vice Mr. R.S. Chandel, Advocate
For the respondents: Mr. P.K. Bhatti, Addl. AG, for respondent No. 1.
Mr. Atul Verma, Advocate, vice Mr. Sumit Himalvi, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as “the Code”), has been maintained by the petitioner for quashing of F.I.R No. 239/18, dated 07.12.2018, under Sections 279 and 337 of the Indian Penal Code, registered at Police Station Theog, District Shimla, H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned trial Court.

2. Briefly stating the facts, giving rise to the present petition are that on 07.12.2018, respondent No. 2/complainant alongwith his wife was coming to Shimla from his Village at Lahoti, around 1:00 p.m., when he reached near Dev Bhoomi Cold Store, Matiyana, a car, bearing registration No. HP-06A-1476, being driven by the present petitioner, came from opposite side and collided with his car, due to which, he sustained injuries. As per the complainant, the accident has occurred due to rash and negligent driving of the petitioner, consequently, F.I.R No. 239/18, dated 07.12.2018, came to be registered against the petitioner. However, now the parties have settled their dispute, vide compromise Deed, **Annexure P-2** and in order to maintain their relation cordial, they do not want to pursue the case against each other. Hence the present petition.

3. Learned vice counsel appearing on behalf of the petitioner has argued that as the parties have compromised the matter, vide Compromise Deed **Annexure P-2**, no purpose will be served by keeping the proceedings alive, hence the FIR, alongwith consequent proceedings, arising out of the same, pending before the learned trial Court may be quashed and set aside.

4. Learned vice counsel appearing on behalf of respondents No. 2 and 3 has argued that the present petition may be allowed, in view of the compromise arrived at between the parties.

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

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

> **[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.**
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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 rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

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

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

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

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

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

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

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

be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

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

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.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. Similarly, Hon'ble Supreme Court in **Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others***vs.***State of Gujarat and another, (2017) 9 Supreme Court Cases 641,** wherein it has been held as under :

"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

16.5 The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9 In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

Even if, the trial is allowed to be continued, as the parties have compromised the matter, there are bleak chances of conviction to secure the ends of justice.

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice would be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise, **Annexures P-2**, placed on record.

11. Accordingly, looking into all attending facts and circumstances, this Court finds that present is a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code and, therefore, the present petition is allowed and F.I.R No. 239/18, dated 07.12.2018, under Sections 279 and 337 of the Indian Penal Code, registered at Police Station Theog, District Shimla, H.P., is ordered to be quashed. Since F.I.R No. 239/18, dated 07.12.2018, under the aforesaid Sections has been quashed, consequent proceedings, arising out of the said F.I.R., pending before the learned trial Court are thereby rendered infructuous.

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

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

Ranjna Bhardwaj …..Petitioner
Versus
Rajneesh Bhardwaj …..Respondent

CMPMO No. 513 of 2018
Reserved on 24.07.2019
Decided on: 01.08.2019

Code of Civil Procedure, 1908-Section 24– Transfer of matrimonial dispute– Guiding principles- Held, it is convenience of wife that is required to be considered over and above inconvenience of husband– Petitioner wife found residing with her parents at Kullu, hvaing no source of income– She has to look after minor daughter also– Petition for restitution of conjugal rights filed by husband in a court at Palampur in district Kangra transferred to Court of District Judge, Kullu. (Para 4)

Case referred:
Dharmi Devi vs. Manohar Lal, CMPMO No. 323 of 2017

For the petitioner: Mr. Naveen K. Bhardwaj, Advocate.
For the respondent: Mr. Ajay Sharma, Senior Advocate with Mr. Ajay Thakur, Advocate, for the respondent.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India, read with Section 24 of the Code of Civil Procedure, has been maintained by petitioner-wife for transfer of case, i.e. HMA No. 11/2018, titled as 'Rajneesh Lal Vs. Ranjna Bhardwaj' from the Court of learned Senior Civil Judge, Palampur, District Kangra, H.P., to the Court of learned Senior Civil Judge, Kullu, District Kullu, H.P., or any other Court in Courts Complex at Kullu.

2. Briefly stating facts giving rise to the present petition are that the marriage between the parties was solemnized on 04.11.1999 in accordance with Hindu Rites and

Custom and out of their wedlock one female child was born. As per the petitioner, after the marriage, the respondent-husband started ill-treating her and their relation became sour to the extent that the now both of them are involved in litigation. The petitioner filed a petition under Section 125 Cr. P.C. in the Court of learned Chief Judicial Magistrate, Kullu, District Kullu, H.P., against the respondent, which was decided on 03.09.2008 and an amount of Rs. 1,000/- per month was awarded to her as maintenance and an amount of Rs. 400/- per month was awarded to her daughter. The respondent-husband has also filed a petition under Section 13 of the Hindu Marriage Act, 1955, before the learned District Judge Kullu, which was dismissed. Thereafter, the respondent-husband filed a petition under Section 9 of Hindu Marriage Act, 1955, for restitution of Conjugal Rights, before the learned Senior Civil Judge at Palampur, District Kangra, H.P., whereupon notice was issued to the petitioner-wife. As per the petitioner, she has no source of income and she is residing with her parents at Kullu, thus, she is not in a position to attend the Court proceedings at Palampur, District Kangra, due to shortage of funds and her minor daughter, hence, the present petition for transfer of case.

3. I have heard the learned counsel for the parties and gone through the records available with this Court.

4. Taking into consideration the fact the petitioner is residing within the jurisdiction of Kullu Courts and she being a lady is unable to go to the Court of learned Senior Civil Judge, Palampur, District Kangra to attend the case proceedings and also taking into consideration the law as settled by this Court in ***CMPMO No. 323 of 2017***, titled ***Dharmi Devi vs. Manohar Lal***, whereby it has been held that it the convenience of the petitioner-wife that is required to be considered over and above the inconvenience of the respondent-husband and since the present petitioner is residing with her parents, having no source of income and has to look-after a minor daughter, the present petition is allowed and the proceedings in HMA No. 11/2018, titled as 'Ranjeesh Lal vs. Ranjna Bhardwaj', pending before the learned Senior Civil Judge Palampur, District Kangra, are transferred to the Court of learned District Judge, Kullu, H.P.

5. The parties, through their counsel, are directed to appear before the learned District Judge, Kullu, H.P. on **26th August, 2019**.

6. The petition, so also pending application(s), if any, stands disposed of in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Mrs. Neelam Kumari. ……Petitioner.
Versus
State of H.P. & ors. ……Respondents.

CWP No. 1937 of 2019
Date of decision: August 26, 2019.

Constitution of India, 1950 –Article 226 – Release of convict on parole for arranging money towards education of daughter – Grant of -Held, husband of petitioner for whose release on parole petition was filed, is a life convict – He was earlier released on parole – As

per Standing Orders, next parole available only after six months – That period has not lapsed so far – Daughter of petitioner admittedly studying in Ukraine and needs money to persue studies –Petition disposed of with direction that prisoner be taken in custody to his native place and post office etc., for doing needful for three days and he be lodged during night in nearby Sub - jail /District jail during this period.(Paras 2 to 6)

For the petitioner	:	Ms. Kiran Dhiman, Advocate,
For the respondents	:	Mr. Narender Guleria, Addl. AG.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge *(Oral)*

The petitioner herein is the wife of life convict Vikas Deep Kanwar who presently is undergoing the sentence in Model Central Jail, Nahan. She has sought the release of her husband from custody on parole to arrange for the funds required by their daughter to pursue her MBBS course in Odessa National Medical University, Ukraine.

2. In compliance to the orders passed on 21st August, 2019, instructions dated 22nd August 2019 have now been placed on record. Annexed thereto is the report of the District Magistrate, Una Himachal Pradesh. The District Magistrate has got the inquiry conducted about the act, conduct and behaviour of the accused during the period when he was previously on parole. The Pradhan, Gram Panchayat though has reported that the daughter of the convict is pursuing her study in Ukraine and that during her ensuing visit to native place she may be in need of money while leaving for Ukraine.

3. Learned counsel on instructions submits that the family has no source of income to bear the expenditure likely to be incurred upon for the academic sessions 2019-2020 and that the convict who is owner in possession of the land intend to raise loan so that his daughter who is going back on 31st August 2019 to Ukraine is in a position to pursue her further study.

4. However, the Pradhan has further reported that the local residents have objection to the frequent release of the convict-husband of the petitioner on parole. It has also been pointed out that the husband of the petitioner had been on parole during the period from 1.4.2019 to 28.4.2019 and surrendered only on 30.4.2019. He has now applied for second parole within a period less than one month, whereas as per the standing orders issued by the Jail Department a convict is entitled for the second parole after the gap of six months from his previous period of parole.

5. Taking into consideration the written instructions and also the report submitted by the District Magistrate, the present is not a fit case where convict Vikas Deep Kanwar, the husband of the petitioner, is entitled to be released on second parole. Above all the period for which he has sought himself to be released on parole is already over. However, keeping in view that his daughter is pursuing MBBS course in Ukraine and her career is at stake for want of money, therefore, we deed it appropriate to order to release the convict in custody for some reasonable time so that he is in a position to arrange for the funds required by his daughter to pursue her further studies.

6. This writ petition is, therefore, disposed of with a direction to the Director General of Prisons, Himachal Pradesh to release the convict Vikas Deep Kanwar undergoing sentence in Model Central Jail, Nahan tomorrow on *27.8.2019* at *10:30 A.M.* under proper police escort. He shall be taken to his native place Village and Post Office, Pandoga, Tehsil

Haroli, District Una in custody. The police escort shall take him in custody to the place(s) i.e. Banks etc. from where he has to raise loan and to be lodged during night in nearby sub jail/district jail, Una. The Police escort shall brought the convict back to Model Central Jail, Nahan on 30th August, 2019 by 5:00 P.M. and hand over his custody there to the Superintendent of Jail for serving out the remaining sentence.

7. Pending application(s), if any, shall also stand disposed of.

8. An authenticated copy of this judgment be supplied to learned Additional Advocate General for compliance.

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

State of Himachal Pradesh ....Petitioner.

Versus

Manohar Lal ....Respondent.

Cr.MMO No.311 of 2019
Date of Decision: 22.8.2019

Code of Criminal Procedure, 1973-Sections 91, 233 & 243– Production of 'document or other thing'- Scope of- Held, scope of Section of 91 of Code is very wide and it can neither be restricted only to documents on which prosecution relies upon nor to stage contemplated by Sections 233 or 243 of Code– Section 91 empowers a court to ensure production of any document or other thing 'necessary or desirable' for purpose of any investigation, inquiry, trial or other proceedings under Code by issuing a summons or written order to those in possession of such material– Sine qua non for an order under this Section is consideration of court that production of document/material concerned is desirable and necessary for purpose of trial, inquiry, investigation etc.- Order of Special Judge directing police to preserve footage of CCTV cameras installed in Police Station, mentioned local banks and call details with location of specified phone numbers, on facts, upheld– Petition dismissed. (Paras 5 & 11)

Case referred:

Ishwar Dass vs. State of HP, judgment dated 16.4.2018 passed in Cr.MMO No. 484 of 2017
Suresh Kalmadi vs. CBI, Crl.M.C. No. 2143 of 2015 decided on 22.5.2015
V.K. Sasikala vs. State, (2012) 9 SCC 771

For the petitioner : Mr. Sudhir Bhatnagar and Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.

For the respondent : Mr. Rajiv Rai, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 23.1.2019, passed by the Special Judge Ghumarwin, District Bilaspur, H.P., camp at Bilaspur, whereby an application under Section 91 CPC, having been filed by the respondent-accused (hereinafter referred to "the accused"), for issuing direction to the petitioner-State to take into possession and preserve all the CCTV footage of the CCTV cameras installed in the Police Station Ghumarwin, State Bank of Patiala, branch Ghumarwin, HP State Co-operative Bank, Kuthera/Massaur and Ghumarwin-Kuthera Chowk as well as call details of mobile numbers 98058-82219, 98162-21495, 78071-95536, 98572-14434, 94598-14305 and 88940-74481, came to be allowed, petitioner-State has approached this Court in the instant proceedings filed under Section 482 of Cr.PC., praying therein to set-aside aforesaid impugned order.

2. Briefly stated facts as emerge from the record are that the respondent – accused, against whom, FIR bearing No. 50/18 dated 16.3.2018, under Sections 20 and 29 of the ND&PS Act, came to be lodged at the PS Ghumarwin, filed an application under Section 91 of Cr.PC, before the court below, praying therein to issue direction to the petitioner-State to take into consideration and preserve all the CCTV footage of the CCTV cameras installed at the places mentioned herein above as well as call details of the mobile numbers, mentioned hereinabove, along with tower locations. The accused averred in the application that they have been falsely implicated in the criminal case vide FIR referred herein above. He further averred that entire story narrated by the police in the FIR detailed herein above, is concocted one because on 15.3.2018, at about 10:00 pm, police in civil dress came to nearby their house at village Khalian and took him, his brother in law namely Bablu and his wife Smt. Sony Bodh to the police Station Ghumarwin for investigation. Accused averred in the application that if CCTV cameras installed at aforementioned places are perused/preserved, it would be ample clear that they have been falsely implicated. Accused in the application also averred that call details of mobile Nos. 98527-14434 and 94598-14305 of Mahender Singh constable and Sh. Sher Singh SHO for the period starting from 15.3.2018 to 17.3.2018 would bring the truth to the fore. Accused averred that he and his wife time and again requested the SHO Ghumarwin to preserve the CCTV footage of CCTV cameras installed in the areas referred herein above, but no action, if any, ever came to be taken at the behest of the SHO, as a consequence of which, he was compelled to file petition (Cr.MMO No. 427 of 2018) before High Court of Himachal Pradesh, wherein this Court directed the accused to move appropriate application before the trial Court and as such, application under Section 91 Cr.PC came to be filed before the competent Court of law. Application as referred herein above filed on behalf of the accused came to be resisted by the respondents, who raised preliminary objection with regard to maintainability and claimed that there is no specific provision, if any, under the Code of Criminal Procedure, where such application can be filed. Petitioner-State averred in the reply that at 3:45am, accused alongwtih one Sh. Bablu son of Sh. Jai Ram, were found in conscious possession of the Charas weighing 5.031 kg on 16.3.2018, at a place called Massour Mod and it cannot be said that they have been falsely implicated. Petitioner State further stated in the reply that court at this stage has no power to direct the concerned person to preserve and give the CCTV footage because investigation is already complete and charge-sheet stands filed in the month of September, 2018. Petitioner-State specifically denied the allegation that accused have been falsely implicated under some criminal conspiracy hatched by the police.

3. Learned trial Court having taken note of the peculiar facts and circumstances of the case as well as law laid down by the Hon'ble High Court of Delhi in case titled ***Suresh Kalmadi v. CBI in Crl.M.C. No. 2143 of 2015, dated 22.5.2015***, allowed the application and directed the petitioner-State to take into possession and preserve all CCTV footage of CCTV cameras installed at the places mentioned in the application. Court below also directed the petitioner-State to furnish call details of mobile

phone numbers, detail whereof has been given herein above. In the aforesaid background, the petitioner-State has approached this court in the instant proceedings, seeking therein quashment of impugned order being contrary to the facts as well as law.

4. Having heard learned counsel for the parties and perused the material available on record, this Court is unable to agree with Mr. Sanjeev Sood, learned Additional Advocate General, that court below had no competence whatsoever to issue direction to the petitioner-State to take into possession and preserve all the CCTV footage in question because very purpose and object of Section 91 Cr.PC is to discover truth and do complete justice to the case.

5. It has been repeatedly held by the Hon'ble Supreme Court as well as this Court that accused is required to be afforded fair opportunity to prove his/her innocence. Moreover, bare perusal of provisions contained under Section 91 Cr.PC, reveals that application under this provision of law can be made at any stage of trial and scope of Section 91 is very wide and it can neither be restricted only to the documents on which the prosecution relies nor to the stage contemplated by Section 233 or 243 of the Code. Section 91 empowers a Court to ensure production of any document or other thing, "necessary or desirable", for the purpose of any investigation, inquiry, trial or other proceedings under the Code, by issuing a summons or a written order to those in possession of such materials. If, Section 91 Cr.PC is read in its entirety, it clearly reveals that sine qua non for an order under this Section is consideration of the Court that the production of the document/material concerned is desirable and necessary for the purposes of trial and as such, objection raised by Sh. Sanjeev Sood, learned Additional Advocate General with regard to competence of the court below to cause production of any document or any other thing during the pendency of the trial, deserves outright rejection.

6. Moreover, issue with regard to the competence of the court toensure production of any document or other thing, "necessary or desirable", for the purpose of any investigation, inquiry, trial or other proceedings under the Code, is no more *res-integra*, rather has been dealt with elaborately by this Court in its ***judgment dated 16.4.2018***, passed in ***Cr.MMO No. 484 of 2017 (Ishwar Dass v. State of HP)***., wherein this Court while interpreting the scope of Section 91 Cr.PC has categorically held that provisions contained under Section 91 Cr.PC casts a duty upon the court to cause production of document or a thing believed to be in possession of some other person, if it considers production of such document necessary for adjudication of the case. It has been further held by this Court that court will not create evidence in favour of an accused or prosecution but, at the same time, it is bounden duty of the court to discover truth about allegations against the accused. Issuance of direction, if any, under Section 91, whereby court enjoys power to cause production of document or a thing believed to be in possession of some person, definitely cannot be considered to be creation of evidence in favour of the accused, who makes an application under Section 91.

7. This Court in the aforesaid judgment has held thatnecessity or desirability would have to be seen with reference to the stage when prayer is made for the production. If any document is necessary or desirable for the defence of the accused, question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. Relevant paras of the aforesaid judgment are as follows:-

> 17. Section 91 pre-supposes that when a document is not produced, process may be initiated to compel production thereof. Any document or thing as envisaged under Section can be produced if it is found that the same is

necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code. First and the foremost requirement of the section is of the document being necessary or desirable. Necessity or desirability would have to be seen with reference to the stage when prayer is made for the production. If any document is necessary or desirable for the defence of the accused, question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When this section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under this section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in this Section. In so far as accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of his defence.

18. Reliance is placed upon judgment of Hon'ble Apex Court in **State of Orissa** v. **Debendra Nath Padhi**, (2005) 1 SCC 568, wherein it has been held as under:

> "23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding that the trial court has powers to consider even materials which accused may produce at the stage of Section 227 of the Code has not been correctly decided.
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> 24. On behalf of the accused a contention about production of documents relying upon Section 91 of the Code has also been made. Section 91 of the Code reads as under:
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>> "Summons to produce document or other thing.(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.
>>
>> (2)..
>> (3).."
>
> 25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that

under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

26. Reliance on behalf of the accused was placed on some observations made in the case of Om Parkash Sharma v. CBI, Delhi[(2000) 5 SCC 679]. In that case the application filed by the accused for summoning and production of documents was rejected by the Special Judge and that order was affirmed by the High Court. Challenging those orders before this Court, reliance was placed on behalf of the accused upon Satish Mehra's case (supra). The contentions based on Satish Mehra's case have been noticed in para 4 as under:

> "The learned counsel for the appellant reiterated the stand taken before the courts below with great vehemence by inviting our attention to the decision of this Court reported in Satish Mehra v. Delhi Admn. ((1996) 9 SCC 766) laying emphasis on the fact the very learned Judge in the High Court has taken a different view in such matters, in the decision reported in Ashok Kaushik v. State ((1999) 49 DRJ 202). Mr Altaf Ahmed, the learned ASG for the respondents not only contended that the decisions relied upon for the appellants would not justify the claim of the appellant in this case, at this stage, but also invited, extensively our attention to the exercise undertaken by the courts below to find out the relevance, desirability and necessity of those documents as well as the need for issuing any such directions as claimed at that stage and consequently there was no justification whatsoever, to intervene by an interference at the present stage of the proceedings.

27. In so far as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt inherent limitations as to the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve

the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by High Court and this Court. But observations were made in para 6 to the effect that if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these observations are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us hereinbefore. Further, the observations cannot be understood to mean that the accused has a right to produce any document at stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19.

28. We are of the view that jurisdiction under Section 91 of the Code when invoked by accused the necessity and desirability would have to be seen by the Court in the context of the purpose investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry.

29. Regarding the argument of accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under Section 482 of the Code and Article 226 of Constitution of India is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal's case."

19. It is quite apparent from the aforesaid exposition of law that necessity and desirability of document sought to be produced with the assistance of the court is to be examined considering the stage when such prayer for summoning and production is made and party which makes such prayer, either police or the accused. But, definitely, application, if any, under Section 91 on the part of accused can be made at the stage of defence.

20. Ratio laid down in aforesaid judgment came to be reiterated in the recent judgment of Hon'ble Apex Court in **M/s V.L.S. Finance Ltd.** v. **S.P. Gupta and anr**, Criminal Appeal No. 99 of 2016 decided on 5.2.2016, wherein it has been held as under:

"43. Before we proceed to dwell upon the power of the Magistrate to grant permission for not pressing the application, we think it necessary to delve into legality of the direction issued by the High Court to the Magistrate to consider the documents filed by the accused persons along with the application preferred under Section 91 Cr.P.C. Section 91 Cr.P.C. reads as follows:-

"Section 91. Summons to produce document or other thing.- (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any

investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

44. The scope and ambit of the said provision was considered in State of Orissa v. Debendra Nath Padhi[17], wherein this Court has held thus:- "The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof." The aforesaid enunciation of law clearly states about the scope of Section 91 Cr.P.C. and we are in respectful agreement with the same."

8. It is quite apparent from the aforesaid exposition of law that in criminal trial, prosecution has to be absolutely fair and impartial because main purpose of criminal trial is not to get someone convicted, rather its object is to discover truth and punish the accused, if found guilty.Hon'ble Apex Court in **V.K. Sasikala** v. **State** (2012) 9 SCC 771, has held that the courts must ensure fairness of the investigative process so as to maintain the citizens' rights under Articles 19 and 21 and also active role of the court in a criminal trial. Hon'ble Apex Court has further held that it is responsibility of the investigating agency as well as of Court to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It is also held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. Relevant paras of the aforesaid judgment are as under:-

> 217. Further, Section 91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. WhereSection 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross- examination or the production of any document or other thing for which the court has to pass a reasoned order.
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> 218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (sic Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

9. Hon'ble Apex Court in judgment referred herein above has categorically ruled that certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. Very importantly, the Hon'ble Apex Court in the case referred herein above has held that absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions.

10. In the case at hand, this Court finds that accused repeatedly requested the police authorities to preserve the CCTV footage of the cameras installed at places mentioned in the application, but such requests of him never came to be paid any heed, as a consequence of which, he was compelled to approach this Court earlier in proceedings i.e.

Cr.MMO No. 427 o 2018. Information supplied to the accused under RTI Act, clearly reveals that request for preservation of CCTV footage of the CCTV cameras installed at the places as well as call details of the mobile numbers mentioned in the application was made, but no prompt steps, if any, ever came to be taken on behalf of the Investigating Agency to do the needful, as was prayed in the application. In the case at hand, the accused are facing trial for a offence, which may entail him punishment i.e. minimum imprisonment for a period of 10 years. Accused are seeking production of CCTV footage, which they feel shall help in defending themselves and as such, prosecution cannot be allowed to argue that respondents-accused are trying to make any roving or fishing inquiry or making an unreasonable request. In a criminal trial, the prosecution has to be absolutely fair and impartial and opportunity to the fullest is required to be given to the accused to prove his/her innocence. Moreover, in the case at hand, accused are already behind bars and as such, there appears to be no force in the argument of learned Additional Advocate General that repeatedly applications are being filed by the accused with a sole motto to delay the trial.

11. Consequently, this Court in view of the aforesaid discussion as well as law taken note herein above, sees no reason to interfere in the order impugned herein, which otherwise appears to be based upon proper appreciation of facts as well as law and as such, same is upheld accordingly. However, taking note of the specific ground raised by the petitioner-State that CCTV footage of CCTV cameras could not be procured without giving opportunity of being heard to the owners of the said CCTV cameras and backup of CCTV camera of PS Ghumarwin cannot be preserved for more than one month as hard disc of 1 TB capacity is used in the said camera, this Court is in agreement with Mr. Sanjeev Sood, learned Additional Advocate General that information, which is either not available or totally impossible to make available, could not have been called for by the court while exercising power under Section 91 of the Cr.PC. In view of the above, impugned order passed by the court below is modified to the extent that the petitioner state shall not be liable to produce CCTV footage of the places mentioned in the application qua the relevant period. The present petition is disposed of in the aforesaid terms alongwith pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Cr. Appeal No. 703 of 2002 along with
Cr. Appeal No. 228 of 2007
Judgment reserved on: 10th July, 2019.
Date of Decision: August 27, 2019

Code of Criminal Procedure, 1973– Sections 377 & 378 (1)– Appeal by State– Whether death of one of co-accused would result in abatement of appeal as a whole against all of them? Held, when there is more than one accused, then appeal abates in part and not in full– It will abate only qua accused who is dead– Depending upon role of surviving accused, appeal against surviving accused either continues or becomes infructuous. (Para 12)

Indian Evidence Act 1872– Sections 101 & 102 – Burden of proof in criminal case– False defence– Effect- Held, before using false defence as additional link, it must be proved that all the links in the chain are complete and do not suffer from any infirmity– Where there is any

infirmity or lacuna in prosecution case, it can not be cured or supplied by a false defence or a plea which is not accepted by court. (Para 17)

1. Cr. Appeal No. 703 of 2002

State of Himachal Pradesh	...Appellant
Versus	
Sanjiv Kumar alias Sanju	....Respondent.

2. Cr. Appeal No. 228 of 2007

State of Himachal Pradesh	...Appellant
Versus	
Ramesh Chand & others	....Respondents.

Cases referred:

Aher Raja Khima vs. State of Saurashtra, AIR 1956 SC 217
B. Venkat Swamy vs. Vijaya Nehru, (2008) 10 SCC 260
Babu vs. State of Kerala, (2010) 9 SCC 189
Eradu and Ors. vs. State of Hyderabad, AIR 1956 SC 316
Gambhir vs. State of Maharashtra, (1982) 2 SCC 351
Hanuman Govind Nargundkar vs. State of Madhya Pradesh, AIR 1952 SC 343
Kishore Chand vs. State of Himachal Pradesh, (1991) 1 SCC 286
M.G. Agarwal vs. State of Maharashtra, AIR 1963 SC 200
Ram Ishwar Chaudhary vs. State of Bihar, 1986 Cri.LJ 1366, Patna High Court
Sharad Biridhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 11
Sheo Swarup vs. King Emperor, (1993-34) 61 IA 398 : AIR 1934 PC 227
State of Karnataka vs. Selvi J. Jayalalitha, (2017) 6 SCC 263
State of U.P. vs. Banne, (2009) 4 SCC 271
Thimma vs. State of Mysore, 1970 (2) SCC 105
Vasa Chandrasekhar Rao vs. Ponna Satyanarayana & Anr., (2000) 6 SCC 286

For the appellant	:	Mr. Ashwani Sharma, Additional Advocate General, for the appellant/State in both the appeals.
For the respondent	:	Mr. Sunil Dutt Vasudeva and Mr. Sanjay Dutt Vasudeva, Advocates, for the respondent in Cr. Appeal No. 703 of 2002. Mr. Imran Khan, Advocate, for the original respondent No. 2 in Cr. Appeal No. 228 of 2007. Ms. Tim Saran, Advocate, for the original respondent No. 3 in Cr. Appeal No. 228 of 2007. Appeal against respondents Tilak Raj and Rattan Lal in Cr. Appeal No. 228 of 2007 already stands abated.

The following judgment of the Court was delivered:

Per: Anoop Chitkara, Judge.

Aggrieved by the acquittal of all the accused of all charges, including that of murder, the State has come up before this Court under Section 378(4) of CrPC. These appeals trace their origin to a complaint made to the Police Station Barmana, District Bilaspur, HP, which culminated in the registration of FIR No. 88 of 1993, under Sections

302, 201, 382, 467, 468, 420, 210, and 411 read with Sections 120B and 34 of the Indian Penal Code. Two separate trials commenced because the police could not apprehend all the accused. Vide a common judgment dated May 15, 2002; the trial Court held the accused not guilty. The State has come up before this Court with these two separate appeals and both these appeals are being taken up together because they originate from the same FIR and collective judgment:

(i) Criminal Appeal No. 703 of 2002, titled as State of Himachal Pradesh vs. Sanjiv Kumar @ Sanju, arising out of Sessions Trial No. 3 of 1995 and

(ii) Criminal Appeal No. 228 of 2007, State of Himachal Pradesh vs. Tilak Raj @ Jasbir @ Jassi (since deceased) & others, arising out of Sessions Trial No. 44 of 1996.

2. The gist of the evidence, apposite to and to arrive at a fair conclusion and to justify the reasoning, is as follows:

3. **FACTS RELATING TO DISCOVERY OF DEAD BODY**:

A) On 20.9.1993 at around 6.00 – 7.00 p.m., a resident of Barmana, named Tulsi Ram (PW-1 in ST 44/96)), had gone to cut grass from his grasslands and on the way, he noticed a dead body, lying near the culvert, down the road. He apprised Babu Ram (PW-2 in ST No. 44/96), who was the Pradhan of the Gram Panchayat Kotla, about noticing of such dead body. On this Babu Ram also visited the spot and saw the dead body, lying suspiciously. Shri Babu Ram, the Pradhan, deputed some persons at the place to guard the dead body and along with ward members of his Panchayat, proceeded to the Police Post Namhol. He informed the police of a human corpse lying nearby a conduit, 10 to 14 feet below the road, near village Panjok. Police recorded this information vide entry No. 15, in the daily diary register (Ext. PW-2/A in ST No. 44/96).

B) Without any loss of time, ASI Ranjha Ram (PW-22 in ST No. 44/96), along with police officials, visited the spot. After verifying the corpse, prima facie the police proceeded to investigate a case of culpable homicide amounting to murder. Thereupon, the investigating officer recorded the statement of Tulsi Ram (PW-2 in ST No. 3/95) under Section 154 CrPC (Ext. PC in ST No. 3/95). Based on this statement, police registered the FIR referred to hereinabove. After registration of the FIR, police prepared the inquest reports (Ext.PA & PB in ST No. 3/95) (Ext. PW1/A & 1/B in ST No. 44/96).

C) The police sent the dead body for post mortem examination. The Prosecutor tendered in evidence the Post mortem report as Ext. PQ (in ST No. 3/1995)/Ext. PW14-A (in ST No. 44/1996) and final opinion as Ext. PR (in ST No. 3/95)/Ext. PW14-B(in ST No. 44/96). On 23.9.1993, Dr. N. K. Sankhyan, (PW-14 in ST No. 44/96), Medical Officer, District Hospital Bilaspur, HP, conducted the post mortem examination on this unidentified dead body. The Doctor observed that the dead body was in a highly decomposed state with millions of maggots present over the same. The length of the dead body was 5 feet & 7 inches, except for the area of contact on the back of the chest, the skin of the body was peeled off, and the face bloated and was dark brownish-black color. Only few hair were present on the scalp. After analysis of the dead body, the Doctor came to the conclusion that the corpse was of a human male, aged between 22 to 30 years. He noticed injuries on the abdomen, and due to this injury, the intestines had protruded from the wound. The Doctor also noticed injuries on the scalp, left the side of the neck, right shoulder and right arm, abdomen,

right thigh, right leg, left knee, inner left leg and ante mortem fracture of 4th cervical vertebra. During the post mortem examination, the Doctor preserved the viscera of the deceased and sent for pathological examination, but the laboratory did not notice any traces of any poison or alcohol. The Doctor concluded that the cause of death as ante mortem injuries and that he died around six days before the post mortem examination, which means around Sep 17, 1993.

D) During the investigation, the police also preserved a locket, and the clothes on the dead body, as evidence for the identification.

E) ASI Ranjha Ram (PW-22 in ST No. 44/96) conducted the initial investigation in the case. He stated that the spot from where he had recovered the dead body was near the Panjok Naala below the Shimla – Bilaspur Road. From the trouser of the deceased, he also recovered a vial which mentioned: "Delay spray made in Germany – Spray Dooz."

F) The investigator got this vial tested from the State Forensic Science Laboratory, Shimla. The Laboratory found liquid in the vial as 2-Dyethyle Aminoacito-2.6 – Xyalaelied Lidocaine and declared that it is local anesthesia drug. The prosecution tendered this report in evidence as Ext. PW-28/A (in ST No. 3/95).

G) After the registration of the FIR, the SHO Kashmir Singh (PW-39 in ST No. 44/96) visited the spot and conducted further investigation. He also took into possession the curtain of Maruti van, from the spot from where the dead body laid, per seizure memo Ext. PW-37/F in ST No. 44/96).

4. **FACTS RELATING TO MISSING OF RAMAN BHARTI**:

A) One taxi driver of the name Raman Bharti used to ply Maruti Van of blue color, having registration No. HP-02-3100, from Nurpur. He went missing from noon of Sep 17, 1993. Sh. Tirath Ram, who appeared as PW-11 (in ST No. 44/96), was the father of Raman Bharti. He testified that at the time when his son had gone missing, he was wearing one vest on which a word in English embossed and a black pant, grey shoes, and one locket. The family launched a frantic search on their level. On Sep 20, 1993, Ravinder Dhiman, brother-in-law of Raman Bharti, started looking for him and enquired from the other taxi drivers of Nurpur. One such driver was Kukka @ Amin Chand (PW-4 in ST No. 3/1995) resident of Nurpur, Distt. Kangra. He apprised Ravinder Dhiman that on Sep 17, 1993, in his presence three boys who were around 23 years, had come there and they asked one Fauji driver of a Maruti van to take them to Shimla to attend a marriage which was at a distance of 30 kilometers from Shimla. On this, said Fauji refused to go with them. After that, those boys went to Raman Bharti and hired his taxi for a fare of Rs. 2200/-. Raman Bharti asked him to go with him, but those boys objected to it under the pretext that two girls also have to accompany them from Dharamshala, therefore, there was no extra seat. After that, Raman Bharti left with them not to be seen again.

B) On this Ravinder and Amin Chand proceeded towards Shimla in search of Raman Bharti. During their return journey, they enquired about missing person at Barmana, where they came to know that the police had recovered a dead body on Sep 23, 1993. They identified it to be of Raman Bharti by looking at the locket and clothes retrieved from the said dead body.

5. **INVESTIGATION & ARREST OF ACCUSED**:

A) On 27.9.1993, ASI Manjhel Singh (PW-38 in ST No. 44/96) took over the investigation. Kukka alias Amin Chand (PW-4 in ST No. 3/95), told the Investigating

Officer that one person (Accused Tilak Raj) sat on the front seat of the Van and two persons (Accused Sanjiv A-1 in ST 3 of 1995, and Sanjay A-2 in ST 3/1995), were also sitting on the back seat of the Van. The investigating officer collected the evidence regarding the stay of accused Tilak Raj in Indora in Distt. Kangra. Tilak Raj @ Jasbir Singh @ Jassi @ Shiva @ Sikander had purchased a scooter from Ganesh (PW-5 in ST No. 3/95 and PW-10 in ST No. 44/96). Ganesh was dealing as a vehicle dealer, and he had a scooter owned by Ashok Kumar for sale. This was a lead to identify accused Tilak Raj. ASI Manjhel Singh was able to pinpoint to accused Sanjiv Kumar as the suspect and kept on searching him for one year, and on 24.8.1994 he arrested him. On interrogation of accused Sanjiv Kumar, he revealed the names of other accused as Sanjay Kumar @ Sajjan and Tilak Raj @ Jasbir Singh @ Jassi. The Investigating Officer took him to Udaipur in Rajasthan. During his investigation, it transpired that one Tilak Raj had been working as a driver in Shambhu Travels at Udaipur, Rajasthan. On reaching Udaipur he came to know that the said Tilak Raj used to reside there, but despite his best efforts he could not trace him.

B) On 6.9.1994, ASI Manjhel Singh, the Investigating Officer (PW-38), arrested Sanjay Kumar @ Sajjan from Dharamshala, Distt. Kangra. On the identification of accused Sanjiv Kumar, he prepared three spot maps/memos Ext. PW-38/A to 38/C in ST No. 44/96) depicting the places where the murder was committed.

C) ASI Sanjay Kumar (PW-44 in ST No. 44/96), also conducted the investigation. On June 18, 1996, in the presence of witnesses Bhagat Ram and Krishnu Ram, accused Tilak Raj @ Jasbir Singh made a disclosure statement, that he could get the Maruti van No. HP-02-3100 recovered. He further disclosed that he had sold it to accused Ramesh Chand resident of Udaipur, Rajasthan, who had changed the color of the said Maruti van from Navy Blue to White and its number to DNJ-4302. He further disclosed in his statement that accused Ramesh Chand had also sold this van to accused Rattan Lal resident of Tekri, Udaipur, Rajasthan. The Prosecutor tendered this statement in evidence as Ext. PW-23/A (in ST No. 44/96). On 23.6.1996 in the presence of Lachhman Singh and Moti Singh accused Tilak Raj identified the house of accused Rattan Lal. However, police could not find him. During the further investigation at Udaipur, the Investigating Officer SI Sanjay Kumar (PW-44) recovered the van from a mechanic shop of accused Jagdish Prajapati and arrested him in the case.

D) Accused Jagdish Prajapati made a disclosure statement that two years before accused Bhagwati Lal of village Sakrota, Distt. Udaipur, Rajasthan, had brought one Maruti van, which was without any number plate and the said van had cuts in its roof on the driver seat, and he had repaired those areas. He also disclosed that he had changed the color of the van from navy blue to white. The Prosecutor tendered this statement in evidence as Ext. PW28/A (in ST No. 44/96). He further stated that shell of the Maruti van was refitted in another Maruti van bearing No. RJ27C 3965 and on his disclosure statement the said Maruti van was found parked outside the house of accused Bhagawati Lal at Sakrota, but on seeing the police, accused Bhagwati Lal ran away from the spot. SI Sanjay Kumar (PW-44) took into possession the said van. It was brought to Police Station Surajpur, Rajasthan.

E) Accused Jagdish allegedly made a disclosure statement to SI Sanjay Kumar that vehicle No. RPZ-1234 was sold to one Mange Lal resident of Udaipur for INR 73,000/- and it has the engine of the Maruti van No. HP02-3100. Such statement was recorded in the presence of witnesses Lachhman Singh and Moti Singh and tendered in evidence as Ext. PW-28/B (in ST No. 44/96). Later on, the Investigating Officer took into possession the vehicle No. RP 1234 vide seizure memo Ext. PW-28/C (in ST No.

44/96). The Investigating Officer (PW-44) got these vehicles checked from a mechanic, namely, Ravi Kumar who noticed that the chassis and engine of both these vehicles were tampered. Both the vehicles were taken into possession and brought to the Police Station at Bilaspur, HP.

F) The Vans that the Police had seized had number plates of registration number RPZ-1234 and RJ-27-C-3965. The prosecution got the recovered Van examined from the Deputy Director of Central Forensic Science Laboratory to link it with the stolen Van having registration No. HP-02-3100.

G) During further investigation on 29.6.1996, ASI Sanjay Kumar (PW-44) took accused Tilak Raj @ Jasbir Singh for the investigation to District Bilaspur, where accused Tilak Raj made a disclosure statement in the presence of witnesses Kala Ram and Manohar Lal that he could identify the vehicle, the place from where he had taken the vehicle HP02 3100 from deceased Raman Bharti. After that accused Tilak Raj made another disclosure statement in the presence of witnesses Tulsi Ram and Kalan Devi that he could get identified the spot from where he had thrown the dead body and took them to the Panjok Naala and identified the place. The statement was reduced into writing and site plan Ext. PW 44/D was prepared.

H) The Investigating Officer also took the specimen signatures and handwriting of accused Tilak Raj in the presence of the Judicial Magistrate. He also took into possession the record of the State Transport Authority, Shimla and RTO Amritsar. The Investigating Officer also collected the evidence, to link the chain of events, right from the boarding of the Maruti van by the accused up to the sale of the same in Udaipur in Rajasthan.

6. The case was investigated and all the accused could not be apprehended and one of the accused had absconded and as such, the Court declared such accused as a proclaimed offender and proceeded against the remaining accused. Subsequently, on the arrest of the absconder, a separate trial was initiated. For this reason the record is contained in two different Sessions Trials namely, Sessions Trial No. 3 of 1995 which relates to accused Sanjiv Kumar @ Sanju and Sajay Kumar @ Sajjan @ Pappu and Sessions Trial No. 44 of 1996 which relates to accused Tilak Raj @ Jasbir Singh, @ Jassi @ Shayama @ Shiva @ Manjit @ Raj @ Sikander, Ramesh Chand, Jagdish Prajapati, Rattan Lal and Bhagwati Lal.

7. The trial Court found prima facie case against all the accused persons and framed charges against each of the accused as stated below:

ST No. 3 of 1995:

Name of accused	**Sections under which charges framed**
Sanjiv Kumar @ Sanju	302, 201 and 382 all read with 34 IPC
Sanjay Kumar @ Sajjan @ Pappu	302, 201 and 382 all read with 34 IPC

ST No. 44 of 1996:

Name of accused	**Sections under which charges framed**
Tilak Raj @ Jasbir Singh @ Jassi	302, 201 & 382 all read with 120B & 34 IPC and 467, 468 & 420 read with 120B IPC.
Ramesh Chand	467, 468, 420 & 216 all read with 120B IPC and 411 IPC

Jagdish Prajapati	467, 468, 420 & 216 all read with 120B IPC
Rattan Lal	467, 468, 420 & 216 all read with 120B IPC

8. The substance of the charges framed against the accused is that on 17.9.1993 accused Sanjiv Kumar, Sanjay Kumar @ Sajjan and Tilak Raj @ Jasbir Singh committed the murder of Raman Bharti, at a place known as Bhrampukhar, Bilaspur, and thereafter threw his dead body below the road, with a view to screen the evidence. After committing the murder, they committed the theft of his taxi, bearing No. HP-02-3100. The charges against the other accused are that they have tampered with the document and purchased the said taxi. All the accused pleaded not guilty to the charges framed against each one of them and claimed trial.

9. Since all the exhibits and statements of the witnesses are almost similar, reference in this judgment will be made to the number of witnesses and the exhibit as contained in Sessions Trial No. 3 of 1995, being prior in time. Because the evidence in both the trials is also almost similar, therefore, it shall be appropriate to discuss the evidence in entirety. There is no conflict in the statements of the witnesses on material particulars.

10. We have heard the learned Additional Advocate General on behalf of the appellants-State and learned counsel for the respondents-accused and perused the entire record.

11. Seven persons were arraigned as accused in the FIR, namely A-1 Sanjiv alias Sanju; A-2 Sanjay alias Pappu (Both in ST 3 of 1995); A-1 Tilak Raj alias Jasbir Singh alias Jassi, alias Shayama, alias Shiva, alias Manjit, alias Raj, alias Sikander; A-2 Ramesh Chand; A-3 Jagdish Prajapati; A-4 Rattan Lal and A-5 Bhagwati Lal (All in ST 44 of 1996). The impugned judgment deals with the prosecution of all the accused except A-5 Bhagwati Lal (ST 44 of 1996), who had been declared a proclaimed offender. During the trial the 2nd respondent/accused Sanjay Kumar @ Sajjan @ Pappu in ST No. 3 of 1995 had expired; therefore, the prosecution had abated against him. In ST No. 44 of 1996, which gave rise to Criminal Appeal No. 228 of 2007, after the judgment of acquittal, 1st respondent/accused Tilak Raj @ Jasbir Singh expired on 3.12.2002 and, therefore, the appeal of the State against accused Tilak Raj @ Jasbir Singh was also abated vide order passed by this Court on 21.6.2004 in CrMPM No. 1220 of 2002 (in Cr.A. No. 228 of 2007). Rattan Lal, who was the 4th respondent/accused in Cr. Appeal No. 228 of 2007 also expired on 19.4.2009 and this Court vide order dated 15.6.2009 passed in Cr.MPM No. 295 of 2009 abated the prosecution against him.

12. The Question of Law that arises for consideration proposes that when the appeal under sections 377 and 378 CrPC, is filed against more than one accused and one or more of them die and one or more accused is alive, then whether the appeal shall abate in full or in part and whether it would continue against the surviving accused?

A) S. 394(1) CrPC reads as follows,

"(1) Every appeal under Section 377 or Section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant :

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply

> to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.
>
> *Explanation* - In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister. The proviso as well as the explanation to sub-section (2) of this section is a new provision. Read together, they exempt an appeal against a conviction and sentence of imprisonment from abatement on the death of the appellant, if his near relative obtains leave of the court to continue the appeal."

B) Sec. 394(1) CrPC mandates that every appeal u/s 377 or 378 CrPC shall finally abate on the death of the accused.

C) In State of Maharastra v. Eknath Yeshwant, (1981) 2 SCC 299, the main accused died, and the surviving accused was just an abettor. Supreme Court declared the appeal against the surviving accused to be infructuous. Supreme Court did not use the word “Abated” but used the word “Infructuous.” The extract of the Judgment is as follows:

> It is stated by the counsel for the respondents that respondent No. 1 is dead. According to the prosecution, respondent No. 1 is the main accused and the second respondent was merely an abettor. Both were acquitted by the High Court. Hence this appeal to this Court. Since the appeal abates against the first respondent on account of his death and the second respondent has already been acquitted, appeal against the second respondent becomes infructuous. The appeal is accordingly disposed of.

D) In Ram Ishwar Chaudhary v. State of Bihar, 1986 Cri.LJ 1366, Patna High Court observes,

> 12. One cannot fail to take notice of the fact that sub-section (2), Section 394 confers a right to appeal to the High Court to any person convicted and sentenced to imprisonment for more than seven years, who for the purpose of sub-section (2), Section 394 of the Code is described as the appellant. The right to appeal in any case of acquittal is conferred upon the State Government against an original or appellate order of acquittal passed by any court other than a High Court. Under Section 394(1), indeed, it is the death of the accused which has been made to cause abatement of the appeal under Section 378 of the Code. Several persons convicted in a case may together join in a common appeal preferred by them, but the appeal by each one of them, although in common with others, is an appeal by him against his own conviction, as each accused, on his conviction, becomes, in the event of an appeal preferred, the appellant in his individual capacity. So in the case of acquittal every individual accused is pronounced not guilty. Section 378 of the Code provides for a common appeal against acquittal of more than one accused, but in the event of appeal filed, each accused individually has to take the appellate order and the High Court can confirm the original or appellate order of acquittal in the case of one and in the case of other reverse the acquittal and convict him. The expression "the accused" used in Section 394(1) of the Code in this sense has to confine to the case of the individual accused who is dead without affecting the appeal against acquittal, so far other accused are concerned.

E) In State of Karnataka v. Selvi J. Jayalalitha, (2017) 6 SCC 263, Hon’ble Supreme Court decided the appeals of surviving accused and declared the abatement only against Selvi J. Jayalalitha.

F) If an appeal has to close only due to the death of one of the accused, then at the first place itself, it would give leverage to the accused to do away one of them and go scot-free, only on this technical snag. It is neither the legislative intention nor can it be interpreted with such a narrow compass. Although the appeal filed by the State is in the terminology of a singular noun, legally speaking, it is an appeal against each of the accused. When it comes to abatement of appeal, all the accused cannot swim and sink in the same boat. Thus the legal interpretation of S. 394(1) CrPC is that when there is more than one accused, the appeal abates in part and not in full and it abates only qua the accused, who is dead; and depending upon the role of the surviving accused, the appeal against the surviving accused either continues or becomes infructuous.

G) In the present case, the role of the surviving accused was at par with that of the expired accused. Thus the appeal does not abate in full, and it abated only in part. The appeal against the surviving respondents shall continue and only a judgment can close it.

APPRECIATION OF EVIDENCE AND REASONING:

13. The entire case is based on circumstantial evidence; therefore, it is necessary to cull out the circumstances to arrive at a conclusion that the chain of the circumstances is complete. None of the accused pleaded guilty and in their statements under sections 313 CrPC, their stand is of denial.

(A) Missing of Raman Bharti:

Sh. Tirath Ram, father of Raman Bharti, appeared as PW-11 (in ST No. 44/96) and testified that his son went missing from noon of Sep 17, 1993. He further testified that at the time when his son had gone missing, he was wearing one vest on which a word in English embossed and was also wearing black pant, grey shoes, and one locket. This circumstance is proved.

(B) Absence of missing person report:

An alarming feature has emerged in this case. Raman Bharti had left Nurpur from where he was plying his taxi, and it was his native place and home, to go to Shimla. He did not return, and even if the statement of Kukka @ Amin Chand (PW-4) is believed that on 20.9.1993 the brother-in-law of the deceased had inquired from him about the deceased, still there was no clue till they had visited the Police Station Barmana. During this period, when the family had already become suspicious, then they must have informed some Police Station about his having gone missing along with the vehicle. They did frantic searches and had even visited Shimla. The investigation is silent that why did the family not report about the missing of Raman Bharti and if they had filed such report, then what were the contents of the same. Section 114 (g) of the Indian Evidence Act, 1872 mandates that adverse inference shall be drawn against the person who withholds the evidence and the presumption is that it was not produced because if produced it would have been unfavorable to the person withholding it. This anomaly is very significant because it would have clarified that the deceased Raman Bharti went with these persons, as later on claimed by Kukka @ Amin Chand (PW-4 in ST No. 3/95). The absolute silence on this aspect would draw an adverse inference that there was some missing person report and contents of such report were not compatible with the version stated by Amin Chand and for that reason the same was withheld from evidence.

(C) Evidence of last seen:

Kukka @ Amin Chand, who appeared as PW-4 in ST No. 3/1995, was a resident of Nurpur, Distt. Kangra. He testified that Raman Bharti, owned a Maruti van bearing No. HP-02-3100 and it was registered as a taxi. He further testified that Raman Bharti used to drive his cab. Although this witness did not support the case of the prosecution in its entirety, but he did prove the fact that on 17.9.1993 in his presence, three boys who were around 23 years of age, had come there and they asked one Fauji driver of a Maruti van to take them to Shimla to attend a marriage which was at a distance of 30 kilometers from Shimla. On this, said Fauji refused to go with them. He further admitted that after that, those three boys went to Raman Bharti and hired his taxi for INR 2200/-. Kukka @ Amin Chand further stated that Raman Bharti had asked him to accompany them till Shimla, but he refused because those three boys had said that two girls also have to accompany them from Dharamshala; therefore, there was no extra seat. He admitted that after that, he did not see Raman Bharti. However, he did not identify any of the accused in the Court. He denied that he had stated to the police that he could recognize those three persons, if produced before him. Police did not subject the accused to any Test Identification Parade. Thus, the prosecution could not prove the fact that three persons, who had travelled with deceased Raman Bharti, in his taxi, were the persons who were arraigned as the accused and charged with the offence. Thus the chain of circumstances has broken at the very initial stage.

(D) Identification of the accused:

As per the case set up by the prosecution, the accused persons were seen by Kukka @ Amin Chand (PW-4 in ST No. 3/95), while hiring the taxi of Raman Bharti and leaving Nurpur towards Shimla. However, Kukka @ Amin Chand did not identify any of the accused in the Court. He denied that he had stated to the police that he could recognize those three persons if produced before him. Amin Chand was re-examined on 4.12.1997 (in ST No. 3/95), wherein he stated that accused Tilak Raj was sitting on the front seat with the driver and two boys sat on the back seat. Thus he identified accused Tilak Raj. In cross-examination, he was confronted about his not identifying the accused when he had earlier appeared in the Court on 12.6.1995 and also in the other Sessions Trial being ST No. 44/1996 as PW-32. He admitted that he had refused to identify the accused earlier because at that time they had clean shaved their heads and had kept beards. The police did not conduct any Test Identification Parade. Even otherwise, there was lot of delay in identification of the accused in the Court. Kukka @ Amin Chand had not mentioned any descriptive features, race, color etc, in his previous statement. Given this contradictory and cryptic evidence, the circumstance of identification of accused is not proved.

(E) Search of Missing Person:

Kukka alias Amin Chand (PW-4 in ST No. 3/95) in whose presence three persons had hired the taxi of Raman Bharti to Shimla testified that on 20.9.1993 one Ravinder Dhiman, brother-in-law of the deceased Raman Bharti inquired from him about the deceased and his taxi. On this, he told him about the fact of going to Shimla with three boys. Then these two persons came to Shimla to search Raman Bharti. In Shimla, one sister of Raman Bharti was residing, and they went to her house, and from there they came to Barmana. On reaching Barmana Police showed them the clothes and locket which they had recovered from the dead body on 23.9.1993. On seeing those clothes and locket, Kukka @ Amin Chand identified them to be belonging to deceased Raman Bharti. However, in Court, this witness did not identify the locket and the clothes to be belonging to the deceased Raman Bharti but identified the shoe (Ext. P-2) as the one which he was wearing. However, he admitted that when the deceased had left with those three boys at that time, he was wearing black pant. However, he realized that the color of the van was blue and not black. However, the absence of evidence about lodging of a missing persons report is doubtful. Despite these

discrepancies, the circumstance that the family had made a frantic search of Raman Bharti, is proved.

(F) Time of death:

Dr. N.K. Sankhyan (PW-14 in ST No. 44/96) who conducted the post mortem examination of the deceased on 23.9.1993 took out and preserved the clothes worn by the said person. The Doctor concluded that the dead body was of a young human male and the time between the death and the post mortem was about six days which leads to Sep 17, 1993. This was the time when the deceased had gone missing. At that stage the police had no information that Raman Bharti had gone missing from Sep 17, 1993. Thus the fact of death taking place on September 17, 1993, is proved.

(G) Identification of dead body:

During investigation, the police preserved the clothes of the dead body for evidence, and during the trial, Tulsi Ram (PW-1) and Babu Ram (PW-2), the witnesses who had seen the dead body initially, identified the clothes to be the same that were on the deceased. They testified that the clothes seized by the police were the same, which were on the dead body at the time when they had seen the same. Tirath Ram (PW-6 in ST No. 3/95 & PW-11 in ST No. 44/96), father of the deceased testified that the locket and clothes which were shown to him in Court during trial belonged to his deceased son. He had no reason to own some other dead body to be that of his son. Even the police of Police Station Bilaspur which had recovered the dead body had no axe to grind against any person. Sh. Tirath Ram who appeared as PW-11 (in ST No. 44/96) testified in his examination in chief that from photographs Ext. P-22 and Ext. P-23 he could not say with certainty that the dead body was of his son Raman Bharti. However, he identified the clothes and locket, which the Doctor had taken off from the dead body of his son. Therefore, even though the dead body was decomposed and it could not be identified because of its decomposition still because of the locket and the clothes worn by the person and tentative age and time of death would lead to a certainty that the dead body was that of Raman Bharti (deceased). Thus the dead body recovered on September 20, 1993, at Panjok Nala, Bilaspur is proved to be of deceased Raman Bharti.

(H) Cause of death was murder:

Dr. N.K.Sankhyan, who conducted the post mortem examination of the deceased, noticed several antemortem injuries on his body. There were incised wounds as well as a fracture on various parts of the body. He did not see any animal bite or the injuries caused by claws and teeth bites of wild animals. Therefore, the prosecution is also able to prove that the cause of death was not natural but homicidal and given the nature of the injuries, it is culpable homicide amounting to murder punishable under Section 302 of IPC. Recovery of the vial which was tested by the FSL as local anesthesia would also give corroboration to the cause of death being culpable homicide amounting to murder. This Court would draw an inference that the accused first of all made Raman Bharti (deceased) unconscious, by spraying local anesthesia and once he was not in his full state of consciousness then quickly done away with his life. Later on, the assailants threw the dead body in an isolated place with a motive to screen the evidence. ASI Ranjha Ram (PW-22 in ST No. 44/96), who conducted the initial investigation in the case, testified that from the trouser of the deceased, he also recovered a vial which mentioned: “Delay spray made in Germany – Spray Dooz.” Such recovery took place on Sep 23, 1993, that is before the family members of Raman Bharti had contacted the police. Thus there was no reason for the police to plant such a vial. Therefore this fact stands proved. The prosecution was also able to determine the link evidence from the spot

from where such bottle was taken into possession from the trouser of the deceased up to its testing in the laboratory.

(I) Evidence regarding presence of accused in the Maruti Van:

The prosecution examined one Sh. Gopi as PW-11 (in ST No. 3/95) to prove that accused Tilak Raj had confessed before him about the petrol pump from which he had filled petrol in the van. However, this is hardly any evidence to place reliance. Neither the petrol pump was named nor the date when such extra-judicial confession was made, was disclosed and why was it made and what was the relationship between this witness and Tilak Raj @ Jasbir. Even otherwise, accused Tilak Raj is dead, and this evidence is only against him, therefore, also, if it were admissible, still it would not have connected the presence of accused Sanjiv Kumar, Sanjay Kumar and Tilak Raj in the van, out of whom only accused Sanjiv Kumar is alive.

(J) Disclosure statement of accused Sanjay Kumar alias Sanjjan regarding the place from where the dead body was thrown:

The prosecution examined Constable Narpat Ram (PW-16 in ST No.3/95) to prove the disclosure statement (Ext. PM) of accused Sanjay Kumar alias Sanjjan in ST No. 3/1995. However, accused Sanjay Kumar is dead; therefore, this evidence is also not going to arrive at any conclusion. Even otherwise, his testimony is also cryptic and leads to no conclusion because it points out to the place from where the accused had thrown the dead body. Whereas, the police had already recovered the dead body from that place. Therefore, in the absence of recovery, such confession does not fall within the exception of Section 27 of the Indian Evidence Act, 1872.

(K) In Aher Raja Khima v State of Saurashtra, AIR 1956 SC 217, a three member bench of Supreme Court holds,

> 20. Then we come to the recoveries. The false beard and mask were found buried in the grounds of Dewayat's house and the appellant is said to have recovered them in the presence of panchas. But those discoveries are inadmissible in evidence because the police already knew where they were hidden...

(L) In Thimma v. State of Mysore, 1970 (2) SCC 105, a three member bench of Supreme Court holds,

> 10. Reliance on behalf of the prosecution was also placed on the information given by the appellant which led to the discovery of the dead body and other articles found at the spot. It was contended that the information received from him related distinctly to the facts discovered and, therefore, the statement conveying the information was admissible in evidence under Section 27 of the Evidence Act. This information it was argued also lends support to the appellant's guilt. It appears to us that when P. W. 4 was suspected of complicity in this offence he would in all probability have disclosed to the police the existence of the dead body and the other articles at the place where they were actually found. Once a fact is discovered from other sources there can be no fresh discovery even if relevant information is extracted from the accused and Courts have to be watchful against the ingenuity of the investigating officer in this respect so that the protection afforded by the wholesome provisions of Sections 25 and 26 of the Evidence Act is not whittled down by the mere manipulation of the record of case diary. It would, in the circumstances be somewhat

unsafe to rely on this information for proving the appellant's guilt. We are accordingly disinclined to take into consideration this statement.

(M) Evidence of stay of accused Tilak Raj at Indora and purchase of scooter:

The prosecution also tried to prove regarding the stay of accused Tilak Raj in Indora in Distt. Kangra. However, because of the death of accused Tilak Raj, all this evidence is now irrelevant as the appeal against him already stands abated. The case of the prosecution is that accused Tilak Raj @ Jasbir Singh @ Jassi @ Shiva @ Sikander had purchased a scooter from Ganesh (PW-5 in ST No. 3/95 and PW-10 in ST No. 44/96). Ganesh was dealing as a vehicles dealer, and he had a scooter owned by Ashok Kumar for sale. The Police took into possession the documents of sale of the scooter and took specimen handwriting of Tilak Raj and got it compared from the Hand Writing Expert. However, this evidence is confined to accused Tilak Raj alone and not against any other accused. But since the appeal against accused Tilak Raj @ Jasbir Singh also abated because of his death, therefore, there is no point to discuss this evidence.

(N) Identification of the Maruti van:

The most substantive evidence against the vehicle being taken from Kangra and on its way towards Shimla has come in the statement of Ramesh Kumar (PW-17 in ST No. 3/95) who was posted at the Toll Tax Barrier Nadaun Bharoli, Distt. Kangra, HP. He stated that on 17.9.1993 at about 6.40 p.m. vehicle No. HP-02-3100 had crossed the bridge, and he had made the requisite entry in the register (Ext. PN). This evidence proves that on 17.9.1993 the Maruti van of Raman Bharti had crossed this Toll Tax Barrier and nothing else. This evidence was further corroborated by Shiv Charan (PW-18 in ST No. 3/95) who was maintaining the register and receipts. Thus this circumstance is proved. However, what is important is to connect the accused with the van. The recovery of van is not proved. Kukka @ Amin Chand (when re-examined as PW-4 in ST No. 3/95) identified the van which was parked in the District Court building and was bearing registration number RJ27C 3965 to be the vehicle belonging to Raman Bharti and also testified that the color had been changed from Navy Blue to White and number plate had also been changed. The Van that the Police had seized had number plates of registration number RPZ-1234. The facts proved by the prosecution do not connect the stolen Van having registration No. HP-02-3100 or its Engine or Chasis, with either RPZ-1234 or RJ27C 3965. The evidence of Expert, the Deputy Director of Central Forensic Science Laboratory, who had examined the seized Van is meaningless because his evidence did not prove that the Vans seized by the Police was the one that was the same which was owned and driven by Raman Bharti.

(O) Recovery of Maruti van:

The disclosure statement, pursuant to which, the police claimed to have recovered Maruti Van, was recorded on June 18, 1996, more than two years and nine months of the incident. The appeal against accused Tilak Raj @ Jasbir Singh stands abated because of his death. The witnesses to the recovery of Maruti Van did not support the case of the prosecution. PW-27 did not support the case regarding tampering of the engine number of Van and stated that Engine number was similar to the one mentioned in the Registration Certificate. PW-28 stated that the police had taken his signatures on blank papers and at that time one Maruti Van was in possession of the police. Ld. Trial Court has discussed this evidence in details from Para 32 to 34 of the Judgment. The reasoning and conclusion drawn by Ld. Sessions Judge is legally correct. Thus this circumstance is not proved.

(P) Presence of accused Tilak Raj, Sanjiv Kumar and Sanjay Kumar at Udaipur, Rajasthan:

The prosecution tried to prove the presence of these persons in Udaipur to demonstrate the sale of Maruti van. To establish this fact, the prosecution examined Goverdhan Singh Chauhan (PW-20 in ST No. 3/99) who was in the business of renting rooms. He identified those persons from the photographs and stated that all these persons had stayed in his house for one month on a monthly rent of Rs. 300/-. The accused had further claimed that they had come from Dharamshala, HP. He also states that during their stay accused Sanjiv was unwell and was admitted in Government Hospital, Udaipur, and they had gone to inquire about his well being. The next fact which he tried to prove is that he had met accused Tilak Raj in Bombay and Gujarat. In cross-examination, he could not tell any date or time. Although no rent receipt was produced but generally when houses are let out on rent for short term people do not enter into a rent agreement to avoid the implications of the Rent Protection Acts. Even if the presence of these three persons is proved still it was incumbent upon the prosecution to get these three accused identified from Goverdhan Singh Chauhan during his statement on oath in Court during the trial. However, for the reasons best known to the prosecution, they were not got identified from him. When accused were available, then their identification through photographs would hardly be a convincing piece of evidence.

14. To establish the guilt of the accused and to connect with the crime, this evidence is not sufficient. It does not lead to any conclusion that it were the accused, who had committed the offence. The facts to connect any of the respondents with the commission of crime are not proved. The prosecution could not prove beyond reasonable doubts that it were the accused who had hired the taxi of Raman Bharti. The star prosecution witness, Kukka alias Amin Chand (PW-4 in ST No. 3/95), in his testimony did not identify any of the accused. He was re-examined and during his testimony on Dec 4, 1997, he could identify only accused Tilak Raj, as the person who was sitting on the front seat of the Van. There are two limbs of this evidence, firstly, during his earliest examination, he had refused to identify Tilak Raj and secondly when he was re-examined, he had already seen the accused Tilak Raj, in Court, where he had appeared to attend the trial. Therefore, if later on, he was able to identify him, it would not be credible identification. Moreover, appeal against Tilak Raj (A-1 in ST 44 of 1996) stands abated, due to his death. There is no evidence that accused Sanjiv (A-1 in ST 3 of 1995) and Sanjay (A-2 in ST 3/1995), were also sitting on the back seat of the Van. The trial qua accused Sanjay, had abated due to his death, This evidence, even if was proved, still was only against accused Tilak Raj and none else. The evidence proved by the prosecution, against the surviving respondents, is not sufficient to arrive at any conclusion about their involvement with the crime or connection with the offence.

15. **LAW RELATING TO APPEAL AGAINST ACQUITTAL**:

a) In M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200, The Constitutional Bench of Supreme Court holds,

> 16. Section 423 (1) prescribes the powers of the appellate Court in disposing of appeals preferred before it and clauses (a) and (b) deal with appeals against acquittals and appeals against convictions respectively. There is no doubt that the power conferred by clause (a) which deals with an appeal against an order of acquittal is as wide as the power conferred by clause (b) which deals with an appeal against an order of conviction, and so, it is obvious that the High Court's powers in dealing with criminal appeals are equally wide whether the appeal in question is one against acquittal or against conviction. That is one aspect of the question. The other aspect of the question centres round the approach which the High Court adopts in dealing with appeals against orders of acquittal. In dealing with such appeals, the High Court naturally bears in mind the

presumption of innocence in favour of an accused person and cannot lose sight of the fact that the said presumption is strengthened by the order of acquittal passed in his favour by the trial Court and so, the fact that the accused person is entitled to the benefit of a reasonable doubt will always be present in the mind of the High Court when it deals with the merits of the case. As an appellate Court the High Court is generally slow in disturbing the finding of fact recorded by the trial Court, particularly when the said finding is based on an appreciation of oral evidence because the trial Court has the advantage of watching the demeanour of the witnesses who have given evidence. Thus, though the powers of the High Court in dealing with an appeal against acquittal are as wide as those which it has in dealing with an appeal against conviction, in dealing with the former class of appeals, its approach is governed by the overriding consideration flowing from the presumption of innocence. Sometimes, the width of the power is emphasized, while on other occasions, the necessity to adopt a cautious approach in dealing with appeals against acquittals is emphasised, and the emphasis is expressed in different words or phrases used from time to time. But the true legal position is that however circumspect and cautious the approach of the High Court may be in dealing with appeals against acquittals, it is undoubtedly entitled to reach its own conclusions upon the evidence adduced by the prosecution in respect of the guilt or innocence of the accused.

b) In Babu v. State of Kerala, (2010) 9 SCC 189, Supreme Court holds,

12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide *Balak Ram v. State of U.P. (1975) 3 SCC 219* , *Shambhoo Missir v. State of Bihar, (1990) 4 SCC 17* , *Shailendra Pratap v. State of U.P., (2003) 1 SCC 761* , *Narendra Singh v. State of M.P., (2004) 10 SCC 699* , *Budh Singh v. State of U.P., (2006) 9 SCC 731* , *State of U.P. v. Ram Veer Singh, (2007) 13 SCC 102 AIR 2007 Supreme Court 3075*, *S. Rama Krishna v. S. Rami Reddy, (2008) 5 SCC 535* , *Arulvelu v. State (2009) 10 SCC 206* , *Perla Somasekhara Reddy v. State of A.P., (2009) 16 SCC 98* , and *Ram Singh v. State of H.P., (2010) 2 SCC 445*).

13. In *Sheo Swarup v. King Emperor, (1993-34) 61 IA 398 : AIR 1934 PC 227* the Privy Council observed as under: (IA p. 404)

'? 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.'

14. The aforesaid principle of law has consistently been followed by this Court. (See *Tulsiram Kanu v. State, IR 1954 SC 1 : 1954 Cri LJ 225*, *Balbir Singh v. State of Punjab, AIR 1957 Supreme Court 216 : 1957 Cri LJ 481*, *M.G. Agarwal v. State of Maharashtra, AIR 1963 Supreme Court 200 : (1963) 1 Cri LJ 235*, *Khedu Mohton v. State of Bihar, (1970) 2 SCC 450* , *Sambasivan v. State of Kerala, (1998) 5 SCC 412* , *Bhagwan Singh v. State of M.P., (2002) 4 SCC 85* and *State of Goa v. Sanjay Thakran, (2007) 3 SCC 755* .)

15. In *Chandrappa v. State of Karnataka, (2007) 4 SCC 415* this Court reiterated the legal position as under: (SCC p. 432, para 42)

'(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, ?substantial and compelling reasons?, ?good and sufficient grounds?, ?very strong circumstances?, ?distorted conclusions?, ?glaring mistakes?, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of ?flourishes of language? to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

16. In *Ghurey Lal v. State of U.P., (2008) 10 SCC 450* this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court?s acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In *State of Rajasthan v. Naresh, (2009) 9 SCC 368* , the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20)

'20. ? an order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.'

18. In *State of U.P. v. Banne, (2009) 4 SCC 271* this Court gave certain illustrative circumstances in which the Court would be justified in interfering

with a judgment of acquittal by the High Court. The circumstances include: (SCC p. 286, para 28)

'(i) The High Court?s decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court?s conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court?s judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in *Dhanapal v. State, (2009) 10 SCC 401* .

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court?s acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is 'against the weight of evidence', or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide *Rajinder Kumar Kindra v. Delhi Admn. (1984) 4 SCC 635* , *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312*, *Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665* , *Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501*, Aruvelu8 and *Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636*)

21. In *Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10* this Court held that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

16. **LAW RELATING TO THE CIRCUMSTANTIAL EVIDENCE**:

a) In Hanuman Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343, a three member bench of Supreme Court holds,

10. “…It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the

accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused…"

b) In Eradu and Ors. v. State of Hyderabad, AIR 1956 SC 316,

10. ..It is a fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that it was the accused and the accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused.

c) In M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200, A Constitutional Bench of Supreme Court holds,

"18. …It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused persons' conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If, the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Courts has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The Court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved; the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt…"

d) In Gambhir v. State of Maharashtra, (1982) 2 SCC 351,

"9. …The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests : (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In the light of the legal position about the circumstantial evidence, we have to examine whether the circumstantial evidence in the instant case satisfies the requirements of law."

e) In, Sharad Biridhichand Sarda v State of Maharashtra, (1984) 4 SCC 116, a three member bench of Supreme Court holds,

“151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh, (supra). This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal v State of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (supra) :

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consisent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 where the following observations were made :

"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

f) In Kishore Chand v State of Himachal Pradesh, (1991) 1 SCC 286, Supreme Court holds,

5. "In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established…"

g) In Vasa Chandrasekhar Rao v. Ponna Satyanarayana & Anr. (2000) 6 SCC 286,

"7. …Where the prosecution wants to prove the guilt of the accused by circumstantial evidence, it is necessary to establish that the circumstances from which a conclusion is drawn, should be fully proved; the circumstances should be conclusive in nature; all the facts so established, should be consistent only with the hypothesis of the guilt and inconsistent with the innocence; and the circumstances should exclude the possibility of guilt of any person other than the accused. In order to justify an inference of guilt, the circumstances from which such an inference is sought to be drawn, must be incompatible with the innocence of the accused. The cumulative effect of the circumstances must be such as to negate the innocence of the accused and to bring home the offence beyond any reasonable doubt. Where accused on being asked, offers no explanation or the explanation offered is found to be false, then that itself forms an additional link in the chain of circumstances to point out the guilt. ..."

h) In, B. Venkat Swamy v. Vijaya Nehru, (2008) 10 SCC 260, a three member bench of Supreme Court observed,

19. "…13. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

Placing reliance upon the Principles of law laid down by Supreme Court in ***Hanumant Govind Nargundkar and anr. v. State of Madhya Pradesh,AIR 1952 SC 343***, the bench holds,

14. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch- stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

SUM UP:

17. From the summary of law relating to Circumstantial Evidence, the following fundamental principles emerge:

1) **CIRCUMSTANCES SHOULD BE FULLY ESTABLISHED**:

The circumstances from which the conclusion of guilt is to be drawn should be fully established. (*Sharad, (1984) 4 SCC 116*). In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established. (*Kishore, (1991) 1 SCC 286*).

2) **CIRCUMSTANCES SHOULD BE CONSISTENT**:

The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (*Gambhir, 1982 (2) SCC 351*). It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused persons' conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If, the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. (*M.G. Agarwal, AIR 1963 SC 200*).

3) **CIRCUMSTANCES SHOULD BE CONCLUSIVE**:

The circumstances should be of a conclusive nature and tendency. (*Sharad, (1984) 4 SCC 116*). It is a fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that it was the accused and the accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused. (*Eradu, AIR 1956 SC 316*).

4) **CIRCUMSTANCES SHOULD BE OF DEFINITE TENDENCY**:

Circumstances should be of a definite tendency unerringly pointing towards guilt of the accused. (*Gambhir, (1982) 2 SCC 351*).

5) **NO OTHER HYPOTHESIS EXCEPT ONE TO BE PROVED**:

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. (*Sharad, (1984) 4 SCC 116*). The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. (*Gambhir, (1982) 2 SCC 351*). They should exclude every possible hypothesis except the one to be proved. (*Sharad, (1984) 4 SCC 116*).

6) **CUMULATIVE EFFECT OF GUILT & NOT INNOCENCE**:

In order to justify an inference of guilt, the circumstances from which such an inference is sought to be drawn, must be incompatible with the innocence of the accused. The cumulative effect of the circumstances must be such as to negate the innocence of the accused and to bring home the offence beyond any reasonable doubt. (*Vasa Chandrasekhar, (2000) 6 SCC 286*).

7) **CHAIN OF CIRCUMSTANCES MUST BE COMPLETE**:

Circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. (*Gambhir, (1982) 2 SCC 351*).

8) **FALSE DEFENCE AS AN ADDITIONAL LINK ONLY WHEN ALL CIRCUMSTANCES ARE ESTABLISHED**:

> Where accused on being asked, offers no explanation or the explanation offered is found to be false, then that itself forms an additional link in the chain of circumstances to point out the guilt. (*Vasa Chandrasekhar, (2000) 6 SCC 286*). It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court. (*Sharad, (1984) 4 SCC 116*).

CONCLUSION:

18. In view of the analysis of the evidence and application of law, the prosecution has failed to prove its case beyond reasonable doubt. The chain of circumstances is broken. There is no error in the reasoning of the Trial Court, and there is no occasion for this Court to take a view contrary to the one taken in the impugned judgment. The Trial Court, in our considered view, has correctly and accurately appreciated the evidence. It cannot be said that the judgment of trial Court is perverse, illegal, erroneous, or based on an incorrect and incomplete appreciation of material on record, resulting into miscarriage of justice.

19. Given the above discussion, both the appeals filed by the State are dismissed. The common impugned judgment dated 15.5.2002, passed in Sessions Trial No. 3 of 1995 (State vs. Sanjiv Kumar @ Sanju and another) and Sessions Trial No. 44 of 1996 (State of Himachal Pradesh vs. Tilak Raj @ Jasbir Singh & others) is affirmed. The bail bonds furnished by the respondents-accused are discharged. All pending applications (if any) are closed. Records of the Trial Court be returned.

****

BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Bhupinder Paul Mahajan …Petitioner(s)
Versus
State of Himachal Pradesh and others …Respondents

CWPs No. 1303 & 1431 of 2019
Reserved on: 22.08.2019
Decided on: 28.08.2019

Constitution of India, 1950– Article 14 & 226– Rejection of technical bid by Expert Committee- Challenge thereto– Petitioner, a Government contractor, contending that in respect of certain other works executed by him for the respondents, he was held qualified on the very same parameters and respondents cannot adopt two different standards– Held, works earlier executed by petitioner were regarding improvement and strengthening of a road under Central Road Fund Scheme– While contract in question is under Pradhan Mantri Gramin Sadak Yojna– Different schemes encompass different parameters and it is not task of courts to sit in appeal over evaluation done by committee of engineers– Court can not apply logic 'once qualified always qualified'. (Paras 34 & 35)

Constitution of India, 1950 – Articles 14 & 226– Tender– Judicial interference- Scope of - Held, power of judicial scrutiny in matter of interpretation of contracts is to be exercised very sparingly particularly in cases, where contract is yet to be borne and is at the stage of invitation to offer– The State or any other institution floating an invitation to offer is entitled to interpret its requirements in a particular manner and at that stage, courts cannot poke their nose. (Para 43)

Cases referred:

Ashok Chauhan vs. State of Himachal Pradesh, decided on 26.05.2017 in CWP No. 880 of 2017

Associated Provincial Picture Houses Ltd. vs. Wednesbury Corpn., (1948) 1 KB 223

Caretel Infotech Ltd. vs. Hindustan Petroleum Corporation Limited, 2019 SCC OnLine SC 494

Jagdish Mandal vs. State of Orissa, (2007) 14 SCC 517

The Silppi Constructions Contractors vs. Union of India, 2019 Lawsuit (SC) 1386

Union of India vs. G. Ganayutham, (1997) 7 SCC 463

For the petitioner(s): Mr. Shrawan Dogra, Senior Advocate, with Ms. Nishi Goel and Mr. Deven Khanna, Advocates.

For the respondents: Mr. Ashok Sharma, Advocate General, with M/s. J.K. Verma, Ranjan Sharma, Adarsh K. Sharma, Ritta Goswami, Ashwani K. Sharma and Nand Lal Thakur, Additional Advocates General, for respondents No. 1 to 4 in both the writ petitions.
Mr. Sanjeev Kuthiala, Senior Advocate, with Mr. Hitesh Thakur, Advocate, for respondent No. 5 in CWP No. 1303 of 2019.
Mr. Vivek Singh Attri, Advocate, for respondent No. 5 in CWP No. 1431 of 2019.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging the disqualification of the technical bids of the petitioner as non-responsive and seeking consequential directions, a person registered as a Class-A Contractor with the Himachal Pradesh Public Works Department, has come up with the above writ petitions.

2. We have heard Mr. Shrawan Dogra, learned Senior Counsel appearing for the petitioner in both the writ petitions, Mr. Ashok Sharma, learned Advocate General appearing for respondents No. 1 to 4 in both the writ petitions, Mr. Sanjeev Kuthiala, learned Senior Counsel appearing for the fifth respondent in one writ petition and Mr. Vivek Singh Attri, learned counsel appearing for the fifth respondent in another writ petition.

Facts in CWP No. 1303 of 2019

3. The fourth respondent herein invited bids online, through an Invitation dated 09.04.2019 for the execution of a work titled as "Up-gradation of T06-Ambla Galoo to Gadiatar road Km. 0/0 to 14/600 under PMGSY (World Bank RRP-II) Batch-I, 2018-19, Complete Stage, District Mandi (H.P.) (SH:-Metalling and Tarring, Missing R/walls, B/walls,

Gabion walls, Missing C.D. works, V-shape drain, Parapets, Logo Boards and five years routine maintenance) Package No. HP-08-500".

4. The work stated above, was under the Rural Road Project-II, under the Pradhan Mantri Gram Sadak Yojna Scheme. Therefore, the bid document was in a standard format, which is in use for World Bank financed contracts.

5. The time-line indicated in the bidding document was that (i) the bidding document will be available in the website from 12.04.2019 to 09.05.2019; (ii) the deadline for receiving bids online was 09.05.2019 at 1030 hours; and (iii) the time and date for opening of Part 1 of the bid (Technical Qualification) was 09.05.2019 at 1100 hours.

6. According to the petitioner, he submitted his bid in response to the aforesaid Invitation, on 09.05.2019 at 7.01 a.m. The bids were evaluated by the Evaluation Committee on 17.05.2019. The Committee concluded that the bid submitted by the petitioner was non-responsive as per Clause 4.4A(b) of the Invitation to Bid.

7. Aggrieved by the conclusion reached by the Evaluation Committee, the petitioner made a representation on 18.05.2019 to the fourth respondent. It was forwarded to the third respondent. The third respondent forwarded the same to a Committee constituted by way of Complaint Handling Mechanism. In a meeting held on 07.06.2019, the said Committee rejected the representation of the petitioner and the proceedings of the meeting of the Committee were forwarded by the Chief Engineer (R-3) to the fourth respondent by a communication dated 10.06.2019, eventually to be served upon the petitioner.

8. Therefore, challenging the Bid Evaluation Report dated 09.05.2019 and seeking a direction to the respondents to consider the works already executed by him as original works and not maintenance contracts, the petitioner has come up with the writ petition CWP No. 1303 of 2019.

<u>Facts in CWP No. 1431 of 2019:</u>

9. The fourth respondent herein invited bids online, through an Invitation dated 17.04.2019 for the execution of a work titled as "Up-gradation of L104-NH Dhanotu to Rohan Galloo road (VR0001) Km. 0/0 to 32/400 under PMGSY (World Bank RRP-II) Batch-I, 2018-19, Complete Stage, District Mandi (H.P.) (SH:-Provinding and laying M/T, R/wall, B/wall, Mising C.D. works, V-shape side drain, Essential Parapets, Crash Barrier, Logo Board and Routine Maintenance of Five year in Km. 0/0 to 32/400)) Package No. HP-08-484".

10. The work stated above, was under the Rural Road Project-II, under the Pradhan Mantri Gram Sadak Yojna Scheme. Therefore, the bid document was in a standard format, which is in use for World Bank financed contracts.

11. The time-line indicated in the bidding document was that (i) the bidding document will be available in the website from 23.04.2019 to 23.05.2019; (ii) the deadline for receiving bids online was 23.05.2019 on 1030 hours; and (iii) the time and date for opening of Part 1 of the bid (Technical Qualification) was 23.05.2019 at 1100 hours.

12. According to the petitioner, he submitted his bid in response to the aforesaid Invitation, on 29.05.2019 at 9.12 a.m. The bids were evaluated by the Evaluation Committee on 16.06.2019. The Committee concluded that the bid submitted by the petitioner was non-responsive as per Clause 4.4A(b) of the Invitation to Bid.

13. Aggrieved by the conclusion reached by the Evaluation Committee, the petitioner made a representation on 16.06.2019 to the fourth respondent, which was forwarded to the third respondent. The third respondent forwarded the same to a Committee constituted by way of a Complaint Handling Mechanism. In a meeting held on 24.06.2019, the said Committee rejected the representation of the petitioner and the proceedings of the meeting of the Committee were forwarded by the Chief Engineer (R-3) to the fourth respondent by a communication made on the same day, eventually to be served upon the petitioner.

14. Therefore, challenging the Bid Evaluation Report dated 16.06.2019 and seeking a direction to the respondents to consider the works already executed by him as original works and not maintenance contracts, the petitioner has come up with the second writ petition in CWP No. 1431 of 2019.

15. Since the parties to the dispute in both the writ petitions are one and the same and also since the subject matters of the dispute, though relating to two different contracts, have a common genesis with the same or similar grounds of challenge and reliefs sought, the writ petitions were taken up together for disposal.

Ground of rejection of the technical bids

16. The only ground on which the technical bids submitted by the petitioner in response to the two Invitations to Bid were rejected, is that he did not satisfy the requirement stipulated in Clause 4.4A(b). It reads as follows:

> *"**4.4 A.** To qualify for award of the Contract, each bidder should have in the last five years (5 years immediately preceding the year, in which the bids are invited, year means financial year);*
>
> *(a) ....*
>
> *(b) satisfactorily completed, as prime contractor or sub contractor, at least one similar work equal in value half of the estimated cost of work (excluding maintenance cost for five years) for which the bid is invited."*

17. The brief reasons for rejection stated in the Bid Evaluation Reports are as follows:

> ***In CWP No. 1303 of 2019:***
>
> *"Non-Responsive as per ITB clause 4.4A(b) which states that to qualify for award of contract, each bidder should have in the last five years (5 years immediately preceding the year, in which the bids are invited, year means financial year) satisfactorily completed, as prime contractor or sub contractor, at least one similar work equal in value half of the estimated cost of work (excluding maintenance cost for five years) for which the bid is invited.*
>
> *But the bidder has uploaded/submitted similar work which is less as per requirement as mentioned in Bid Data Sheet."*
>
> ***In CWP No. 1431 of 2019:***
>
> *"Non-Responsive as per ITB clause 4.4A(b) which states that to qualify for award of contract, each bidder should have in the last five years (5 years immediately preceding the year, in which the bids are invited, year means financial year) satisfactorily completed, as prime contractor or sub contractor, at least one similar work equal in value half of the estimated cost of work (excluding maintenance cost for five years) for which the bid is invited.*

The bidder has uploaded details of work done for the last five years i.e. from year 2013-14 to 2017-18 as required under clause 1.3.1 of section-3 in which he has enlisted 8 No. of works but he has uploaded work done certificate only for work appearing at Sr. No. 8 which is work done certificate for Output Performance Based Road Contract for Maintenance of particular road for full five years and still in progress hence doesn't qualify the criteria stipulated, being work not completed and is only maintenance work"

Stand of the petitioner

18. According to the petitioner, he satisfies Clause 4.4A(b), as he had completed at least one similar work in value, half of the estimated cost of work (excluding maintenance cost for five years) for which the bids were invited. In order to test the correctness of his claim, it is necessary to see the "Work Done Detail" submitted by the petitioner himself for the last five years, under the Heading "Experience to be considered of similar type of work". This "Work Done Detail" as given by the petitioner in a tabulation, is as follows:

Project Name	*Name of the employer*	*Contract No.*	*Schedule of Works*	*Awarded Amount (Rs. Crores)*	*Schedule of Works*	*Completed Amount (Rs. Crores)*	*Remarks & construction work completed on dated*	*Actual Date of completion with maintenance*
OPRC for the maintenance of Package 02 – Road in Mandi District of H.P. (Shimla Mandi Road Via Tattapani (From Tattapani to Dadour)	*Chief Engineer (Mandi Zone) HP PWD Mandi, Distt. Mandi (HP)*	*OPRC – 02 for 2014-15*	*IR*	*5.86 Crore*	*IR*	*6.04 Crore*	*Completed on dt. 04-09-2015*	*05-12-2019*
			MI	*3.19 Crore*	*MI*	*3.29 Crore*	*Completed on dt. 04-12-2015*	
			PM	*13.54 Crore*	*PM*	*13.85 Crore*	*Completed on dt. 04-05-2018*	
			OM	*12.35 Crore*	*OM*	*9.41 Crore*	*Work In Progress*	
			EW	*3.39 Crore*	*EW*	*3.77 Crore*	*Completed*	
	Total Awarded Amount:-			*38.33 Crore*	*Total Completed Amount:-*	*36.36 Crore*		
All component i.e. construction part is complete as per above detail except ordinary maintenance.								

19. The acronyms used in Column No. 6 of the above tabulation stand for:

IR – Initial Rectification Works

MI – Minor Improvement Works

PM – Periodic Maintenance Works

OM – Ordinary Maintenance Works

EW – Emergency Works

20. Apart from the work that the petitioner indicated in the above table, the petitioner also furnished another statement containing "Work Done Detail" in respect of another Project, but the same was not within a period of five years immediately preceding the year in which the bids are invited. Therefore, we are not concerned with the same. Even the arguments of the learned Senior Counsel for the petitioner revolved only around the work as indicated in the above table.

21. According to the petitioner, the total estimated cost of the work in respect of which CWP No. 1303 of 2019 is filed, was ₹ 750.29 Lacs for construction and ₹ 69.77 Lacs towards maintenance. Similarly, the total estimated cost of work in respect of the contract that forms the subject matter of CWP No. 1431 of 2019 was ₹ 1321.98 Lacs towards construction and ₹ 154.84 towards maintenance.

22. Therefore, for the satisfactory fulfillment of the prescription contained in Clause 4.4A(b), a bidder was required to have completed a similar work whose value was not less than around ₹ 375 Lacs, if the maintenance portion is not taken into account or around ₹ 410 Lacs, if the portion relating to maintenance is also taken into account. This is in respect of the contract relating to the first writ petition.

23. In respect of the contract which is the subject matter of the second writ petition, the petitioner should have satisfactorily completed at least one similar work whose value is around ₹ 661 Lacs, if the portion relating to maintenance is not included and around ₹ 737 Lacs, if the portion relating to maintenance is included.

24. The case of the petitioner is that the OPRC Contract for the maintenance of Package 02 Road in Mandi District, which he cited as a similar type of work satisfactorily completed, was for a total estimated cost of ₹ 38.33 Crores. Out of this, the petitioner has already completed satisfactorily, all items such as IR, MI, PM and EW and that insofar as the item relating to OM is concerned, the work is in progress, he having completed the same to the value of ₹ 9.41 Crores. It is the case of the petitioner that even if the items relating to Periodic Maintenance (PM) Work already completed on 04.05.2018 to the value of ₹ 13.85 Crores and Ordinary Maintenance (OM) Work, partly completed to the value of ₹ 9.41 Crores is excluded from the value of the work already completed, he could be seen to have completed satisfactorily a similar type of work of the value of more than ₹ 12 Crores and that therefore, by any stretch of imagination, his technical bid could not be held to be non-responsive, in relation to the contract which forms the subject matter of the first writ petition. The same is the argument in respect of the contract which forms the subject matter of the second writ petition.

25. As stated already, the reason for the rejection of the technical bid of the petitioner, as per the Bid Evaluation Report, was that he did not fulfill the stipulation contained in Clause 4.4A(b). After the petitioner gave a representation and the same was placed before the Complaint Handling Mechanism Committee, the Committee gave elaborate reasons. The relevant portion of the minutes of the meeting of the Complaint Handling Mechanism Committee dated 07.06.2019 are as follows:

> *"The committee has observed that bidder Sh. Bhupinder Paul Mahajan has uploaded details of work done for last five years i.e. from year 2013-14 to 2017-18 as required under clause 1.3.1 of section-3 in which he has enlisted 8 Nos. of works but he has uploaded work done certificates only for four Nos. of works appearing at S. No. 1, 4, 7 and 8 of this list. The committee observed that Work Done Certificate for work at Sr. No. 1 has been completed in the year 2012-13, which doesn't qualify as it has been completed prior to year*

> *2013-14 i.e. beyond the last five years period i.e. 2013-14 to 2017-18. The work at Sr. No. 4 has been completed between last five years period i.e. 2013-14 to 2017-18 but the completion cost of this work is less than the half of the estimated cost of the work put to tender i.e. Rs. 375.15 lacs (50% of total estimated cost of Rs. 750.29 lacs of the work put to tender) as per requirement under this clause which is clearly mentioned in bid data sheet of SBD against clause 4.4 A (b) at page 29. The work at Sr. No. 7 has been completed between last five years period i.e. 2013-14 to 2017-18 but the work is for stage-I construction and doesn't qualify under similar work as the present work is for stage-II construction. The work Done Certificate for the work at Sr. No. 8 is for Output Performance Based Road Contract for Maintenance of a particular road for full five years and still in progress hence doesn't qualify the criteria stipulated, being work not completed and is only maintenance work."*

26. It is seen from the reasons stated above that the Work Done Detail in relation to one particular contract OPRC (Output Performance based Road Contract) submitted by the petitioner, whose tabulation we have already extracted earlier, alone qualified for consideration. The petitioner does not question the other parts of the minutes of the meeting of the Committee.

27. In relation to Work Done Certificate at Sr. No. 8 mentioned in the minutes of the Complaint Handling Mechanism Committee, the objections of the Committee were two fold, namely: (i) that the work carried out by the petitioner was only for maintenance and not for a similar work namely original work; and (ii) that in any case, the work is not fully completed till date. Thus, there are two grounds on which the Committee had decided to reject the claim of the petitioner. The first is that the work relied upon by the petitioner was of maintenance work and not similar type of work. The second is that in any case, the work is not a satisfactorily completed work. Clause 4.4A(b) mandates two conditions to be satisfied, namely: (i) satisfactory completion, and (ii) of similar type of work.

Grounds raised in the writ petitions and the response of the respondents

28. In the above background of facts, the grounds on which the petitioner challenges the rejection of his technical bid are: (i) that in respect of another work for Mandi Division, the petitioner was held qualified on the basis of similar facts; (ii) that in respect of another item of work in Shimla also, the petitioner was held qualified; (iii) that the interpretation given by World Bank to OPRC Contracts (Output Performance based Road Contract), as per their Standard Procurement Document was that these contracts are original works and hence the Work Done Detail relied upon by the petitioner at Sr. No. 8 was actually an original contract; (iv) that in a previous round of litigation relating to another contract, the petitioner approached this Court, which eventually resulted in the Chief Engineer (Mandi Division) seeking a clarification from the Engineer-in-Chief to constitute an independent Committee to decide and give fair advice whether OPMC (Output Performance based Road Contract) is a construction contract for original work or a maintenance contract and that the Engineer-in-Chief, issued a clarification on 15.05.2019 advising the Chief Engineer to include a particular clause that would clarify the position; and (v) that the Complaints Handling Mechanism Committee which decided to reject the representation of the petitioner on 07.06.2019 comprised of the very same members as the Evaluation Committee, making it a case of an appeal from Caesar to Caesar and that therefore, the impugned rejection should be set aside.

29. In response, it is argued by the learned Advocate General: (i) that once an Expert Committee constituted for the redressal of complaints has come to the conclusion

that the nature of the work already carried out by the petitioner was not an original work but a maintenance work and also that the same was not satisfactorily completed but was in progress, the scope of judicial review gets narrowed down; (ii) that even by the petitioner's own admission, what was carried out by him earlier was only a maintenance contract for Package 02 and the same was also incomplete; and (iii) that even assuming without admitting that the petitioner was declared eligible in respect of another contract on the basis of same facts, the same cannot make the petitioner qualified, especially when a judicial review is sought. It is also contended by the learned Advocate General that the contracts floated by the respondents fall under different categories and that the contract already awarded to the petitioner was under the CRF (Central Road Fund) and that therefore, the same yardstick cannot be applied to a contract under the PMGSY (Pradhan Mantri Gram Sadak Yojna).

30. Mr. Sanjeev Kuthiala, learned Senior Counsel appearing for the fifth respondent in one case and Mr. Vivek Singh Attri, learned counsel appearing for the fifth respondent in another case, also invited our attention to the fact that the Work Done Detail given by the petitioner at Sr. No. 8 was in relation to a contract whose work was in progress and hence, the most primary condition of satisfactory completion of work was not there.

31. We have carefully considered the rival contentions.

Discussion and Analysis

32. The first two grounds on which the petitioner challenges the rejection of his technical bids are that in respect of certain works in Mandi and Shimla, he has been held qualified on the very same parameters and that therefore, the respondents cannot adopt two different standards. Reliance is placed in this regard, by Mr. Shrawan Dogra, learned Senior Counsel for the petitioner, on the proceedings of the Evaluation Committee held on 06.08.2018 in respect of the work of “Improvement and Strengthening of Pandoh-Kanda Road Km. 0/0 to 24/0 om CRF”. Column No. 17 of the Report of the Evaluation Committee dated 06.08.2018 in relation to the said work shows that what the petitioner relied upon in the said contract was OPBRC Package 02, Shimla-Mandi Via Tattapani, work in progress and the same was held by the Committee comprising of six persons including two Executive Engineers, a Deputy Controller, two Superintending Engineers and one Chief Engineer to meet the qualification criteria. Therefore, it is contended by the learned Senior Counsel for the petitioner that *what is sauce for the goose is sauce for the gander*.

33. But as rightly contended by the learned Advocate General, the said contract was for the improvement and strengthening of a road under the Central Road Fund Scheme, while the contract in question is under the Pradhan Mantri Gram Sadak Yojna. Different schemes, obviously encompass different parameters and it is not the task of the Courts to sit in appeal over the evaluation done by a Committee of Engineers.

34. Even assuming without admitting that the petitioner's technical bid was held qualified in respect of another contract, the same cannot preclude the respondents from applying the terms and conditions contained in the bid document in this case. We cannot apply the logic “*once qualified always qualified*”. Therefore, the first two grounds of attack are liable to be rejected.

35. The third ground of attack to the impugned rejection is that the interpretation given by World Bank to OPRC Contracts (Output Performance based Road Contract), as per their Standard Procurement Document was that these contracts are original works and hence the Work Done Detail relied upon by the petitioner at Sr. No. 8 was actually an original contract.

36. What is relied upon by the learned Senior Counsel for the petitioner in this regard is a "Sample Bidding Document – Request for Bids – Works – Roads (Output and Performance Based Road Contracts – OPBRC)".

37. But the above document is filed for the first time after completion of pleadings, through a Miscellaneous Petition in CMP No. 7977 of 2019 in CWP No. 1303 of 2019. In any case, this is a document which appears to have been downloaded from the website of "Public-Private-Partnership Legal Resource Center", whose authenticity is not known. Moreover, the publication is indicated to be of January, 2017. As the heading suggests, it is only a Standard Procurement Document made available, purportedly by World Bank to be used by anyone. Whatever is contained in the said document cannot be equated either to Ramanatha Aiyar's Law Lexicon or Blacks'Law Dictionary. It is also not necessary that whatever is contained in the said document was required to be adopted as such.

38. In fact, the caption given to the details furnished in the said document reads as follows:

> *"Foreword and Notes to the Users of this SPD"*

Therefore, we cannot rely upon the said document to come to the conclusion that OPBRC is a contract for original construction and not for maintenance.

39. The next ground of attack to the impugned rejection is that in a previous round of litigation relating to another contract, the petitioner approached this Court, which eventually resulted in the Chief Engineer (Mandi Division) requesting the Engineer-in-Chief to constitute an independent Committee to decide and give fair advice whether OPMC (Output Performance based Road Contract) is a construction contract for original work or a maintenance contract and that the Engineer-in-Chief, issued a clarification on 15.05.2019 advising the Chief Engineer to include a particular clause that would clarify the position.

40. It is true that when another tender was floated in January/February, 2019 under the Central Road Fund Scheme for the improvement and strengthening of Thalout – Thachi – Somgad Road, the technical bid of the very same petitioner was held disqualified, forcing him to come up with a writ petition in CWP No. 384 of 2019. When the writ petition came up for hearing, the respondents offered to recall the tender and issue a re-tender. Before the issue of the re-tender, the Chief Engineer (Mandi Zone), by his letter dated 30.04.2019, requested the Engineer-in-Chief to constitute an independent Committee to decide and give fair advice whether OPBMC is a construction contract for original work or a contract for maintenance work. The Engineer-in-Chief, through his reply dated 15.05.2019, advised the Chief Engineer that Clause 4.5.3(b) of the bid document (involved in that case) could be amended suitably to include one more line for the purpose of avoiding ambiguity. The sentence sought to be included in Clause 4.5.3(b) read as follows:

> *"However it shall not include the work contracts of maintenance of roads, OPBMC executed by the applicant/bidder and only original road construction work contracts shall include as experience."*

41. On the basis of the previous litigation and the advice sought by the Chief Engineer and the clarification issued by the Engineer-in-Chief, it is contended by Mr. Shrawan Dogra, learned Senior Counsel for the petitioner, that when admittedly there was an ambiguity, the benefit should go to the petitioner and that without the incorporation of such a clause in the present Invitation to Bid, the respondents were not entitled to disqualify the petitioner.

42. But we are unable to accept the said contention. The very fact that the Engineer-in-Chief, who is the Head of the Department had taken a stand even in respect of another contract that OPBMC cannot be considered as an original construction contract, would show that the respondents were clear in their mind, if not in their language. It is not within the domain of the Courts to interpret the terms of the contract, except in cases where disputes have arisen after the completion of the contract or at least during the course of execution of the contract. This is for the reason that when the execution of the contract is in progress or after it is completed, the disputes would lie in the realm of mutual rights and obligations and the discharge of those obligations.

43. The power of judicial scrutiny in the matter of interpretation of contracts, has to be exercised very sparingly in cases where a contract is yet to be borne and it is at the stage of Invitation to Offer. The State or any other institution floating an Invitation to Offer is entitled to interpret its requirements in a particular manner and at that stage, the Courts cannot poke their nose.

44. From the letter of clarification issued by the Chief Engineer, Mandi on 30.04.2019 and the advice given by the Engineer-in-Chief on 15.05.2019, it is clear that the official respondents never considered the OPBMC contracts to be original construction contracts. Once they have made it clear in respect of another contract which became the subject matter of litigation, the official respondents are entitled to stick on to the very same interpretation in respect of the contracts, which are the subject matters of both the present writ petitions. Therefore, more than advancing the cause of the petitioner, these documents actually advance the case of the official respondents. Hence, the fourth ground of attack is also to be rejected.

45. The fifth ground of attack to the impugned rejection is that the Complaints Handling Mechanism Committee which decided to reject the representation of the petitioner on 07.06.2019 comprised of the very same members as the Evaluation Committee, making it a case of an appeal from Caesar to Caesar and that therefore, the impugned rejection should be set aside.

46. But it is seen from the Bid Evaluation Report dated 17.05.2019, which rejected the technical bid of the petitioner that the Committee comprised of (i) Sh. Ramesh Bodh, Divisional Accounts Officer; (ii) Sh. Pradeep Singh Thakur, Executive Engineer (Mandi Division); (iii) Sh. Jagesh Vaidya, Executive Engineer (Design); and (iv) Sh. Kartar Chand, Superintending Engineer. However, the Complaints Handling Mechanism Committee comprised of (i) Sh. Ram Lal Chauhan, Superintendent Gr-I (CTR); (ii) Sh. Paras Ram Chauhan, Deputy Controller (F&A); (iii) Sh. Pradeep Singh Thakur, Executive Engineer (Mandi Division); (iv) Sh. Anil Parmar, Executive Engineer (Design), (v) Sh. Kartar Chand, Superintending Engineer; and (vi) Sh. Prakash Chand, Superintending Engineer (D&W). Therefore, it is not a case of appeal from Caesar to Caesar nor is it a case of appeal from Caesar to Brutus.

47. The alternative argument of the learned Senior Counsel for the petitioner is that in respect of the contract for Improvement and Strengthening of Pandoh Kandha Road, an Evaluation Committee comprising of (i) Sh. K.K. Kaushal, Executive Engineer; (ii) Sh. Paras Ram Chauhan, Deputy Controller (F&A); (iii) Sh. Anil Parmar, Executive Engineer (D); (iv) Sh. Kartar Chand, Superintending Engineer; (v) Sh. Lalit Bhushan, Superintending Engineer; and (vi) Sh. K.S. Thakur, Chief Engineer (MZ), submitted a report on 06.08.2018 holding in Column No. 17 thereof, the very same OPBRC to be an original work and that the Complaints Handling Mechanism Committee, which rejected the representation of the petitioner also comprised of most of the members of the very same Committee.

48. It is true that four members of the Evaluation Committee of the 2018 Contract also happened to be the members of the Complaints Handling Mechanism Committee in the case on hand. But it does not mean that what was omitted to be taken note of in the previous case should never be taken note of. Once the respondents have taken a stand that two different interpretations are possible for two different Schemes (one under CRF and another under PMGSY), it is not possible for this Court to act as Maxwell. Therefore, none of the grounds of attack to the impugned rejection merit acceptance.

49. Relying upon the decision of the Supreme Court in **Union of India vs. G. Ganayutham {(1997) 7 SCC 463},** it is contended by Mr. Shrawan Dogra, learned Senior Counsel for the petitioner, that every administrative action should pass the test of reasonableness propounded by Lord Greene in **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corpn. {(1948) 1 KB 223},** which has also been followed in India in several cases. It is the contention of the learned Senior Counsel for the petitioner that the impugned rejection, will not pass the test of Wednesbury reasonableness.

50. But our answer to the said contention would be two fold. The first is that even according to Professor Wade, "Wednesbury principle is on the terminal decline". The second is that to interfere with the decision of the administrator, the decision of the Administrative Authority should be so unreasonable and absurd that no sensible or reasonable person could have come to such a conclusion. Therefore, we do not think that the aforesaid decision is of any assistance to the petitioner.

51. The learned Senior Counsel for the petitioner also relies upon an unreported decision of this Court in **Ashok Chauhan vs. State of Himachal Pradesh,** decided on 26.05.2017 in **CWP No. 880 of 2017.** But the dispute involved in the said case was as to whether a person who had executed some works for a Public Sector Undertaking as a sub-contractor and some works for a Private Enterprise as a contractor, was qualified in terms of the clauses contained in the bidding document. The Court found that there was no specific clause in the tender document that the work experience gained under a private party should not be looked into. Therefore, it is clear that the said decision arose under completely different circumstances and it cannot be of any help to the petitioner.

52. Courts have always distinguished various types of Government contracts from each other and adopted different parameters for testing the administrative action in relation to such contracts. Courts have also applied different parameters while dealing with challenges to tender processes and challenges to the blacklisting of contractors in the course of execution of contracts or in the course of grant of State largesse. The position is summarized by the Supreme Court in para 22 of the report in **Jagdish Mandal vs. State of Orissa, {(2007) 14 SCC 517},** as follows:

> *"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide*

contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tendered/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

53. As we have pointed out earlier, the very document relied upon by the petitioner shows that the Engineer-in-Chief, the Head of the Department, understood the contents of the document in a particular manner. This understanding of the author of the document has to be respected, as held by the Supreme Court in **Caretel Infotech Ltd. vs. Hindustan Petroleum Corporation Limited, (2019 SCC OnLine SC 494),** the relevant portion of which is as follows:

"39. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited, this Court has expounded further on this aspect, while observing that the decision making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision making process would not suffice.

40. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements......."

54. The role of the Court in such cases was aptly summed up by the Supreme Court in **The Silppi Constructions Contractors vs. Union of India, (2019 Lawsuit (SC) 1386)** as follows:

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in

contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

55. In view of the above, we find that the rejection of the technical bids of the petitioner was neither arbitrary nor unreasonable nor mala fide and that therefore, the writ petitions deserve to be dismissed. Accordingly, they are dismissed, so also the pending miscellaneous applications, if any.

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

Sh. Chhotu Ram alias Chhotu Khan (since deceased) through his legal representatives Sittar Mohammad and others ….Petitioners.

Vs.

Sh. Raunki Ram (since deceased) through his legal representatives Imtiaz Mohammad and others …..Respondents.

CMPMO No.: 78 of 2019
Date of Decision: 20.08.2019

Code of Civil Procedure, 1908– Order VI Rule 17– Amendment of pleadings– Essential conditions– Held, first and foremost party seeking amendment in pleadings has to cross hurdle of due diligence– It has to satisfy that proposed amendment could not be incorporated in pleadings earlier despite due diligence– It is only after this hurdle is crossed by party, the court enters into issue whether proposed amendment is necessary for purpose of adjudication of lis or not. (Para 13)

For the petitioners: Mr. Sanjeev Kuthiala, Senior Advocate, with Ms. Anainda Kuthiala, Advocate.

For the respondents: Mr. Ramakant Sharma, Senior Advocate, with M/s Devyani Sharma and Soma Thakur, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioners have prayed for setting aside order, dated 11.12.2018 (Annexure P-6), passed by the Court of learned Senior Civil Judge, Nalagarh, District Solan, H.P., vide which an application filed by the petitioners-plaintiffs under Order VI, Rule 17 of the Code of Civil Procedure for amendment of the plaint, has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are as under:

Predecessor-in-interest of the petitioners, namely, Sh. Chhotu Khan filed a suit for permanent prohibitory injunction against the respondents herein in the Court of learned Civil Judge (Senior Division), Nalagarh in July, 2013. His case was that he was owner in possession of suit property comprised in Khata Khatauni No. 622 min/783, measuring 18.60 sq. metres in Khasra No. 689, situated in Up-Mohal Purana Nalagarh, HB No. 139/1, Pargana & Tehsil Nalagarh, District Solan, H.P. Defendants were absolute strangers qua the suit property and were having no right, title or interest over the same, yet they started demolishing old construction as also started digging foundation in the suit property with intent to grab the property, as the suit land was adjoining the property of defendants. In these circumstances, suit was filed by Shri Chhotu Khan for a decree of permanent prohibitory injunction for restraining the defendants from changing the nature of the suit land or dispossessing the plaintiffs from the suit property by demolishing old construction raised over the suit land by the plaintiff.

3. Written statement to the plaint was filed by the defendants in August, 2013 alongwith a counter claim. In the meanwhile, Shri Chhotu Khan died and his legal representatives, i.e., the present petitioners were brought on record as plaintiffs in place of deceased Shri Chhotu Khan.

4. In the month of November, 2018, an application was filed by the petitioners for amendment of the plaint under Order VI, Rule 17 of the Code of Civil Procedure, on the ground that during the pendency of the suit, the defendants had encroached upon some portion of the suit land in spite of an injunction order somewhere in the month of December, 2013, which had necessitated the amendment of the suit. The application was resisted by the non-applicants-defendants.

5. Vide impugned order, said application has been rejected by the learned Court below by holding that the application was filed after a lapse of about five years from the date when spot was inspected by the Local Commissioner and further that the nature of the amendment sought in the plaint also did not relate with the controversy in hand, especially in

view of the counter claim preferred by the defendants. Learned Court also held that plaintiffs could not explain the delay and why the same was not filed earlier. It thus held that the plaintiffs had failed to show sufficient ground for allowing the application. On these basis, learned Court dismissed the application.

6. Feeling aggrieved, the petitioners have filed the present petition.

7. Learned Senior Counsel for the petitioners has argued that the impugned order is not sustainable in the eyes of law, because it could not be said that the application for amendment of the plaint was filed at a belated stage or that the petitioners had not exercised due diligence. He further argued that because the petitioners were subsequently impleaded as plaintiffs, on account of them being the legal representatives of deceased Chhotu Khan, they had a right to seek amendment in the plaint, as in their individual capacity as plaintiffs, they could rake up the issue subsequently. Learned Senior Counsel has also argued that even otherwise, it was settled law that amendment of plaint was to be liberally allowed by the Courts, as compared to written statement.

8. On the other hand, learned Senior Counsel for the respondents has submitted that there was no infirmity in the impugned order and the findings returned by the learned Court below called for no interference, as no case was made out by the petitioners for amendment of the plaint.

9. I have heard learned counsel for the parties and have also gone through the impugned order as well as the record appended with the petition.

10. It is also a matter of record that the suit praying for a decree of permanent prohibitory injunction was filed by the predecessor-in-interest of the petitioners in the year, 2013. Though nothing has been mentioned in the present petition as to when did Shri Chhotu Khan die and when the present petitioners were impleaded as plaintiffs in their capacity of being legal representatives of Shri Chhotu Khan, however, this Court has been informed that Shri Chhotu Khan died somewhere in the year 2014-2015 and the present petitioners were impleaded as plaintiffs somewhere in the year 2014-2015.

11. It is a matter of record that the application for amendment of the plaint was filed by the petitioners in the month of November, 2018. The reasons mentioned in the application as to why amendment in the plaint was necessitated, were that during the pendency of the suit, defendants had encroached upon the suit land after demolishing the old structure somewhere in the month of December, 2013 and had also taken away the steel guarders and wooden planks worth Rs.15,000/-, which was a fresh cause necessitating amendment in the plaint, as the plaintiffs were entitled for grant of a decree of mandatory injunction directing the defendants to hand over the possession of suit property to the plaintiffs.

12. Order VI, Rule 17 of the Code of Civil Procedure provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties, but provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

13. Thus, it is apparent from the perusal of statutory provisions that first and foremost the party seeking amendment in the pleadings, has to cross the hurdle of due diligence, meaning thereby that it has to satisfy the Court that the proposed amendment could

not be incorporated in the pleadings earlier despite due diligence. It is only after this hurdle is crossed by a party that the Court enters into the issue as to whether the proposed amendment is necessary for the purpose of adjudication of the *lis* or not.

14. In the present case, events which according to the petitioner have necessitated amendment of the plaint even as per the petitioners took place in December, 2013. There is no cogent explanation given in the application as to why the plaint was not immediately amended after December, 2013 by filing an appropriate application in this regard. The contention of learned Senior Counsel for the petitioner that the reason for this was that petitioners were subsequently impleaded as party in the suit, in my considered view, has no legal force. The petitioners were not impleaded as parties to the suit under the provisions of Order I, Rule 10 of the Code of Civil Procedure. In other words, it is not as if the petitioners were subsequently added as party to the lis on the ground that they were necessary parties. They came to be impleaded as plaintiffs in their capacity of being the legal representatives of Shri Chhotu Khan, who died during the pendency of the petition. As earlier discussed, incidentally there is not even a whisper in the pleadings as to when Shri Chhotu Khan died and when were the petitioners impleaded as plaintiffs in their capacity of being legal representatives of Shri Chhotu Khan in the suit. Petitioners are stated to be impleaded as plaintiffs being legal representatives of deceased Shri Chhotu Ram somewhere in the year 2014-2015. Even from the year 2015, there is no cogent explanation in the application filed under Order VI, Rule 17 of the Code of Civil Procedure as to what took the petitioners around three years in filing the application. This demonstrates that the petitioners have not been able to make out a case that despite due diligence, the proposed amendment could not be incorporated by the petitioners in the pleadings earlier.

15. The second contention of learned counsel for the petitioners that as the petitioners stood impleaded as plaintiffs later on, they had an independent right to raise the plea of having the plaint amended, is also in my considered view without any legal basis. As the petitioners entered into the footsteps of their predecessor-in-interest, they did not acquire any status in the lis better than their predecessor in interest. As the purported act of defendants of dispossessing the plaintiffs from the suit land, even as per the petitioners took place when their predecessor-in-interest was alive, it was for him to have had taken appropriate steps in this regard, which admittedly, he did not do during his life time. After his death, the petitioners entered into his footsteps. Then also, they could have had filed an application praying for amendment in the plaint within some reasonable time after being impleaded as plaintiffs, which also was not done by them. There is undue long delay on the part of petitioners in moving the Court for amendment of the plaint, which has not been satisfactorily explained by them.

16. The third contention of learned Senior Counsel for the petitioners that the impugned order is not sustainable in the eyes of law, as learned Court below has erred in not appreciating that the prayer for amendment in the plaint has to be liberally construed, in my considered view, is completely mis-placed. The law is to the contrary. Settled law is that in the matter of a prayer being made for amendment in the written statement, then such a prayer has to be liberally construed by the Court of law. However, the fact of the matter still remains that be it the amendment of the plaint or the written statement, the spirit of Order VI, Rule 17 of the Code of Civil Procedure cannot be given a go bye by the Court concerned.

17. In these circumstances, it cannot be said that learned Trial Court erred in dismissing the application filed by the petitioners praying for amendment of the plaint, because in my considered view, learned Trial Court has rightly dismissed the said application by holding that the petitioners were not able to explain due diligence and as the application was filed at a belated stage, the same could not have been allowed.

18. In view of the findings returned hereinabove, as this Court finds no merit in the present petition, the same is dismissed, so also pending miscellaneous applications, if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J AND HON'BLE MRS. JUSTICE JYOTSNA REWAL DUA, J.

Neelam ……Petitioner.
Versus
State of H.P. & Others …..Respondents.

Civil Writ Petition No.156 of 2019.
Decided on: 22nd August, 2019

Constitution of India, 1950- Articles 14 & 226– Equality before law– Petitioner engaged as a PTA teacher pursuant to resolution of Parents Teachers Association, seeking release of Grant-in-Aid qua her– State contending that government having stopped engagement of teachers on PTA basis therefore, grant-in-aid cannot be released– Held, petitioner was eligible for being posted as a teacher– She is continuously working as such in school since 2009– State found to have released Gant-in-Aid in favour of similarly placed other teachers– Petition allowed – State directed to release Grant-in-Aid in favour of petitioner also and continue to do so till she works as a teacher on PTA basis. (Paras 7 to 10)

For the petitioner: Mr. Rajesh Verma, Advocate.
For the respondents : Mr. Vikas Rathore &Mr. Narinder Guleria, Addl. A.Gs. with Mr. J.S. Guleria, Dy. A.G. &Mr. Manoj Bagga, Asstt. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Supplementary affidavit has not been filed despite opportunity granted nor any such affidavit is required to decide the points in issue in this writ petition as the same can otherwise be decided effectively and judiciously in view of the material already available on record.

2. Heard.

3. In this writ petition, a direction has been sought to be passed to the respondents to extend the benefit of Grant-in-Aid to PTA Rules, 2006 in favour of the petitioner at par the similarly situated person with all consequential benefits. Order under challenge Annexure P-6, whereby the representation made by her consequent upon the directions of this Court in CWP No. 1555 of 2018 (Annexure P-4) she previously filed, has been sought to be quashed and set aside.

4. The qualification of the petitioner is M.A. (Sociology), B.Ed., M.Ed., LT & TGT (Arts). She has also qualified the Teacher's Eligibility Test. Her testimonials are Annexure P-2 (Colly.). According to her, a post of Post Graduate Teacher (Sociology) was lying vacant in Government Senior Secondary School, Sangrah, District Sirmaur, H.P. The Parents Teachers Association authorized by the respondent-State to provide teachers in the Schools

against the post lying vacant, has passed a resolution appointing thereby the petitioner as PGT (Sociology) being eligible, in all respect, for this post. Copy of the resolution dated 15.7.2009 is Annexure P-1. Consequently, she reported for duty and is continuing as PGT in the School till date. The respondent-State, when not released the grant-in-aid in her favour, she filed CWP No. 277 of 2017 in this Court. The said writ petition was subsequently withdrawn by her vide order dated 26.6.2018, Annexure P-3. The complaint is that the respondent-State released the grant in-aid in favour of other similarly situated appointed/situated teachers. When such benefit was withheld from her, she preferred CWP No.1555 of 2018, which was disposed of vide order dated 23.10.2018 Annexure P-4 with a direction to the petitioner to file representation and the same was directed to be considered and decided by the competent authority by affording opportunity of being heard to all concerned.

5. The petitioner has made the representation Annexure P-5. The same has, however, been rejected vide impugned order dated 3.1.2019, Annexure P-6. In this way, it is third round of litigation between the parties on the subject matter of dispute i.e. the entitlement of the petitioner to receive the Grant-in-Aid.

6. According to the petitioner, she has been discriminated against the similarly situated person. She has cited the instances such as the case of Hem Raj decided by a Division Bench of this Court vide judgment Annexure P-8, Devi Saran decided vide judgment Annexure P-9 and Kapil Chauhan, decided vide judgment Annexure P-10. In the rejoinder also, she quoted the instance of Deepak Chauhan, whose matter was also decided by this Court vide judgment Annexure P-11.

7. The response of the respondent-State in a nut-shell is, however, that the Government stopped the engagement of the teachers on PTA basis vide instructions dated 3.1.2008. The engagement of the petitioner vide resolution dated 15.7.2009 is therefore, stated to be contrary to the decision so taken by the respondent-State. The judgment of this Court in Hem Raj's case has, however, not been disputed. It has rather come on record that the judgment passed in Hem Raj's case has now been implemented, of course subject to the out come of the SLP preferred by respondent State against the same. It has also come in the rejoinder that the judgment Annexure P-11 passed by this Court in Deepak Chauhan's case has attained finality and implemented also.

8. If it is so, we fail to understand as to why the petitioner is not entitled to the same relief as has been extended to Deepak Chauhan, aforesaid consequent upon the judgment Annexure P-11. Said Mr. Chauhan, was also engaged as Art and Craft Teacher in Government Senior Secondary School, Tulah, District Mandi on 25.09.2008 i.e. after 3.1.2008, the date of so called decision not to engage the teachers on PTA basis taken by the respondent-State. The judgment passed in Hem Raj's case has also been implemented, of course subject to final outcome of the pending SLP in the Hon'ble Supreme Court. The judgment Annexure P-10 in Kapil Chauhan's case also stands implemented and has attained finality. We are, therefore, satisfied that the petitioner is similarly situated person and has been discriminated in the matter of release of Grant-in-Aid against Hem Raj, Kapil Chauhan and Deepak Chauhan, etc.

9. The points in issue in this writ petition as such are squarely covered by the judgments passed in Hem Raj's case Annexure P-8, Kapil Chauhan's case, Annexure P-10, and Deepak Chauhan's case Annexure P-11. The petitioner being M.A. (Sociology), B.Ed., M.Ed., LT & TGT (Arts) and also qualified the Teacher's Eligibility Test (TET), was eligible for appointment as PGT at the relevant time. It is not even the case of the respondent also that

she is not qualified for the post in question. It is worth mentioning that she is working continuously in the School right from her initial appointment vide resolution dated 15.7.2009 Annexure P-1. She has rendered more than ten years of service by now. She, therefore, is entitled to the release of Grant-in-Aid.

10. In view of the above, we allow the writ petition and direct the respondents to work out the Grant-in-Aid payable to the petitioner, in terms of the Grant-in-Aid Rules 2006 and release the arrears upto date within two months from today. The respondents are also directed to continue to release the Grant-in-Aid in favour of the petitioner in future also till she continue to work as PTA provided teacher in the School. The writ petition is accordingly disposed of, so also the pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Bhupender Sharma …..Petitioner.
Versus
State of HP and others ……Respondents.

CWP No. 161 of 2019 a/w
CWP No. 629/2019.
Judgment reserved on 20.08.2019
Decided on: 29.08.2019

Constitution of India, 1950– Article 14 – Equality before Law – Eligibility/ qualification for a post – Post of Junior Office Assistant– R & P rules amongst other things requiring Diploma in computer science/computer application/ information technology from recognized university/ institution or 'O' or 'A' level diploma from National Institute of Electronics and Information Technology etc – Whether a person holding graduation or post graduation degree in computer application/ computer science/ information technology is ineligible?– Held, assessment of merit should be confined only to those who satisfy the eligibility criteria prescribed by R & P Rules– Persons who fall out side the purview of R & P Rules can not take advantage of higher qualification/ result of written examination– Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad, (2019) 2 SCC 404, relied upon. (Para 37)

Cases referred:

Jyoti K.K. vs. Kerala Public Service Commission, (2010) 15 SCC 596
Mohd. Riazul Usman Gani vs. District & Sessions Judge, (2000) 2 SCC 606
Parvaiz Ahmad Parry vs. State of Jammu and Kashmir, (2015) 17 SCC 709
State of Punjab vs. Anita, (2015) 2 SCC 170
Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad, (2019) 2 SCC 404

For the petitioner(s): Mr. K. D. Shreedhar, Sr. Advocate with Ms. Shreya Chauhan, Advocate for the petitioner in CWP No. 161/2019.
Mr. Rajnish Maniktala, Sr. Advocate with Mr. Naresh Verma, Advocate, for the petitioners in CWP No. 629/2019.

For the respondents: Mr. Ashok Sharma, Advocate General with M/s. J.K. Verma, Ranjan Sharma, Ritta Goswami and Nand Lal Thakur, Additional Advocates General, for respondents No. 1 to 3 in

CWP No. 161/2019 and for respondents No. 1 and 2 in CWP No. 629/2019.
Mr. Angrez Kapoor, Advocate, for respondent No.4 in CWP No. 161/2019.
Mr. Bhuvnesh Sharma, Advocate, for respondent No. 5 in CWP No. 161/2019.
Mr. Ankush Dass Sood, Sr. Advocate with Mr. Rakesh Kumar Sharma, Advocate, for the interveners (CMP No. 2427/2019)
Mr. Rajnish Maniktala, Sr. Advocate, with Mr. Naresh Verma, Advocate, for the interveners (CMP No. 2594/2019)
Ms. Ranjana Parmar, Sr. Advocate with Mr. Karan Parmar, Advocate, for the interveners (CMP No. 2595/2019.
Mr. Sanjeev Kumar, Advocate, for respondent No. 3 in CWP No. 629/2019.
Mr. K.D. Shreedhar, Sr. Advocate with Mr. Kush Sharma, Advocate, for respondents No. 5 to 53 in CWP No. 629/2019.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging a common order passed by the Himachal Pradesh State Administrative Tribunal (hereinafter referred to as 'the Tribunal') directing the competent Authority, namely the Himachal Pradesh Staff Selection Commission to make selections to the post of Junior Office Assistants (Post Code No. 556) strictly (i) in accordance with the Common Recruitment and Promotion Rules for the post of Junior Office Assistants (Information Technology), Class -III (Non-Gazetted) in various departments of the Government, and (ii) in consonance with the decision of the Supreme Court in ***Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad [(2019) 2 SCC 404]***, one candidate who claims to possess higher qualifications than those prescribed in the Recruitment Rules, purportedly in the same field/discipline has come up with the first writ petition CWP No. 161/2019.

2. Challenging an interim order of *status-quo* passed on 26.2.2019 with regard to the issuance of appointment orders pursuant to the recommendations made by the Himachal Pradesh Staff Selection Commission in respect of the very same recruitment, a group of selected candidates have come up with the second writ petition CWP No. 629/2019.

3. In CWP No. 161/2019, a few individuals whose applications have been rejected on the ground that they had not acquired the technical qualifications from a recognized institute, have come up with an application for intervention.

4. Another set of candidates who claim to possess the qualifications exactly as prescribed by the Rules have also come up with an application for intervention in CWP No. 161/2019. A third group of candidates who do not want persons who have acquired the qualifications from un-recognized institutions to be considered for appointment have come up with the third intervention application in CWP No. 161/2019.

5. We have heard Mr. K. D. Shreedhar, learned Senior Counsel appearing for the petitioner in CWP No. 161/2019, Mr. Rajnish Maniktala, learned Senior Counsel appearing for the petitioners in CWP No. 629/2019, Mr. Angrej Kapoor and Mr. Sanjeev Kumar, Advocates, appearing for the Himachal Pradesh Staff Selection Commission, Mr. Bhuvnesh Sharma, learned counsel appearing for the fifth respondent in CWP No.

161/2019 (who was the applicant before the Tribunal), Mr. Ashok Sharma, learned Advocate General for the State, and Mr. Ankush Dass Sood, learned Senior Counsel, Mr. Ranjana Parmar, learned Senior Counsel, and Mr. Rajnish Maniktala, learned Senior Counsel for the interveners in the Applications filed in CWP No. 161/2019.

6. The brief facts, out of which CWP No. 161/2019 arises, are as follows:

(i) By an advertisement bearing No. 32-3/2016 issued sometime in October, 2016, the Himachal Pradesh Staff Selection Commission (hereinafter referred to as 'the Commission') invited applications on-line for recruitment to various categories of posts in several departments of the Government of Himachal Pradesh. One of the posts for which the applications were invited was that of Junior Office Assistants on contract basis. The Post Code number allotted to the said post was 556. The number of posts of Junior Office Assistants advertised under the said Notification were 704. Subsequently, 302 posts were also included for recruitment.

(ii) The essential qualifications prescribed in the Notification for recruitment, for the post of Junior Office Assistant were as follows:

> *"(i).10+2 from a recognized Board of School Education/University.*
>
> *(ii) One year diploma in Computer Science/Computer Application/Information Technology from a recognized University/Institution.*
>
> *(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi*
>
> *OR*
>
> *(i) 10+2 from a recognized Board of School Education/University.*
>
> *(ii) 'O' or 'A' level Diploma from National Institute of Electronics &Information Technology (NIELIT)*
>
> *(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi*
>
> *OR*
>
> *(i) 10+2 from a recognized Board of School Education/University.*
>
> *(ii) Diploma in Information Technology (IT) from a recognized ITI/Institution.*
>
> *(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi"*

(iii) The mode of selection for the post of Junior Office Assistant, as prescribed in the Notification was as follows:

> *"1.Objective type screening test (MCQ) consisting of General English of 10+2 standard, General Hindi of Matric standard, Everyday Science, General Knowledge including General Knowledge of Himachal Pradesh, Social Science, Current affairs & logic. =200 Marks*
>
> *2. Type skill test on computer of qualifying nature in prescribed speed 30 WPM in English or 25 WPM in Hindi for those who qualify objective type screening test.*
>
> *3. Interview of those who qualify in typing skill tests. = 30 Marks."*

(iv) It appears that about 38,932 applications were received in all, out of which 34,154 candidates were provisionally admitted for the screening test.

(v) A written objective type screening test was held on 28.4.2017, in which 20,009 candidates alone appeared, with the others provisionally admitted remaining absent.

(vi) Out of these 20,009 candidates who appeared for the screening test, 10,030 candidates were declared qualified in the screening test.

(vii) These candidates were called in the ratio 1:10 for undergoing a skill test in typing.

(viii) The skill test in typing was conducted during the period from 14.9.2017 to 8.11.2017. In the skill test, 7,208 candidates appeared and out of them 4,038 candidates qualified.

(ix) Out of the 4,038 candidates who qualified in the skill test in typing, 3,452 candidates (in the ratio of 1:3) were declared by a Notification dated 16.2.2018 as short-listed for further process of selection.

(x) Finding that the list of short-listed candidates contained the roll numbers of candidates who possessed a Degree in Computer Sciences, but not a Diploma in Computer Sciences, one Mr. Naresh Kumar, who is the fifth respondent in CWP No. 161/2019, filed Original Application OA No. 7397/2018 on the file of the Tribunal. The main ground on which the said Naresh Kumar made a claim for disqualifying the Degree Holders who did not possess a diploma as prescribed in the Statutory Rules, was that in ***Zahoor Ahmad Rather*** theSupreme Court has already clinched the issue with regard to higher qualifications vis-a-vis lower qualifications prescribed by the Rules.

(xi) By a judgment dated 21.12.2018 the Tribunal disposed of the said Original Application No. 7397/2018 directing the competent Authority to make selections in accordance with the ratio laid down by the Supreme Court in ***Zahoor Ahmad Rather.*** It is against the said judgment that a person who holds a BA Degree in Mathematics and a post Graduate Degree in Master of Computer Applications has come up with the above CWP No. 161/2019.

7. On 11.1.2019, notice of motion was ordered in CWP No. 161/2019. While doing so, this Court also granted stay of operation of the order of the Tribunal dated 21.12.2018 in OA No. 7397/2018. However, the Commission was directed to allow the eligible candidates to participate in the process of Selection.

8. Pursuant to the interim order passed by this Court on 11.1.2019 in CWP No. 161/2019, the Commission issued a Notification dated 23.2.2019 containing a select list of candidates.

9. Immediately one group of candidates approached the Tribunal and filed O.A No. 677/2019. In the said Application, the Tribunal passed an interim order on 26.2.2019 directing *status quo* as on 26.2.2019, at 10 a.m. to be maintained with regard to the issue of appointment letters pursuant to the recommendations made by the Commission vide their Notification dated 23.2.2019.

10. Emboldened by the said interim order, groups and groups of persons filed a batch of Applications in OA No. 677,678,680, 681, 682, 691, 693, 695, 701, 703, 705, 712, 713, 733, 738, 754, 765, 775, 778, 783, 797, 809, 813 of 2019. In all these Applications, the Tribunal passed an interim order on 7.3.2019, to the same effect as was passed on 26.2.2019 in O.A No. 667 of 2019. It is against the said interim orders passed on 26.2.2019, and 7.3.2019 that a group of candidates who claim to possess exactly the same qualifications as prescribed by the Recruitment Rules have come up with the second writ petition CWP No. 629/2019.

11. Thus, we have on hand, one writ petition challenging a final order passed by the Tribunal in a Single Original Application and another writ petition challenging an interim order passed by the Tribunal in a batch of Original Applications. We shall first take up CWP No. 161/2019, in which the final order of the Tribunal is under challenge.

CWP No. 161/2019.

12. As stated at the beginning, this writ petition arises out of a final order passed by the Tribunal in OA No. 7397/2018. The said Application OA No. 7397/2018 was filed by one Naresh Kumar who is the fifth respondent in this writ petition contending that the persons who do not hold a Diploma in Computer Sciences, but holding a Degree or Post Graduate Degree in Computer Sciences cannot be selected for appointment in view of the law laid down by the Supreme Court in ***Zahoor Ahmad Rather.*** The Tribunal actually did not go into the nitty-gritties of the issues. On the contrary, the Tribunal disposed of the Original Application with a very innocuous direction. To understand the same better, it may be useful to extract the operative portion of the impugned order of the Tribunal. It reads as follows:

> *"5.Consequently, the original application is disposed of with a direction to the respondents/competent authority to make selections to the post of Junior office Assistant (Code 556) strictly in accordance with Common Recruitment and Promotion Rules for the posts of Junior office Assistant (Information Technology), Class-III (Non-Gazetted) in various Departments of Himachal Pradesh Government and in consonance with the decision of the Hon'ble supreme Court in Civil Appeal Nos. 11853-11854 of 2018,* ***Zahoor Ahmad Rather and Ors. etc. versus Sheikh Intiyaz Ahmad and Ors****. etc., decided on December 05,2018, Annexure A-6"*

13. As could be seen from the operative portion of the order of the Tribunal, the Tribunal did not actually decide the *lis* raised before it. The Tribunal merely directed the Commission to apply the Rules and take a decision in accordance with the law laid down by the Supreme Court.

14. By the very nature of the order passed by the Tribunal, it is doubtful as to whether the same can be challenged at all. Technically if this Court has to set aside the order of the Tribunal, it would virtually tantamount to directing the Commission not to follow the Recruitment Rules and not to abide by the law declared by the Supreme Court. Therefore, the very maintainability of the writ petition is in doubt especially when the impugned order merely directs the Commission to follow the Rules and the law laid down by the Supreme Court.

15. But at the same time, we cannot lose sight of the fact that the *lis* raised by the fifth respondent in this writ petition as to whether the Degree Holders can be allowed to compete for selection or not, was left undecided by the Tribunal. If the issue is left undecided, it would be appropriate for this Court to remand the matter back to the Tribunal. But the Tribunal has now been abolished making it impossible for us to send the matter back to the Tribunal for a decision on the *lis,* with which the fifth respondent herein went before the Tribunal.

16. Hence, it is imperative for us to decide whether the persons who possess Under-Graduate and the Post Graduate Degrees in Computer Sciences can be treated as qualified according to the Recruitment and Promotion Rules, especially in the light of the law laid down by the Supreme Court.

17. We have already extracted the qualifications prescribed for the post, in one of the previous paragraphs. The Notification for recruitment prescribe the essential qualifications, as prescribed by the Recruitment and Promotion Rules and there is no dispute about the same. At the cost of repetition, the essential qualifications as prescribed are reproduced once again for easy appreciation as follows:

"(i).10+2 from a recognized Board of School Education/University.

(ii) One year diploma in Computer Science/Computer Application/Information Technology from a recognized University/Institution.

(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi

OR

(i) 10+2 from a recognized Board of School Education/University.

(ii) 'O' or 'A' level Diploma from National Institute of Electronics & Information Technology (NIELIT)

(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi

OR

(i) 10+2 from a recognized Board of School Education/University.

(ii) Diploma in Information Technology (IT) from a recognized ITI/Institution.

(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi"

18. Though three different sets of qualifications are prescribed in the alternative, a careful scrutiny would show that a pass in 10+2 from a recognized Board of School Education/University and computer typing speed of 30 words per minute in English or 25 words per minute in Hindi are prescribed uniformly in all the three alternatives. It is only in respect of the Diploma in Computer Sciences that there is a slight variation among all the three alternatives.

19. In other words, insofar as a Diploma is concerned, the aspirants for the post should either have a one year Diploma in Computer Sciences/Computer Applications/ Information Technology from a recognized University/ Institution or have 'O' or 'A' level Diploma from the National Institute of Electronics and Information Technology or have a Diploma in Information Technology from a recognized ITI/Institution.

20. Two groups of candidates appear to be aggrieved by the strict adherence to the Recruitment and Promotion Rules. One set of candidates are those who hold an Under Graduate or Post Graduate Degree in Computer Applications or Information Technology. According to them, they possess a higher qualification in the same field, which cannot be considered as a disqualification.

21. Another set of candidates who are aggrieved by the strict adherence to the Recruitment and Promotion Rules are those who have undergone Diploma Courses in the Institutions which are not considered by the State/ Commission to be recognized institutions.

22. Interestingly, it is only a candidate with an Under-Graduate Degree in Mathematics and a Post Graduate Degree in Computer Applications who has chosen to challenge the judgment of the Tribunal. The other group of candidates who have acquired Diplomas from the Institutions which are not accepted to be recognized institutions, have not come up with an independent challenge to the order of the Tribunal, but have chosen to come up as interveners.

23. In fact, the interveners in CWP No. 161/2019 do not even know where they stand insofar as the relief sought in CWP No. 161/2019 is concerned. We made a pointed query to the learned Senior Counsel appearing for the interveners as to whether they want

the Writ petition to be allowed or dismissed. He had no answer, since the allowing of the writ petition would only benefit Degree Holders and Post Graduate Degree Holders and not those who secured Diplomas from un-recognized Institutions. The dismissal of the writ petition would have the effect of keeping away those who have secured an undergraduate/post graduate degree. In either case, persons who have secured a diploma from unrecognized institutions will not derive any benefit. Therefore, in the absence of an independent challenge to the order of the Tribunal by persons holding Diplomas from the Institutions which are treated by the State and the Commission to be un-recognized, the interveners cannot get anything in these matters.

24. Now let us come to the case of the petitioner in CWP No. 161/2019. His case is that he holds a Degree in Mathematics and a Post Graduate Degree in Computer Applications and that therefore, he should be deemed to have fulfilled the essential educational qualifications.

25. But unfortunately for the petitioner in CWP No. 161/2019, he has become a *fait accompli* to a development that has taken place after the institution of the writ petition. This Court passed an interim order on 21.5.2019 in the above writ petition. The same reads as follows:

> *" In some of the matters, which have been adjourned for 17.6.2019, learned Advocate General has sought time for constitution of a Committee to examine equivalence of academic/technical qualification. Let the said Committee comprising of at least 3 to 5 experts be constituted within two weeks, which will examine all the issues regarding recognition or genuineness of the qualifications, which are claimed to be equivalent or higher than those prescribed under the Recruitment and Promotion Rules. The question whether person possessing equivalent qualification will be eligible for the advertised post is kept open to be decided at the appropriate stage. Meanwhile, it shall be the discretion of the State Government to offer appointment to the selected candidates strictly in order of merit on contract basis (and not against regular posts)provided that such candidates are possessing qualification strictly as per R&P Rules. These appointments will be a stop-gap arrangement and subject to outcome of these writ petitions."*

26. Pursuant to the said order, the Government constituted a Committee of six Members. By the proceedings dated 15.6.2019, the Committee unanimously decided that the candidates with higher qualifications cannot be considered for appointment under the existing R & P Rules.

27. After having accepted the constitution of an Expert Committee, we do not know how far the petitioner can now canvass that a person with higher qualification is entitled to compete for selection.

28. Despite the above, we shall deal with the contentions raised by Mr. K.D Shreedhar, learned Senior Counsel for the petitioner in CWP No. 161/2019.

29. Broadly the grounds on which the petitioner in CWP No.161 of 2019 seeks the consideration of his claim for appointment to the post of Junior Office Assistant (IT), as projected by Mr.K.D. Shreedhar, learned Senior Counsel are as follows:

(i) That despite a provision having been made in the "Important Instructions for filling up Online Applications" for the rejection of applications of ineligible candidates, the Staff Selection Commission allowed the candidates like the petitioner herein to participate in the

entire process of selection, including the written examination and the document verification and that, therefore, the Commission is estopped from rejecting the candidature of the petitioner at the time of declaration of results;

(ii) That in the previous selection, candidates possessing higher qualification in the same Field/Discipline like the petitioner herein were permitted to participate and hence two different interpretations to the Rules cannot be made in two different selections;

(iii) That persons who possess a higher qualification in the same discipline cannot be rejected, especially after they have participated in the process of selection and also secured higher marks than the other candidates;

(iv) That out of 1156 posts for which recruitment was carried out, the respondents could select only about 500 candidates who satisfy the criteria prescribed by the Recruitment & Promotion Rules in strict terms and hence no prejudice will be caused to anyone if candidates with higher qualification are considered; and

(v) That in any case the Rules have now been amended to the advantage of persons like the petitioner and hence the petitioner should be declared as eligible.

30. We have carefully considered the above submissions.

31. The first contention of the learned Senior Counsel for the petitioner revolves around one of the instructions found in the “Important Instructions” for filling up Online Applications. It was indicated in those “Important Instructions” that the information in respect of provisionally admitted candidates and the rejected candidates will be uploaded in the website of the Commission before the conduct of Screening Test/Examination. On the basis of this provision in the “Important Instructions”, it is contended that the Staff Selection Commission ought to have rejected the applications of ineligible candidates at the earliest point of time before the Screening Test and that since they did not choose to do so but allowed the candidates to go through the entire process of selection, the Commission is now estopped from rejecting the candidature of persons like the petitioner.

32. But the aforesaid contention deserves to be rejected for two reasons: (i) there can be no estoppel against the statutory prescription contained in the Recruitment and Promotion Rules; and (ii) the stipulation contained in the “Important Instructions” does not speak about the rejection of applications for want of qualifications etc. The instructions relied upon by the learned Senior Counsel is only to the effect that the relevant information will be posted in the website of the Commission. The instructions relied upon by the learned Senior Counsel do not even mention the grounds on which an application can be rejected. Therefore, the mere fact that the petitioner had been permitted to participate in the entire process of selection, would not prevent the Commission from examining the eligibility of the petitioner as per the statutory Rules. In fact the Commission is obliged, before releasing the list of selected candidates, to scrutinize all the certificates furnished by the candidates to find out whether they satisfy the eligibility criteria prescribed by the Rules or not.

33. Many times, candidates whose applications are rejected even before the screening test, come up before Courts/ Tribunals and taking into account the balance of convenience, the Courts/ Tribunals also grant interim orders permitting them to undergo the process of selection. This does not mean that they are declared as eligible. Therefore, the first contention deserves to be rejected.

34. The second contention of the learned Senior Counsel for the petitioner is that in the previous selection, candidates with similar qualifications were held eligible. But this contention is to be stated only to be rejected. Whenever a case of this nature comes up

before the Court, all that is required is for the Court to see whether the petitioner satisfies the eligibility criteria prescribed in the Rules or not. Once the candidate is found not to possess the qualifications as prescribed in the Rules, it is not possible to go on the basis of past precedent. Whatever be the understanding of the Staff Selection Commission about the Rule position, in the previous round of litigation, there is today a report of the Equivalence Committee constituted by the Government pursuant to the order of this Court dated 21.05.2019. This Committee comprised of (i) Director of Technical Education; (ii) Director of Higher Education; (iii) Secretary of H.P. Takniki Shiksha Board; (iv) Director in the Department of Information Technology; (v) Deputy Director (Technical) in the office of Director of Technical Education; and (vi) Secretary to the Staff Selection Commission.

35. An argument was advanced to the effect that this Court by its order dated 21.05.2019 contemplated the constitution of an expert committee and not a committee of bureaucrats. But this argument is to be rejected for the simple reason that the Members of the Committee represent the employer, namely, the Government of H.P., who alone is competent to decide the qualifications required for appointment to a post. Therefore, even if some candidates with similar qualifications had been selected in the previous selection, the same cannot be a ground, especially to make a judicial pronouncement. Hence the second ground of attack is liable to be rejected.

36. The third contention of the learned Senior Counsel for the petitioner is that the petitioner has a higher qualification in the same discipline than what is prescribed and that he has also secured a higher rank in the written examination, proving himself to be more meritorious. Therefore, it is his contention that a more meritorious candidate cannot be thrown out, paving the way for less meritorious.

37. Though the aforesaid contention is very attractive, we do not think that the same is acceptable on a deeper scrutiny. The argument that the possession of a higher qualification would presuppose the possession of lower qualification, originally accepted by the Supreme Court in **Jyoti K.K. vs Kerala Public Service Commission {(2010) 15 SCC 596}**, had already been distinguished in **State of Punjab vs. Anita {(2015) 2 SCC 170}**. This distinction was quoted with approval in a subsequent decision in **Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad {(2019) 2 SCC 404}**. Therefore, the petitioner cannot advance his cause on the basis of a purported higher qualification. Insofar as the argument revolving around merit is concerned, it is to be pointed out that the assessment of merit should be confined only to those who satisfy the eligibility criteria prescribed by the Rules. Persons who fall outside the purview of the Rules cannot take advantage of the result of the written examination. Therefore, the third contention also deserves to be rejected.

38. The fourth contention is that the service commission could not get more than around 500 candidates for filling up 1156 posts and that when huge number of posts are available, the Service Commission and the Government should not take a stand like the one they have now taken.

39. But we do not agree. If for some reason the respondents are unable to fill up more than 50% of the posts by strictly applying the Rules, it is up to them to take a call as to what should be done. It is not within the domain of the Court to issue directions to fill up the remaining posts with candidates with higher qualifications. As a matter of fact there are also candidates other than those possessing higher qualifications, waiting in the wings. Persons who have qualified from unrecognized institutions are also advancing the very same argument that several posts remain vacant. We must also take note of one important aspect, namely, that the selection which has become the subject matter of the present controversy, commenced in October 2016. Now a period of three years has passed. During

this three year period, many candidates would have become qualified as per the Rules. Therefore, it is up to the Government to take a call whether to fill up the remaining posts with other candidates who participated in the selection or to throw the unfilled posts open for the next selection. Hence, the fourth contention also requires to be rejected.

40. The last contention revolves around an amendment to the Recruitment and Promotion Rules, made under the notification dated 14.01.2019. Taking clue from the amendment to the Rules, it is contended by the learned Senior Counsel for the petitioner that what is now prescribed by the Rules is only the minimum educational qualifications, paving the way for people with higher qualifications to participate. Therefore, the learned Senior Counsel contends that at least the latest amendment may be applied.

41. But as we have pointed out earlier, the recruitment which is the subject matter of the present writ petition, commenced with the issue of a notification in October 2016. Merely because the selection was hit by a series of litigation, it is not open to the respondents to apply an amendment introduced on 14.01.2019, to the selection which was already under progress pursuant to the notification of October 2016.

42. In fact whenever an amendment, made after the issue of the notification for recruitment, is sought to be relied upon by the State, affected candidates always contend that the rules of the game cannot be changed in the middle of a selection. The same logic should apply, even if the rules of the game are changed to the advantage of one group of persons.

43. In any case the amendment to the Rules does not advance the cause of the petitioner. This can be appreciated by having a look at the amendment to the Rules.

44. By a Notification dated 14.01.2019, issued in exercise of the power conferred by the proviso to Article 309 of the Constitution, a set of Rules, namely, the Himachal Pradesh Department of Personnel Junior Office Assistant (Information Technology) Class-III (Non-Gazetted) Ministerial Services Common Recruitment and Promotion (First Amendment) Rules, 2019, were issued amending the existing rules. The essential qualifications originally stipulated in Column No.7 of Annexure A of the Rules relating to recruitment to the post of Junior office Assistant were modified as follows:

> "(a) **<u>ESSENTIAL QUALIFICATION(S)</u>**:-
>
> (i) 10+2 from a recognized Board of School Education.
>
> (ii) Diploma of minimum one year duration in Computer/ Science/ Computer Application/Information Technology from an Institution affiliated to a recognized Board or University or from a deemed University.
>
> OR
>
> "O" or "A" level Diploma from National Institute of Electronics & Information Technology (NIEIT)
>
> (iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi."

45. The only change made by the amendment is the insertion of the word "minimum". In the place of the words "one year diploma", the words "diploma of minimum one year duration" were substituted in the Rules.

46. As a result, persons holding diplomas, of durations of one year, two years or three years have now become eligible as per the amended Rules. A person holding a BA degree with Mathematics and a Masters' degree in Computer application cannot take

advantage of the said amendment. The amendment does not include within its purview, degree holders and the post graduate holders. Therefore, the last contention also deserves to be dismissed.

47. Relying upon the decision of the Supreme Court in **Mohd. Riazul Usman Gani vs. District & Sessions Judge{(2000) 2 SCC 606}**, it is contended by the learned Senior Counsel for the petitioner that the possession of a higher qualification cannot be a bar for the consideration of a candidate for selection to a post requiring a lower qualification.

48. It is true that the Supreme Court held in that case that the possession of a higher qualification cannot become a disadvantage to a candidate. But the Supreme Court made it clear in the fourth last paragraph of the same judgment that they were saying what they said, on the facts of the case on hand and that the same should not be understood as laying down a rule of universal application. Hence the said decision is of no assistance to the petitioner.

49. The reliance placed by the learned Senior Counsel for the petitioner in **Parvaiz Ahmad Parry vs. State of Jammu and Kashmir {(2015) 17 SCC 709}**, is also misplaced. That was a case where the Rules stipulated the qualification of a BSc in Forestry or equivalent from any University recognized by the Indian Council of Agricultural Research. The appellant before the Supreme Court had acquired a degree in another subject with Forestry as one of the ancillaries and he had also acquired a MSc degree in Forestry. Therefore, the said decision turned on the special facts of the case. Hence it is distinguishable.

50. Today the declaration of law that holds the field is the one in **Zahoor Ahmad Rather**. It was made clear in the said case that it is not the role of the Courts to find out the equivalence. In fact the Court implored in **Zahoor Ahmad Rather** that the State, as the employer, may legitimately bear in mind several factors including the nature of the job, the aptitudes required for efficient discharge of duties, functionality of qualification and the content of the course of studies. The State as a public employer, it was pointed out in the said decision, may well take into account social perspectives that require creation of job opportunities across the societal structure.

51. Whether we like it or not, ours is a society which is full of inequalities. Some are less fortunate and end up only with a Diploma. Some are better placed to acquire degrees and Post Graduate Degrees. If the State has different avenues of employment for different sections of people, the same cannot be undone by the Courts by juxtaposing higher qualifications into lower qualifications. Therefore, the challenge to the impugned judgment of the Tribunal is merit-less. Hence CWP No.161 of 2019 is liable to be dismissed. All applications for intervention are dismissed, as the interveners have no common cause either with the writ petitioner or with the 5th respondent herein. The theme of their song is not in tune either with that of the writ petitioner or with that of the 5th respondent herein, who was the applicant before the Tribunal. Hence CWP No.161 of 2019 as well as the intervention applications filed therein is dismissed.

52. Insofar as CWP No.629 of 2019 is concerned, it arises out of an interim order passed by the Tribunal to maintain status quo as on 26.02.2019. But this order of status quo was passed as a sequel to an interim order passed by this Court on 11.01.2019 in CWP No.161 of 2019 and the consequential release of a list of selected candidates. Now that CWP No.161 of 2019 is dismissed, the interim order as originally passed on 11.01.2019 goes. In any case the interim order dated 11.01.2019 passed in CWP No.161 of 2019 was already modified by this Court by a further order dated 21.05.2019 by which a discretion was

granted to the State Government to offer appointment to the selected candidates. Therefore, to a great extent the grievance of the petitioner in CWP No.629 of 2019 stands readdressed by the interim order dated 21.05.2019 passed in CWP No.161 of 2019.

53. However, there is a small area which requires clarification. By the order dated 21.05.2019, this Court directed the appointments to be made only on contract basis. Now that we have dismissed CWP No.161 of 2019, the fetters placed on the Service Commission and the Government by any interim order, passed either by this Court or by the Tribunal, shall stand removed. In other words, CWP No.629 of 2019 is also allowed and the impugned order set aside.

54. Pending application(s), if any, also stand(s), disposed of.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Himachal Pradesh Staff Selection Commission and others ...Petitioners.
Versus
Pawan Thakur ...Respondent.

CWP No. 1769 of 2018
a/w connected matters.
Judgment reserved on 20.08.2019
Decided on: 29 .08.2019

Constitution of India, 1950 – Articles 14 & 226 – Equality before law - Appointment to public office – R & P Rules prescribing eligibility criteria – Person(s) claiming higher qualification than prescribed in Rules –Whether court(s) can direct to treat them as having qualification equivalent to prescribed eligibility norms ? – Held, prescription of qualifications for a post is a matter of recruitment policy and State as an employer is entitled to prescribe qualifications as a condition of eligibility – It is no part of the role or function of judicial review to expand upon the ambit of prescribed qualifications – Equivalence of qualification is not a matter which can be determined in exercise of power of judicial review – Direction of Administration Tribunal to appoint petitioners holding higher qualification in the same discipline vis-a-vis eligibility qualification prescribed in R&P Rules set aside. (Paras 16, 17 & 29)

Cases referred:
Jyoti K.K. vs. Kerala Public Service Commission, (2010) 15 SCC 596
Parvaiz Ahmad Parry vs. State of Jammu and Kashmir, (2015) 17 SCC 709
State of Punjab vs. Anita, (2015) 2 SCC 170
Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad, (2019) 2 SCC 404

CWPs No. 1769, 1770, 1772 to 1775/2018.
For the petitioner(s): Mr. B.C. Negi, Sr. Advocate with Mr. Nitin Thakur, Advocate, for petitioner (s) No. 1.

Mr. Ashok Sharma, Advocate General with M/s. J.K. Verma, Adarsh K. Sharma, Ritta Goswami and Nand Lal Thakur, Additional Advocates General, for petitioners No. 2 and 3.

For the respondents: Mr. Yogesh Kumar Chandel, Advocate, for the respondent(s).

CWP No. 1771/2018.

Mr. B.C. Negi, Sr. Advocate with Mr. Nitin Thakur, Advocate, for petitioner No. 1.
Mr. Yogesh Kumar Chandel, Advocate, for respondent No.1.
Mr. Ashok Sharma, Advocate General with M/s. J.K. Verma, Adarsh K. Sharma, Ritta Goswami and Nand Lal Thakur, Additional Advocates General, for petitioners No. 2 and 3.
Mr. Mehar Chand, Advocate, for proforma respondent No.4.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging a common order passed by the Himachal Pradesh State Administrative Tribunal (hereinafter referred to as 'the Tribunal') in a batch of Original Applications, directing the Himachal Pradesh Staff Selection Commission (hereinafter referred to as the 'Staff Selection Commission') to appoint the applicants before the Tribunal as Surveyors, the Staff Selection Commission has come up with these seven writ petitions.

2. We have heard Mr. B.C. Negi, learned Senior Counsel appearing for the Staff Selection Commission which is the petitioner in all these writ petitions, the learned Advocate General appearing for the State and Mr. Yogesh Kumar Chandel, learned counsel appearing for the respondents, who were applicants before the Tribunal.

3. By a Notification dated 16.5.2016, the Staff Selection Commission invited applications for appointment to various posts, in various departments of the Government. One of the posts included in the Notification for recruitment was the post of Surveyors, to be appointed on contract basis, in the Department of Industries and in the Department of Irrigation and Public Health. The post code allotted to the said post in the Department of Irrigation and Public Health was 527. The post code allotted to the said post in the Department of Industries was 488.

4. The essential qualifications prescribed in the Notification for recruitment to the post of surveyors in the Department of Irrigation and Public Health were (i) a pass in 10+2 examination from a recognized Board/University; and (ii) a certificate in the trade of Survey Work or its equivalent from a recognized I.T.I or from an Institute duly recognized by the Central/HP Government. The essential qualifications prescribed for recruitment to the post of surveyors in the Department of Industries were (i) Matric Examination or its equivalent from a recognized Board of School Education/ Institution duly recognized by the Central /H.P. Government and (ii) two years Certificate Course in the trade of Survey Work from a recognized I.T.I/Institution duly recognized by the Central/H.P. Government

5. The post of Surveyor is in Class-III and is a Non-Gazetted State Cadre post. The Rules relating to recruitment and Promotion to the said post, in the department of Irrigation and Public Health, titled as "Himachal Pradesh Department of Irrigation and Public Health Surveyor Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2013"issued by the Governor in exercise of the powers conferred by proviso to Article 309 of the Constitution, also prescribe the very same qualifications as indicated in the Notification

for recruitment, namely (i) a pass in 10+2 examination from a recognized Board/University; and (ii) a Certificate in the trade of Survey Work or its equivalent from a recognized I.T.I or from an Institute duly recognized by the Central/H.P. Government.

6. Similarly, the prescription in the notification, with regard to post of Surveyor in the department of Industries was also in tune with the Recruitment and Promotion Rules for the post of Surveyors in the Department of Industries.

7. In response to the said Notification for recruitment, a lot of candidates, including those who were either Diploma Holders or Degree Holders in the discipline of Civil Engineering, also applied. The diploma/degree holders applied on the basis that they were holding a higher qualification in the same discipline and that therefore, there could be no bar.

8. On 25.9.2016, a written screening test was conducted and even the Diploma Holders and Degree Holders in Civil Engineering were allowed to participate in the written screening test. The results of this screening test were declared on 20.1.2017, and the short-listed candidates were invited for interview from 6.3.2017 to 9.3.2017.

9. But in the meantime, the applications of candidates holding a Diploma or Degree in Civil Engineering were rejected. Challenging the orders of rejection, a set of candidates filed Original Applications in O.A. Nos. 787, 801, 802, 823, 836, 942 and 1329 of 2017 on the file of the Tribunal.

10. By a common order dated 17.5.2018, the Tribunal allowed all the seven Applications, mainly on the basis of the judgment of the Supreme Court in ***Jyoti K.K. vs. Kerala Public Service Commission [(2010) 15 SCC 596].*** It is against the said common order of the Tribunal dated 17.5.2018, passed in the aforesaid seven Applications, that the Staff Selection Commission has come up with the present batch of seven writ petitions.

11. There are no disputes on facts. It is admitted on both sides (i) that the Notification for recruitment as well as the Recruitment and Promotion Rules prescribe a pass in matriculation or its equivalent from a recognized Board of School Education/Institution duly recognized by the Central/H.P. Government and a two years Certificate Course in the trade of Survey Work from a recognized I.T.I/Institute duly recognized by the Central/H.P. Government for the post of Surveyors in the Department of Industries with post code No. 488 (ii) that the Notification for recruitment and the R&P Rules prescribe a pass in 10+2 examination from a recognized Board/University and a Certificate in the trade of Survey work or its equivalent from a recognized I.T.I or from a Institute duly recognized by the Central/H.P. Government, for appointment to the post of Surveyors in the Department of Irrigation and Public Health with post code No. 527; and (iii) that the respondents in these writ petitions, had either a Diploma in Civil Engineering or a Degree in Civil Engineering.

12. It is not the case of the respondents that they first completed a Certificate Course in the trade of Survey Work and thereafter went on to study a Diploma or Degree in Civil Engineering. Admittedly, after a pass in 10+2, the respondents had gone to a Diploma or Degree Course in Engineering.

13. As we have stated earlier, the main ground on which the Tribunal allowed the Original Applications of the respondents herein, was the ratio purportedly laid down by the apex Court in ***Jyoti K.K.*** But in ***Jyoti K.K.*** the essential technical qualifications prescribed by the Rules for recruitment to the post of Sub-Engineers (Electrical) in the Kerala State Electricity Board were (i) a Diploma in Electrical Engineering of a recognized

Institution obtained after a 3 years course of study, or (ii) a Certificate in Electrical Engineering from any one of the recognized technical schools with five years of service in the Kerala State Electricity Board. The Kerala Public Service Commission rejected the applications of candidates who possessed a B. Tech. or B. Degree in Electrical Engineering. But, the Supreme Court took note of Rule 10 (a) (ii) of Part I of Kerala State and Subordinate Services Rules, 1956, which clearly stipulated that the qualifications recognized by Executive Orders or Standing Orders of the Government as equivalent to a qualification stipulated in the special Rules as well as those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be considered as fulfillment of the eligibility criteria. Interestingly Rule 10 (a) (ii), though contained in the General Rules for State and Subordinate Services, also contained a *non-obstante* Clause. Rule 10 (a) (ii) of the Kerala State and Subordinate Services Rules, extracted by the Supreme Court in ***Jyoti K.K*** reads as follows:

> ***"10.(a)(ii)*** *Notwithstanding anything contained in these rules or in the Special Rules, the qualifications recognised by executive orders or standing orders of government as equivalent to a qualification specified for a post in the Special Rules and such of those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be sufficient for the post."*

14. It is relevant to note that the prescription contained in Rule 10 (a) (ii) of the General Rules, was notwithstanding anything contained even in the Special Rules.

15. The Supreme Court also observed in para-9 of its decision in ***Jyoti KK*** that the Special Rules did not contain any clause for exclusion of candidates who possessed higher qualifications. Therefore, the Supreme Court allowed the case of the Degree Holders in Engineering.

16. It is exactly for the above stated reasons that in a subsequent decision in ***State of Punjab vs. Anita [(2015) 2 SCC 170]*** the Supreme Court distinguished the decision in ***Jyoti K.K.*** The distinction made in ***Anita***, was relied upon by the Supreme Court in a more recent decision in ***Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad [(2019) 2 SCC 404].*** In fact in paragraph 25 of the report in ***Zahoor Ahmad,*** the Supreme Courtmade it clearthat the hypothesis formulated in ***Jyoti K.K.*** as though the possession of a higher qualification would presuppose the acquisition of a lower qualification, cannot be accepted in the absence of a statutory stipulation like the one contained in Rule 10(a) (ii) of the Kerala State and Subordinate Services Rules. Again in para 26 of the report in ***Zahoor Ahmad,*** the Supreme Court reiterated that the decision in **Jyoti K.K.** turned on the provisions of Rule 10(a) (ii) of General Rules and that in the absence of such a Rule, it is not possible to draw an inference that a higher qualification presupposes the acquisition of a lower qualification. The Supreme Court cautioned in ***Zahoor Ahmad*** that the prescription of qualifications for a post, is a matter of recruitment policy and that the State as the employer, is entitled to prescribe the qualifications as a condition of eligibility. The Court cautioned that it is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications.

17. Emphasis was laid by the Supreme Court in ***Zahoor Ahmad*** that the equivalence of qualification is not a matter which can be determined in exercise of the power of judicial review. One of the important observations made by the Supreme Court in para 27 of the report in ***Zahoor Ahmad*** is that the State, as a public employer, may well take into account social perspectives that require the creation of job opportunities across the societal structure. This observation assumes significance in the light of the fact that there are

different layers of un-employed youth, with some dropping out of Schools, some abandoning studies after acquiring a Certificate Course, some pursuing a Diploma and a few pursing a Degree. If the State thinks that different job opportunities had to be created across the board, for all these sections of unemployed youth, the same cannot be found fault with. Therefore, the only ground on which the Tribunal allowed the Original Applications of the respondents herein, on the basis of ratio in ***Jyoti K.K*** cannot be upheld. It is true that the judgment of the Tribunal was rendered on 17.5.2018 and the decision in ***Zahoor Ahmad*** came on 5.12.2018. But ***Jyoti K.K.*** was not distinguished for the first time in ***Zahoor Ahmad.*** It had already been distinguished in ***Anita*** which the Tribunal did not take note of.

18. Mr. Yogesh Kumar Chandel, learned counsel appearing for the respondents contended (i) that even as per the reply filed by the State government, which is the employer, before the Tribunal, a person with higher qualifications is eligible for a post for which a lower qualification is prescribed if such higher qualification had been obtained in the same field (ii) that the syllabus for Degree/Diploma in Civil Engineering includes the syllabus prescribed for a Certificate Course in the trade of Survey Work (iii) that even as per the syllabus of semester system for the trade of survey, redesigned by the Government of India, Ministry of Labour and Employment, a Diploma/Degree Holder in Civil Engineering is entitled to be appointed as Instructor for a one year Course in Survey Work (iv) that persons who hold a Certificate Course in the trade of Survey Work are allowed lateral entry, into a Diploma Course in Civil Engineering (v) that the R&P Rules not merely stipulate a Certificate in the trade of Survey Work, but also stipulate an equivalent qualification as essential qualification, but the word "equivalent" was not found in the Rules that the Supreme Court was concerned in ***Zahoor Ahmad*** (vi) that what is applicable to the case of the respondents is actually the ratio laid down by the Supreme Court in ***Parvaiz Ahmad Parry vs. State of Jammu and Kashmir [(2015) 17 SCC 709]*** (vii)that the Government had already appointed Diploma Holders as Electricians and hence they cannot discriminate against the Surveyors (viii) that some Diploma Holders are already working as Surveyors and hence the respondents cannot be thrown out as ineligible and (ix) that in any case, 30% of the posts in the category of Junior Engineers are reserved for Surveyors, indicating thereby that persons who possess the essential qualifications for recruitment to a promotional post, cannot be said to be ineligible for a feeder category post.

19. The first contention of the learned counsel for the respondents revolves around a statement contained in paragraph 2 of the reply filed by the Engineer-in-Chief of the I&PH Department, in O.A No.787 of 2017 before the Tribunal. All that was said by the Engineer-in-Chief in his reply before the Tribunal was that a person having a higher qualification becomes eligible for a post for which a lower qualification is prescribed, if such higher qualification had been obtained in the same field. After having said so, the Engineer-in-Chief also asserted in the very same paragraph of his reply that in the present matter, the fields of Surveyors and Civil Engineers are altogether different. The Engineer-in-Chief asserted further in his reply that the possession of a Degree in Civil Engineering cannot be treated as the possession of a qualification in the same field of Surveyors. Therefore, the reply filed by the Government before the Tribunal may not advance the cause of the respondents and hence the first contention of the learned counsel for the respondents is liable to be rejected.

20. The second contention revolves around the syllabus for the Certificate Course in the trade of Survey Work. But as pointed out by the Supreme Court in ***Zahoor Ahmad,*** we are not experts to find out equivalence. Therefore, the second contention does not merit acceptance.

21. The third contention is to the effect that the Degree/Diploma Holders in Civil Engineering are entitled to be appointed as Instructors for a one year Certificate Course in Survey Work and that therefore, the exclusion of Degree/Diploma Holders will tantamount to exclusion of the teachers, while students are eligible.

22. Though this contention based on *guru-sishya* prescription appears to be very attractive on its face, it may not stand legal scrutiny. The qualifications prescribed for the post of Instructor for the trade of Surveyor under the "Craftsmen Training Scheme" are as follows:

> *"NTC/NAC in the relevant trade with 3 years' post qualification experience or Diploma/Degree in Civil Engg. With 2/1 year's post qualification experience respectively."*

23. First of all we do not know whether the trade of Surveyor under the Craftsmen Training Scheme designed by the Government of India is just the same as the Certificate Course in the trade of Survey Work that is prescribed by the R&P Rules of the Government of Himachal Pradesh. In any case, post qualification experience is also stipulated along with a Degree/ Diploma in Civil Engineering, for appointment to the post of Instructors in the trade of Survey. Therefore, what is sought to be raised as the third contention, is just an over simplification of the issue and we are unable to uphold the same.

24. The fourth contention is about the eligibility of holders of a Certificate in the trade, for lateral entry into Diploma Courses. But the fact that a Certificate Holder is entitled to be admitted to a Diploma Course, may not make the holder of a Diploma, a person holding the essential qualifications. There are different parameters (i) for higher studies; and (ii) for appointment to a post. One cannot be mixed up with the other. In fact, the very same contention appears to have been raised in ***Zahoor Ahmad*** before the Supreme Court, as seen from para 11.2 but it was not accepted by the Supreme Court.

25. The fifth contention revolves around the expression "equivalent" found in the R&P Rules of the State of Himachal Pradesh and the absence of such an expression in the R&P Rules that formed the subject matter of the decision of the supreme Court in ***Zahoor Ahmad.*** But we do not think that such an artificial distinction can be made of the decision in ***Zahoor Ahmad.*** The decision in ***Zahoor Ahmad*** makes it clear that the equivalence of a qualification is not a matter that can be determined in exercise of the power of judicial review.

26. The next contention of the learned counsel for the respondents revolves around the judgment of the Supreme Court in ***Parvaiz Ahmad Parry.*** But in the said case, the facts were clearly loaded in favour of the individuals. The Recruitment Rules prescribed the qualification of a Degree in Forestry or equivalent. The candidate before the Court had acquired a BSc Degree with Forestry as one of the subjects and he had also acquired a Post Graduate Degree, namely MSc in Forestry itself. Therefore, the decision in ***Parvaiz Ahmad Parry*** cannot go to the rescue of the respondents.

27. The next two contentions relate to the appointment of Diploma Holders as Electricians and some Diploma Holders as Surveyors. But we do not think that any appointment made in contravention of the Statutory Rules can be taken as a precedent.

28. The last contention of the learned counsel for the respondents is that 30% of the posts of Junior Engineers are reserved for Surveyors and that therefore, what holds good as a qualification for a promotional post will equally hold good for a feeder category post.

29. But we do not think so. A Surveyor with sufficient number of years of experience may be treated by the Recruitment Rules to be eligible for promotion to the post of Junior Engineer. It does not mean that a person who is eligible for appointment as Junior Engineer should be considered as eligible for appointment to a feeder category post. The only task of the Courts in such cases is to find out whether a candidate fulfills the qualifications prescribed by the Recruitment Rules or not. The moment it is found that a candidate does not fulfill the qualifications as stipulated in the Statutory Rules, the *lis* should come to an end. This is the moral of the story behind the decision in ***Zahoor Ahmad.*** Therefore, the Tribunal was wrong in relying upon the decision in ***Jyoti K.K.*** Hence the order of the Tribunal is liable to be set aside. Accordingly these writ petitions are allowed, the common order of the Tribunal passed in the Applications filed by the respondents herein is set aside and the Original Applications filed by the respondents herein shall stand dismissed**.** Pending applications, if any also stand disposed of.

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

Shri Madan Lal and others …Appellants.

Versus

Shri Gyan Chand and Others ….Respondents.

RSA No. 462 of 2005
Reserved on: 16.7.2019
Decided on : 25.7.2019

Indian Succession Act, 1925– Section 63 – Indian Evidence Act, 1872 – Section- 68 - Will– Execution of and proof – Trial court holding will to be duly proved on record – First appellate court allowing appeal and returning findings that execution of Will not proved in accordance with law– RSA by defendants – Held, marginal witness 'SR' clearly deposing about sound mental state of testator and his signing Will in presence of marginal witnesses and about said witness signing/thumb marking Will in testator's presence– Will duly registered before Sub-Registrar– Other marginal witness 'JR' not supporting case of propounders/ defendants and denying his having marked Will in presence of testator –'JR' instead, appearing as witness for plaintiff - He admitting in his cross-examination that plaintiff had asked him to depose as his witness– Also admitting presence of testator and other attesting witness 'SR' at relevant time– Deposition of 'SR' proved due execution of Will by testator– Registration of Will by Sub-Registrar raises presumption of truth and this presumption remains unrebutted– Appeal allowed– Decree of first appellate court set aside and that of trial court restored. (Paras 10 to 12)

For the Appellants: Mr. G.D Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

For the Respondents: Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Pal Thakur, Advocate, for respondent No.1.
Mr. Malay kaushal, Advocate, for respondents No. 2 (a) to 2 (c).
Ms. Megha Kapoor Gautam, Advocate, for respondent No.3.
Respondents No. 4 (a) to 4 (e), 5 to 9 and 12 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The learned trial Court i.e. Sub Judge, Ist Class, Court No.1, Paonta Sahib, non-suited the plaintiff/respondent No.1 herein (for short the plaintiff), and, obviously returned findings adversarial to the plaintiff, vis-a-vis, execution, of, the apposite testamentary disposition, by, deceased testator one Harnama, on 14.1.1994, wherethrough he constituted the contesting defendants No.1 and 2/appellants herein (for short the defendants), as, his legatees, and, rather pronounced qua, it, being proven to be validly, and, duly executed.

2. The aggrieved therefrom plaintiff, instituted an appeal, before the learned first appellate Court i.e. Additional District Judge, Sirmaur, District at Nahan. The learned first appellate Court, hence pronounced a verdict rather leaning, vis-a-vis, the plaintiff, and, obviously adversarial to the defendants.

3. The aggrieved therefrom, the, contesting defendants hence reared the instant Regular Second Appeal, before this Court, wherethrough they strive, to, beget reversal, of, the impugned verdict.

4. The brief facts of the case are that one Ram Saran S/o Shri Hira, who was grandfather of the plaintiff and defendants No. 1 and 2, and, proforma defendants No. 3 to 9, and, father in law of proforma defendant No.10, was the owner in possession of the land comprised in Khasra No. 239 measuring 9-15 bigha, situated in Mauza Taruwala, Patti Heerpur, Tehsil Paonta Sahib, District Sirmaur, H.P., and, in the settlement, new Khasra No. 500/239 was assigned. The land comprised in khasra No. 240 measuring 0-1 bigha and Khasra No. 242 measuring 5-14 bigha, total measuring 5-15 bigha, situated in mauza Taruwala, patti Heerpur was also possessed by the afore Ram Saran as tenant under proforma defendants No. 11 to 17, as per the jamabandi for the year 1965-66. After the demise of Ram Saran, his entire land was inherited by his legal heirs in equal shares as per the pedigree table drawn in para 4 of the plaint. It has been averred that after the death of Smt. Dei, who was the daughter of Ram Saran, her share was equally inherited by her legal heirs who after inheriting the same relinquished their rights in favour of deceased Harnama, who was the father of the plaintiff, and, defendants No. 1 and 2, and, proforma defendants No. 3 to 9, and, husband of proforma defendant No. 10. It has further been averred that lateron a civil suit being filed by Dayal Singh, titled as Dayal Singh v. Harnama and others, bearing No. 132/1 of 1992 was dismissed as withdrawn on the undertaking of said Harnama that he will not alienate the suit land in any manner and will give the suit land to his sons in equal share vide his statement recorded in that afore suit on 24.8.1993. The afore Harnama during his lifetime executed a will in favour of defendants No. 1 and 2. At the time of execution of the afore will, he was ill and very weak, and, was not in a position to bequeath his property in any manner, but defendants No.1 and 2 put pressure upon him and got executed a will in their favour on 14.1.1994, which was registered in the office of Sub Registrar, Paonta Sahib. It has been averred by the plaintiff that the will is shrouded by suspicious circumstances, and, is illegal null and void and void abnitio and the mutation No. 1427 of 26.2.1996 which has been attested on the strength of the aforesaid will is also null and void and liable to be set aside. It has also been averred by the plaintiff that the suit land was possessed by Shri Ram Saran and after his death the same was inherited by the aforesaid Harnama and the same is joint Hindu ancestral property and the entire land was inherited by Shri Harnama from his father which land has also been bequeathed by him in favour of defendants No1 and 2 and the said 'Will' will not affect the right of the plaintiff and proforma defendants No.3 to 10. It has further been stated by the plaintiff that on the strength of the aforesaid mutation defendants No.1 and 2 are trying to dispose of the suit

land and they were asked by him several times to get the mutation cancelled but the defendants No.1 and 2 are avoiding the same on one pretext or the other. On the basis of the aforesaid averments, the plaintiff filed a suit for declaration with a consequential relief of injunction.

5. The defendant No.1 filed the written-statement, wherein it has been averred that late Sh. Harnama executed a valid will in favour of defendants No. 1 and 2, and, at the time of execution of the will, he was in sound disposing state of mind and the same was registered in the Office of Sub Registrar, Paonta Sahib. It has also been stated that Harnama used to live with them and defendants No.1 and 2 used to serve and maintain him. It has also been denied that the suit land was the ancestral property and further submitted that Harnama was competent to bequeath the suit land in favour of defendants No.1 and 2. Defendants No. 2,3 and 4 also filed separate written-statements, and, supported the case of the plaintiff. In the replication, the plaintiff controverted the contentions of the defendants, and, reiterated his stand taken in the plaint.

6. From the pleadings of the parties, the following issues were framed by the learned trial Court:-

> 1. Whether Harnama executed a valid will in favour of defendants No.1 and 2 on 14.1.1994 in sound and disposing mind, if so its effect? OPD 1 and 2.
>
> 2. Whether will dated 14.1.1994 executed by Sh. Harnama is a result of coercion under influence, if so its effect? OPD
>
> 3. Whether the plaintiff is entitled to the relief of permanent injunction ? OPP
>
> 4. Whether plea taken in amended plaint is barred by limitation? OPD 1 & 2.
>
> 5. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the suit of the plaintiff. In an appeal, preferred therefrom, by the plaintiff, before the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court.

8. Now defendants No.1 and 2, have instituted the instant Regular Second Appeal before this Court, wherein, they assail the findings recorded, in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 9.5.2006, this Court, admitted the appeal, on the hereinafter extracted substantial question, of law:-

> Whether the finding of the first appellate Court that the will set up by the appellant-defendant is not genuine, is contrary to the evidence on record and the law applicable to the facts and hence bad?

Substantial question of law:-

9. Ex. DW-2/A is a registered testamentary disposition executed by the deceased Harnama, wherethrough he constituted, the propounders thereof, as, his legatees, Ex. DW-2/A, after its purported valid execution, by the deceased testator, comprised in (a) it being signatured by the deceased testator, in, presence, of, the marginal witnesses thereto, namely one Sant Ram, and, one Julfi Ram, (b) and thereafter it also purportedly, in, the presence of deceased testator, hence stood signatured or thumb marked, by the marginal witnesses thereto, (c) besides thereafter, the, afore testamentary disposition, stood presented, before the Sub Registrar concerned, and, whereat the statutory endorsement, was made thereon, by the Sub Registrar concerned, with trite voicings, vis-a-vis, the

contents, of, Ex. DW-2/A being readover and ensured to be comprehended, to the deceased testator, and, also thereafter the latter hence embossing thereon, his, signatures in Urdu. Moreover, he also thereat stood identified, by his counsel, whose uncontested signatures, hence occur, on the reverse of Ex. DW-2/A, (d) preponderantly also when the plaintiff, did not, make any endeavor, to rebut, the presumption of truth enjoyed rather by the afore made signatures, and, seals, upon, the endorsement hence recorded by the Sub Registrar concerned, (e) and, also with the signatures thereunderneath in urdu, of, the deceased testator remaining uncontested, (f) thereupon, a conclusion was erectable, vis-a-vis, within the ambit of Section 63 of the Indian Succession Act, the, defendants rather proving its valid and due execution.

10. However, the learned first appellate Court, proceeded to dispel the vigour, of, the afore will, on, anvil of the testification rendered, by one Julfi Ram, who appeared as PW-5. In his testification, PW-5 made echoings, vis-a-vis, (a) the deceased testator, not subscribing on, the apposite testamentary disposition, rather his signatures, in his presence (b), and, also rendered echoing qua his also thereafter, in presence of the deceased testator, not, thumb marking Ex. DW-2/A, (c) and, therefrom the learned first appellate Court, proceeded to, conclude that with the statutory ingredients, borne in Section 63 of the Indian Succession Act, rather, when make it peremptory, for, the apposite testamentary disposition, hence, being construable to be validly, and, duly executed, (d) qua hence the deceased testator provenly making his signatures, in, the presence of the marginal witnesses thereto, and, thereafter the latters also provenly making their signatures thereon, in, the testators' presence, (e) whereas, the testification of PW-5, being outside, the purview of Section 63 of the Indian Succession Act, (f) thereupon, it concluded qua dehors the testification, rendered by the other marginal witnesses, to, Ex. DW-2/A, who rather stepped, into the witness box as DW-1, and, who therein rendered, a, candid unequivocal echoing, hence affirmatively attracting the statutory provisions, enshrined, in Section 63 of the Indian Succession Act, and (g) also deposed, vis-a-vis, execution of Ex. DW-2/A, by the deceased testator, ensuing from his thereat, being in, a sound disposing state of mind (h) besides also identified the signatures, of, one Mr. R.K Parara, as occur, on the reverse of Ex. DW-2/A, rather yet the peremptory statutory parameters enshrined, in, section 63 of the Indian Succession Act, hence, remaining unsatiated.

11. Even though, the enshrined statutory parameters, as, contemplated in Section 63 of the Indian Succession Act, for, begetting apt proven satiation, rather are not enjoined to be proven, by both the apposite marginal witnesses, rather, are, enjoined to be proven, only by one of the attesting witnesses, vis-a-vis, the relevant testamentary disposition. However, as aforestated, disconcurrent testifications, stood echoed, by PW-5 Julfi Ram, and, by DW-2 Sant Ram, both of whom are the marginal witnesses to Ex. DW-2/A, (i) the former supports the plaintiff, and, latter supports the propounders i.e defendants, (ii) however, upon an incisive reading, of, the testimony of Julfi Ram, who appeared in the witness box as PW-5, and, who as concluded, by the learned first appellate Court, failed to render echoings, hence within, the ambit of Section 63 of the Indian Succession At, hence constrains the learned first appellate Court, to, construe qua Ex. DW-2/A, being not proven to be validly, and, duly executed, his testification hence unfolding rather suspicions' being sparked, vis-a-vis the veracity, of, his afore articulations(iii) suspicions whereof, are engendered by his also not denying the factum, qua, at the afore stage, the afore marginal witness thereto, one Sant Ram, being also present, (iv) his also not denying the factum, of, the deceased testator appending his signatures, on Ex. DW-2/A, wherefrom rather it is to be concluded qua his also deposing qua his therethrough hence proving even his carrying, the requisite aminus attestandi (v) lastly, when at the end of his cross-examination, he has acquiesced, to a suggestion, vis-a-vis, the plaintiff asking him, to

depose, as his witness, therefrom an inference is erectable, vis-a-vis, his deposing at the behest, and, the instance of the plaintiff, (vi) and, therefrom a further inference is erectable, vis-a-vis, his afore testificatiion, as, comprised in his cross-examination, also denuding, the, tenacity, of, the afore rendered echoings, borne in his examination-in-chief, (vii) and, the afore rendered echoings also being construable, qua rather theirs being supportive, qua an inference, vis-a-vis, in contemporaneity, of, execution of Ex. DW-2/A, the, afore marginal witness, one Sant Ram being also present, (viii) and, when thereafter Sant Ram, stepped into the witness box as DW-2, and, in his testification, rendered a clear voicing, vis-a-vis, both he, and, PW-5 Julfi Ram, sighting the deceased testator hence signature Ex. DW-2/A, in Urdu, (ix) and, thereafter his making a vivid bespeakings qua thereafter, both he, and Sant Ram, also, in the presence of the deceased testator, making their respective signatures/thumb impressions thereon, (x) and, when the testification of Sant Ram, stood recorded, subsequent, to the recording of the deposition of PW-5 (Julfi Ram), and, who, as afore-stated acquiesced, vis-a-vis, his deposing, at the behest, of the plaintiff, (xi) and, also when the afore Sant Ram remained rather unconfronted, with the deposition of PW-5 Julfi Ram (xii) nor when PW-5 Julfi Ram stood confronted, with the deposition of Sant Ram, hence carrying therein, the afore echoings, (xiii) conspicuously upon the latter being recalled, for hence being confronted, with, all the afore requisite emerging repelling effect(s), vis-a-vis his testification, and, ensuing, from, the subsequent to his recorded testification, the afore Sant Ram, hence in his testification, making echoings rather *stricto sensu* hence falling within, the, domain, of, the statutory parameters contemplated in Section 63, of, the Indian Succession Act, thereupon prima-facie a firm inference, is erectable, qua, the plaintiff acquiescing, vis-a-vis, the veracity, of, the testification rendered, by DW-2 Sant Ram.

12. Moreso when the apt statutory sealed signatures, of the sub Registrar, exist, on the reverse of the Ex. DW-2/A, and, whereto a presumption of truth is enjoyed, and, when the afore presumption remains un-rebutted, by clinching rebuttal evidence thereto being adduced, (i) besides, when the deceased testator, also thereat stood identified, by his counsel, whose signatures rather are also proven by his Clerk, one DW-2 Sant Ram,marginal witness to Ex. DW-2/A, thereupon vis-a-vis a registered testamentary disposition, any, purported minimal deviation(s), vis-a-vis, compliance(s) qua the peremptory mandate, borne in Section 63 of the Indian Succession Act, is, hence blunted, and, negated, (a) as, any contratherewith inference would erode, the, factum of, through the apposite sealed and signatured unrebutted endorsement, whereunder the proven signatures, of, the testator exists, hence the valid execution of a registered testamentary disposition rather standing clinchingly proven. In sequel, the verdict, of, the learned Appellate Court hence suffers from, an, infirmity, as well as a perversity. Consequently, I find merit in this appeal, which is accordingly allowed, and, the judgment and decree of the learned first Appellate Court, is, quashed and set aside, and, the judgment of learned trial Court, is, maintained, and, affirmed. Substantial question of law are answered accordingly. Records be sent back forthwith. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

State of H.P through its Principal Secretary (IPH) & another …Applicants/ Petitioners.

Versus

Sandeep Kumar …Non-applicant/Respondent.

CMP(M) No.806 of 2019 in
Review Petition No.76 of 2019
Date of decision: 30.07.2019

Limitation Act, 1963– Section 5 - Condonation of delay of 581 days in filing review petition– Justifiability– State contending that executive engineer concerned could not understand implications of order sought to be reviewed – And for filing review, department was required to follow procedure involving movement of files from one office to another etc – Held, it is not understandable why executive engineer failed to understand the implications of an innocuous order to the effect that state withdrew its Writ pursuant to re-engagement of respondent– Plea of delay on account of movement of files from one office to another is a mundane explanation not supported by contemporaneous official records- No cogent reason given for delay in question– Application dismissed. (Paras 4 & 6)

For the applicants/petitioners: Mr. Dinesh Thakur, Additional Advocate General with Mr. Amit Kumar Dhumal, Ms.Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General.
For the non-applicant/respondent: Tim Saran, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

By way of this application, a prayer has been made for condonation of 581 days delay in filing the Review Petition, for review of the order passed by this Court in CWP No.10603 of 2012, dated 2.8.2017, which reads as under:-

> "Mr. Vikram Thakur, learned Deputy Advocate General, submits that respondent stands re-engaged by the State and in this view of the matter, he has instructions not to press this writ petition at this stage. Accordingly, the petition is dismissed as not pressed. Miscellaneous applications pending, if any, also stand disposed of".

2. The order, review of which has been sought alongwith which an application has been filed for condonation of 581 days delay in filing the appeal, was passed on the basis of the statement which was so made in the Court by the learned Deputy Advocate General. The reasons mentioned in the application as to why there is a delay of 581 days in filing the review are that initially Executive Engineer, Flood Protection Division, Gagret, District Una, H.P., could not understand the implication of the order passed by this Court and thereafter, the applicant being a government department, had to follow certain procedure and channel and the file had to move from one place to another till the final draft of Review Petition was duly approved and sent to the office of the learned Additional Advocate General.

3. In my considered view, the explanation which has been given in the application for condonation of delay is worth rejection.

4. Plainly speaking, the order passed by the Court was so innocuous that this Court fails to understand why, Executive Engineer, Flood Protection Division, Gagret, District Una, H.P., failed to understand the implication of the order which was passed by this Court. Is this Court to believe that an officer of the rank of Executive Engineer does not understands the language of an order which says that learned Deputy Advocate General submits that respondent stands re-engaged and in this view of the matter, he has instructions not to press the petition at this stage?

5. Besides this, further explanation which has been given in application for condonation of delay is a mundane explanation and in fact the officers who are appending their signatures to the applications for condonation of delays on such like averments, do not even understand that law of limitation applies equally cutting across the board be it a private litigant or the government. This Court takes exception to such kind of pleadings which are being made in the applications for condonation of delay, which are not supported by any contemporaneous official record.

6. Be that as it may, as there is no cogent explanation as to why, it has taken 581 days delay for the State to approach this Court, this application being devoid of any merit, is dismissed.

7. As the application for condonation of delay in filing the Review Petition has been dismissed, the Review Petition is also dismissed being barred by limitation, so also the miscellaneous application(s), if any.

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

United India Insurance Company Limited ...Appellant
Versus
Sanjiv Kumar & Others ...Respondents

F.A.O. No. 222 of 2018
Reserved on:17.07.2019
Date of decision: 31.07.2019

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application – Defences – Non- renewal of registration certificate – Effect – Held, though registration of vehicle was not renewed after expiry of statutory period of 15 years and no taxes were paid yet insurance company insured the vehicle – No evidence that vehicle was not roadworthy at the relevant time when accident occurred or such unfitness caused accident – Plea that vehicle was not registered can not be raised to deny claim. (Paras 30 & 31)

Motor Vehicles Act, 1988– Section 166 – Motor accident– Claim application– Defences– Fake driving licence– Effect– Held, evidence shows that insured had given vehicle to driver concerned only after seeing his driving licence– Nothing on record to demonstrate that owner was aware that licence of driver was take– Insurer can not absolve itself from liability to indemnify award. (Paras 36 to 38)

Cases referred:
ICICI Lambard General Insurance Company Limited vs. Ajay Kumar Mohanty, 2018 ACJ 1020
Ram Chandra Singh vs. Rajaram and others, (2018) 8 SCC 799
Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another, 2009 (6) SCC 121

For the appellant: Mr. P.S. Chandel, Advocate.
For respondents: Mr. Vijender Katoch Advocate, for respondent No.1.
Mr. Ajay Sharma, Sr. Advocate, with Mr. Rakesh Chaudhary, Advocate, for respondent No.2.
Respondent No.3 ex-parte.

The following judgment of the Court was delivered:

Ajay Mohal Goel, J.

By way of this appeal, the Insurance Company has challenged the award passed by the Court of learned Motor Accident Claims Tribunal-1, Kangra at Dharamshala, H.P. in M.A.C.P.(R.B.T.) No.107-K/II/13/10, titled Sanjiv Kumar Versus Rimpi Kumar & others, vide which the claim petition has been allowed by learned Tribunal in the following terms:-

> "For the reasons recorded here in above, while discussing the aforesaid issues No.1 to 4, the present petition is hereby allowed with costs to the effect that the claimant is awarded a compensation to the tune of ₹2,28,597 (Rupees Two lacs twenty eight thousand five hundred and ninety seven only) alongwith interest @ 9% per annum from the date of filing of this petition till realization thereof, which shall be inclusive of the amount if already awarded under Section 140 of the M.V. Act. The aforesaid amount of compensation shall be paid by respondent No.3. Memo of costs be prepared and the file, after due completion be consigned to record room".

2. Brief facts necessary for adjudication of the present appeal are as under:-

Claimant Sanjiv Kumar filed a claim petition under Section 166 of the Motor Vehicles Act, 1988, praying for compensation to the tune of ₹10,00,000/- on account of injuries and disability sustained by him in an accident on 8.12.2008. According to the claimant, on 8.12.2008, he was on his way to Shahpur on his motor cycle bearing registration No.HP-39-5943. At about 8:30 p.m., when he reached near Manjhgran, a maruti car bearing registration No.HP-40A-2389, came from the opposite side, which was being driven by Mukesh Kumar Abrol (respondent No.2 before the learned Tribunal) in a high speed. When the claimant saw the car, he stopped his motor cycle by the side of the road, however, Mukesh Kumar, who was driving the car in a rash and negligent manner, hit the claimant, as a result of which claimant fell down and sustained grievous injuries including multiple fracture in his right leg. The claimant was immediately taken to Shahpur hospital and from there he was shifted to Dr.RPGMC Hospital, Tanda (Kangra). He remained admitted in the said hospital for one day and thereafter, he was taken to Bhinder Hospital, Pathankot, where he remained admitted from 9.12.2008 to 21.12.2009. According to the claimant, he was working as a contractor and he was earning ₹12,000/- per month.

Accordingly, he prayed for compensation to the tune of ₹10,00,000/- on account of the injuries suffered by him in the accident which took place on account of rash and negligent driving of the maruti car by its driver.

3. Owner of the car Rimpi Kumar (impleaded as respondent No.1 in the Claim Petition) contested the petition. Though he admitted that he was owner of the maruti car bearing registration No.HP-40A-2389 and the same was insured with United India Insurance Company Limited (present appellant/ respondent No.3 before the learned Tribunal), however, his defence was that no accident took place on account of rash and negligent driving of the driver.

4. Person driving the vehicle, by way of a separate reply also denied the allegations that the claimant had suffered injuries due to his rash and negligent driving. His defence was that he was not driving the vehicle in question and therefore, there was no occasion of him being involved in any accident. As per him, it was the claimant who was driving the motor cycle in a rash and negligent manner, due to which he sustained injuries.

5. Insurance Company also contested the petition and took preliminary objection with regard to breach of terms and conditions of the Insurance Policy as also of the provisions of the Motor Vehicles Act. It also raised the plea that the driver was not possessing an effective driving licence at the time of the accident, though it was not denied that as on the fateful date, the vehicle was registered with the Insurance Company. The factum of the income of the claimant being to the tune of ₹12,000/- per month was also denied.

6. On the basis of the pleadings of the parties, learned Tribunal framed the following issues:-

> "1. Whether the claimant sustained injuries in a motor vehicle accident allegedly caused by rash and negligent manner of driving of offending vehicle by respondent No.2? OPP
>
> 2. If issue No.1 above is proved in affirmative to what quantum of compensation, the claimant is entitled to, and from whom? OPP
>
> 3. Whether the accident occurred on account of rash & negligent manner of driving of motorcycle by the claimant? OPR-2
>
> 4. Whether the claim petition is bad for non-joinder of necessary parties? OPR-2
>
> 5. Whether the respondent No.2 was not holding a valid and effective driving licence to drive the offending vehicle at the relevant time? OPR-3
>
> 6. Whether the petition is the result of collusion inter-se the petitioner and the respondents No.1 & 2? OPR-3
>
> 7. Whether there was a breach of the terms and conditions of the insurance policy by the owner and driver of the offending vehicle? OPR-3
>
> 8. Relief".

7. On the basis of evidence led by respective parties, the issues so framed, were decided by the learned Tribunal in the following manner:-

> "Issue No.1: Yes.
>
> Issue No.2: ₹2,28,597/- from respondent No.3 with interest.
>
> Issue No.3: No.

Issue No.4:	No.
Issue No.5:	No.
Issue No.6:	No.
Issue No.7:	No.
Relief:	The petition is allowed with costs per operative part of the award”.

8. Learned Tribunal held that it stood proved from the record that the accident had taken place on account of rash or negligent driving of respondent Mukesh Kumar Abrol, who was duly identified by eye-witness, PW-4 Yash Pal. Learned Tribunal also observed the fact that respondent Rimpi Kumar had admitted the ownership of the vehicle and had stated that respondent Mukesh Kumar Abrol, who was driving the car, was his friend and that Mukesh Kumar Abrol had taken the vehicle on the pretext that there was some function in his family and it was later on that he came to know that on 8.12.2008, his car had met with an accident. Learned Tribunal also held that as far as injuries suffered by the claimant were concerned, statement of PW-2 Dr. G.D. Gupta, clearly established that claimant had suffered fracture shaft of femur right with residual stiff kneeand examination of the claimant by the Medical Board proved that the claimant had suffered from 10% permanent disability.

9. Learned Tribunal also held that though the claimant had pleaded his income to be ₹12,000/- per month as a contractor, however, he had not clarified in the pleadings as to what kind of contractor-ship he used to undertake.

10. While assessing the income of the claimant, learned Tribunal relied upon the copy of the acknowledgement issued by the Income Tax Department, which demonstrated that annual gross income of the claimant from all sources for the assessment year 2008-09 was ₹94,580/-. On its basis, learned Tribunal assessed the monthly income of the claimant to be ₹7,500/-. Relying upon the disability certificate Ext.PW2/A, proved by Dr. G.D.Gupta, one of the member of the Medical Board, learned Tribunal held that as the claimant had suffered 10% permanent disability, which was unlikely to improve which had reduced his working as well as earning capacity, the claimant was entitled to compensation to the tune of 10% of his monthly income by applying the formula laid down by the Hon’ble Supreme Court in***Sarla Verma (Smt) and others*** Versus ***Delhi Transport Corporation and another,*** reported in ***2009 (6) SCC 12*1**. Learned Tribunal held that 10% of the monthly income of the claimant comes to ₹750/- and thus annual loss of the claimant would come to ₹750X12= 12,000/- per month.

11. Keeping in view the fact that age of the claimant was 33 years at the time when the accident took place, learned Tribunal applied the multiplier of 16 and assessed the compensation on account of loss of future income to be ₹1,44,000/-. Besides this, learned Tribunal also awarded an amount of ₹34,597/- in favour of the claimant on account of medical expenses as were borne out from Ext.P1 to Ext.P6 (cash memos).

12. Learned Tribunal also held that in view of the injuries suffered by the claimant, confinement to bed of the claimant from 8.12.2008 to 21.12.2008 stood justified and claimant must have spent some amount on his transportation from the spot to Dr. RPGMC Hospital, Tanda and then to Bhinder Hospital, Pathankot and from there, back to his native place. Learned Tribunal also held that during this period, one attendant must have remained with him and the claimant also underwent pain or trauma. Learned Tribunal thus held the claimant to be entitled to a lump sum of ₹5,00,000/- on account of attendant charges, pain and suffering and transportation charges. Thus in all, learned Tribunal held the claimant to be entitled to compensation of ₹1,44,000+ 34,597+ 50,000= ₹2,28,597/-.

13. Learned Tribunal also held that it stood proved from Insurance Policy Ext.RW2/A that the vehicle in issue was duly insured with the Insurance Company and the Policy was valid from 9.12.2007 to the midnight of 8.12.2008, whereas the accident had taken place during the day time on 8.12.2008. It held that as it stood established that on the relevant day, vehicle in question was duly insured with the Insurance Company, therefore, the Insurance Company was liable to indemnify the owner in paying the amount of compensation.

14. While answering the objection of the Insurance Company that driver of the offending vehicle was not holding a valid and effective driving licence, learned Tribunal held that owner of the car had categorically deposed that when he gave the car to Mukesh Kumar, he had seen the driving licence of Mukesh Kumar, which was with respondent Mukesh Kumar at the relevant time. On these basis, learned Tribunal held that owner of the car had acted in a bonafide manner by believing the driving licence of respondent No.2 to be genuine and though the licence was later on proved to be fake, but for the same the owner could not be held liable. Learned Tribunal held that burden was upon the Insurance Company to plead and establish that owner was having the knowledge that the driving licence produced by the driver was fake and despite this he allowed the driver to drive the car. Learned Tribunal held that in the absence of any such specific proof and evidence, Insurance Company could not escape from its liability. On these basis, learned Tribunal held that the Insurance Company was liable to indemnify the owner.

15. Feeling aggrieved, the Insurance Company has filed the present appeal.

16. Learned counsel for the appellant has challenged the award passed by the learned Tribunal on the following grounds:-

(a) The multiplier of 16 awarded by the learned Tribunal was erroneous as it was held by the learned Tribunal in para 16 of the award that multiplier of para 15 would be applicable in the case.

(b) Learned Tribunal has erred in granting an amount of ₹50,000/- under the head attendant charges, pain and suffering and transportation charges, which amount was on the higher side.

(c) Learned Tribunal had erred in not appreciating that the Insurance Company was not liable to indemnify the owner because as on the date of the accident, the vehicle was not having a valid Registration Certificate.

(d) That the learned Tribunal erred in not appreciating that as the driver of the vehicle was not possessing a valid driving licence on the date when the accident took place, therefore, the Insurance Company could not have been burdened with the claim amount by the learned Tribunal.

17. No other point was urged.

18. I deal with all these points raised by the learned counsel one by one.

(a) The multiplier of 16 awarded by the learned Tribunal was erroneous as it was held by the learned Tribunal in para 16 of the award that multiplier of para 15 would be applicable in the case:-

19. Learned counsel for the appellant has argued that a perusal of para 15 of the award would demonstrate that learned Tribunal despite coming to the conclusion that in the facts of the case multiplier of 15 would be applicable, erred in granting compensation to the claimant by applying the multiplier of 16.

20. Having heard learned counsel for the appellant and having perused para 16 of the award under challenge, in my considered view, this plea of the appellant is liable to be rejected.

21. The multiplier which has to be awarded in such like cases where the age of the victim is 16 years, has been clearly spelled out by the Hon'ble Supreme Court in its judgment in ***Sarla Verma (Smt) and others*** Versus ***Delhi Transport Corporation and another,*** reported in ***2009 (6) SCC 121***. As per the said judgment of the Hon'ble Supreme Court, in the present case, the claimant was entitled to the multiplier of 16. It appears to me that in para 15 of the award there appears to be a typographical error in the award, wherein "multiplier of 15" has been wrongly typed instead of "multiplier of 16". In para 40 of the judgment of the Hon'ble Supreme Court in Sarla Verma's case (supra), in the chart appended thereto, in column 4 against the age group of 31 to 35 years, multiplier of 16 is mentioned. In para 42 of the same judgment, Hon'ble Supreme Court has held that the multiplier to be used should be as mentioned in column 4 of the table in para 40 thereof. In this view of matter, learned Tribunal has rightly applied the multiplier of 16 and there is no error in said finding returned by the learned Tribunal.

(b) Learned Tribunal has erred in granting an amount of ₹50,000/- under the head attendant charges, pain and suffering and transportation charges, which amount was on the higher side:-

22. Learned counsel for the appellant has argued that amount of ₹50,000/-, which has been awarded by the learned Tribunal in favour of the claimant on account of attendant charges, pain and suffering and transportation charges, is on the higher side and the claimant in fact is not entitled to anything above ₹20,000/- to ₹25,000/- as the claimant has not placed any material on record to substantiate that he was entitled to an amount of ₹50,000/- under these heads.

23. On the other hand, learned counsel for respondent No.1/ claimant has argued that the amount so awarded by the learned Tribunal was a reasonable amount and the same by no stretch of imagination could be termed to be on the higher side because this amount stood awarded by the learned Tribunal under three headings i.e. attendant charges, pain and sufferings and transportation charges.

24. Having heard learned counsel for the parties and having gone through the record of the case, in my considered view, it cannot be said that the amount of ₹50,000/- which has been awarded by the learned Tribunal under three heading I.e. transportation charges, attendant charges and pain and sufferings, can be said to be on the excessive side.

25. Undoubtedly, as is borne out from the record, as a result of the accident, the claimant/ respondent has suffered 10% permanent disability. It is clearly borne out from the record that an amount of approximately ₹35,000/- was ordered to be reimbursed to him on account of medical expenses. It has been proved on record that after the accident, the claimant was taken to the Hospital at Shahpur in district Kangra, from where he was shifted to Dr**.** RPGMC Hospital, Tanda.After remaining admitted in Tanda hospital for one day, he was shifted to Bhinder Hospital, Pathankot, where he remained admitted from 8.12.2008 to 21.12.2008. The injuries which have been suffered by the claimant are grievous injuries and the same have been duly proved by PW-2 Dr. G.D.

26. Hon'ble Supreme Court in***ICICI Lambard General Insurance Company Limited*** Versus ***Ajay Kumar Mohanty 2018 ACJ 1020***, in a claim for compensation under Section 166 of the Motor Vehicles Act arising out of a disability sustained by the claimant therein as a result of a motor accident in which the claimant therein had suffered from

temporary disability, *inter alia* ordered compensation of ₹2,00,000/- towards trauma, pain and sufferings.

27. Similarly, in ***Mallikarjun*** Versus ***Divisional Manager, National Insurance Co. Ltd. and another***, Hon'ble Supreme Court in a case of motor vehicle accident where a child had suffered disability, held as under:-

> " 12. Though it is difficult to have an accurate assessment of the compensation in the case of children suffering disability on account of a motor vehicle accident, having regard to the relevant factors, precedents and the approach of various High Courts, we are of the view that the appropriate compensation on all other heads in addition to the actual expenditure towards treatment, attendant, etc., should be, if the disability is above 10 per cent and up to 30 per cent to the whole body, ₹3,00,000; up to 60 per cent, ₹4,00,000; up to 90 per cent, ₹5,00,000 and above 90 per cent, it should be ₹6,00,000. For permanent disability up to 10 per cent, it should be ₹1,00,000, unless there are exceptional circumstances to take a different yardstick".

28. In view of the judgments of the Hon'ble Supreme Court cited hereinabove also, it cannot be said that an amount of ₹50,000/- which has been awarded by the learned Tribunal to the claimant under the headings i.e. attendant charges, pain and sufferings and transportation charges, can be said to be excessive. In my considered view, the amount so awarded by the learned Tribunal keeping in view the fact that the claimant suffered grievous injuries and has been left permanently disabled to the extent of 10%, is a reasonable amount and the same calls for no interference.

(c) Learned Tribunal had erred in not appreciating that the Insurance Company was not liable to indemnify the owner because as on the date of the accident, the vehicle was not having valid Registration Certificate:-

29. Learned counsel for the appellant has argued that the impugned award is further not sustainable in the eyes of law as the learned Tribunal has erred in not appreciating that as the vehicle which was insured by the present appellant was not having a valid Registration Certificate as on the date when the accident took place, the Insurance Company was not liable to be compensated.

30. Record demonstrates that the Registration Certificate of the vehicle in issue was not renewed after the expiry of statutory period of 15 years and the owner of the vehicle had also not paid any tax after 2006. However, the fact of the matter is that despite these facts, the Insurance Company undertook the Insurance of the vehicle w.e.f. 9.12.2007 upto the midnight of 8.12.2008 after charging premium from the owner of the car. As has also been held by the learned Tribunal, there is no material placed on record by the appellant/ Insurance Company to demonstrate that the vehicle in issue was not fit to be plied on the road or that the accident took place due to the unfitness of the car in question. This Court concurs with the findings returned by the learned Tribunal that in the absence of any evidence that the vehicle was either unfit to be plied on road or the accident took place due to the unfitness of the vehicle in issue, the Insurance Company cannot escape its liability to indemnify the owner.

31. Appellant company has also not been able to prove that the vehicle which was a private car was being used for any purpose other than for which it could have been used as per the Registration Certificate. Even otherwise, in my considered view, the onus was also upon the Insurance Company to have had satisfied itself when it undertook the

insurance of the vehicle either by way of renewal or otherwise from 9.12.2007 onwards, that the vehicle was possessing a valid Registration Certificate. At the time of charging premium, none of these things are taken into consideration by the Insurance Company, but when it comes to indemnifying the insured then all such like pleas are raised by the insurer to defeat the claim of the insured, which cannot be permitted.

32. In view of the above discussion, this plea of the appellant is also rejected.

(d) That the learned Tribunal erred in not appreciating that as the driver of the vehicle was not possessing a valid driving licence on the date when the accident took place, therefore, the Insurance Company could not have been burdened with the claim amount by the learned Tribunal:-

33. Learned counsel for the appellant has argued that the award passed by the learned Tribunal whereby it has held the Insurance Company to be liable to indemnify the owner and pay compensation to the claimant is erroneous and the same is liable to be set aside. Learned counsel has argued that it is apparent from the record that Mukesh Kumar Abrol, who was driving the car at the time when the accident took place, was not possessing a valid driving licence. He has argued that RW-3 Jatinder Sharma, Junior Assistant from the office of D.T.O. Jalandhar, placed on record Ext.RX, copy of the driving licence of respondent Mukesh Kumar which revealed that licence No.R3586 was not in the name of Mukesh Kumar Abrol, but was issued in the name of one Naveen Chawla son of Sham Dass Chawla, resident 55/75, Green Model Town, Jalandhar and it was valid upto 18.5.2014 for scooter and car. On these basis he has argued that as it stood proved on record that the driver was not possessing a valid licence as on the date when the accident took place, learned Tribunal erred in directing the Insurance Company to indemnify the owner in paying the amount of compensation.

34. On the other hand, learned counsel for the respondents have argued that the factum of the driver possessing a fake licence was not in the knowledge of the owner of the vehicle and this has categorically come in the statement of the owner of the vehicle that he had seen the licence before handing over the car to the driver and as at the relevant time, the licence shown to the owner was in the name of respondent Mukesh Kumar, nothing more was to be inquired into by the owner of the vehicle as the same clearly demonstrated that the owner of the vehicle acted prudently before handing over his car to respondent Mukesh Kumar.

35. I have given my considered thought to the rival contentions of the learned counsel for the parties. It is not in dispute that the licence of respondent of Mukesh Kumar Abrol was bearing No.R3586 and the Junior Assistant from the office of D.T.O. Jalandhar i.e. the place from where the licence was issued, has proved that the said licence was not issued in the name of Mukesh Kumar, but was issued in the name of Naveen Kumar Chawla son of Sham Dass Chawla. Now in this background, what has to be seen is as to whether the owner of the car was aware of the fact that the person to whom he was handing over the car was not possessing a valid driving licence at the relevant time or not?

36. It is not in dispute that respondent Mukesh Kumar, to whom the vehicle was given by owner i.e. respondent Rimpi Kumar, was his friend and there was no relation of driver and employer between Mukesh Kumar and Rimpi Kumar. It has come in the statement of Rimpi Kumar that before he gave the car for being driven to Mukesh Kumar, he had seen his licence. This he stated so in a suggestion so put to him in his cross-examination by the learned counsel for the claimant.

37. Hon'ble Supreme Courtin ***(2018) 8 SCC 799 titled as Ram Chandra Singh*** Versus ***Rajaram and others***,has held that insurer would be absolved if owner was aware that the licence was fake, yet it permitted the driver to drive the vehicle. To be more specific, Hon'ble Supreme Court in para 11 of the said judgment has held as under:-

> " 11. Suffice it to observe that it is well established that if the owner was aware of the fact that the licence was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving licence is fake, per se, would not absolve the insurer. Indubitably, the High Court noted that the counsel for the appellant did not dispute that the driving licence was found to be fake, but that concession by itself was not sufficient to absolve the insurer"

38. In this case there is nothing on record to demonstrate that the owner was aware that the licence possessed by respondent Mukesh Kumar was a fake licence. This fact has come on record only after deposition of RW-3 Jatinder Kumar, Junior Assistant from the office of D.T.O. Jalandhar.

39. A perusal of the award passed by the learned Tribunal also demonstrates that the learned Tribunal has categorically held that burden was upon the Insurance Company to have had specifically pleaded and proved, as also established that the owner was having knowledge that the driving licence produced by respondent Mukesh Kumar was fake, yet despite this fact he allowed respondent Mukesh Kumar to drive this car and in the absence of any specific proof and evidence in this regard, Insurance Company could not escape from its liability.

40. In my considered view, findings so returned by the learned Tribunal are inconsonance with the law laid down by the Hon'ble Supreme Court, refer to hereinabove and therefore, it cannot be said that the learned Tribunal has erred in directing the Insurance Company to indemnify the owner of the vehicle in paying the compensation.

41. In view of my findings returned hereinabove, as this Court does not finds any merit in the present appeal, the same is dismissed. Pending miscellaneous application(s), if any, stand disposed of. Interim order, if any, also stands vacated.

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

Dila Ram ….Appellant/plaintiff

Versus

Jalam Ram & others …Respondents/defendants.

RSA No. 58 of 2014
Decided on: 05.08.2019

Limitation Act 1963 – Sections 64 & 65– Adverse possession– Joint land– Proof– Held, land purchased by father in name of his five sons i.e., parties to litigation– Land recorded in joint ownership of plaintiff and defendant No.1– Defendant No. 1 never agreed to transfer his share in favour of plaintiff – Presumption of truth attached with revenue entries– Otherwise also, plaintiff can not lay suit for claiming ownership by way of adverse possession– RSA dismissed. (Paras 9, 12 & 13)

Case referred:
Gurdwara Sahib vs. Gram Panchayat Village Sirthala and Another, 2014 (1) SCC 669

For the appellant : Mr. Jyotirmay Bhatt, Advocate.
For the Respondents : Mr. Lalita Verma, Advocate, for respondent No.1.
None for respondents No.2 to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this appeal, the appellant has challenged the judgment and decree dated 13.12.2013, passed by the learned Additional District Judge-(I), Mandi, District Mandi, H.P. (Camp at Karsog), in Civil Appeal No.16/2013, vide which learned Appellate Court while allowing the appeal filed by present respondent No.1, set aside the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Karsog, District Mandi, H.P., in Civil Suit No.19 of 2003/ 22 of 2012, titled as Dila Ram Versus Jalam Ram and others, which suit stood decreed by the learned trial Court in favour of the plaintiff/ present appellant, vide judgment and decree dated 27.12.2012.

2. Facts necessary for the adjudication of the present appeal are as under:-

Appellant/plaintiff (hereinafter to be referred as "plaintiff") filed a suit for declaration and correction of revenue entries against the defendant and proforma defendants, *inter alia* on the ground that the suit land measuring 25-19-16 bighas was recorded in the ownership of Param Dev, defendant No.1 and proforma defendants No.2 to 4. As per the plaintiff, earlier land was purchased by one Nard Ram, who remained in possession of the same since the year 1960. Mutation of the land was attested in the name of Nard Ram as also his four brothers namely Karam Dass, Mast Ram, Jalam Ram and Megh Singh, in equal share. Nard Ram, Karam Dass, Mast Ram and Megh Singh changed the ownership in the name of Param Dev, Daulat Ram, Narain Dass and Hari Singh. However, Jalam Ram changed the ownership of his share in the name of one Dile Ram.

3. According to the plaintiff, he was in possession over the suit land since the time of settlement i.e. since the year 1968 and he had perfected his title over the suit land against Jalam Ram, by way of adverse possession and revenue entries reflecting defendant No.1 as owner of the suit land, were liable to be changed. As per the plaintiff, cause of action arose on 1.1.2003, when defendant did not agree for change of ownership of the suit land despite plaintiff asking him repeatedly to do so.

4. The suit was contested by the defendants, *inter alia* on the ground that the suit land was purchased by five brothers and accept defendant No.1, other co-sharers relinquished their respective shares in favour of Param Dev, Daulta Ram, Narain Dass and Hari Singh. Defendant No.1 denied that possession over the suit land was with the plaintiff. Defendant No.1 stated that he was residing within Sub-Tehsil Nihri, Tehsil Sundernagar, District Mandi, H.P. and that plaintiff had no cause of action to maintain the suit nor any right to sue the defendant had accrued in his favour.

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

"1. Whether the plaintiff has perfected his title by way of adverse possession? OPP

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

3. Whether the suit is bad for mis-joinder and non-joinder of necessary party? OPD

4. Whether the plaintiff has no cause of action and locus-standi to file the present suit? OPD

5. Relief".

6. On the basis of evidence led by the parties in support of their respective contentions, learned Trial Court returned the following findings on the issues so framed:-

"Issue No.1	:	Yes.
Issue No.2	:	Not pressed.
Issue No.3	:	Not pressed.
Issue No.4	:	Not pressed.
Relief	:	Suit of the plaintiff is decreed as per operative part of the judgment".

7. The suit was thus decreed by the learned trial Court *inter alia*, by holding that the evidence demonstrated that the plaintiff was in cultivating possession of the suit land and that he had perfected his title by way of adverse possession. Learned trial Court relying upon the statements of plaintiff's witnesses as also the statement of defendant Jalam Ram held that Jalam Ram himself had admitted that Dile Ram was coming in possession and cultivating the suit land and that there was no partition between the parties. It held that Jalam Ram had admitted that Dile Ram was paying land revenue of his share of land at village Soja. On these basis, learned trial Court held that defendants could not substantiate that possession of the plaintiff was not adequate, in continuity and in publicity adverse to him and held that plaintiff had become owner of the suit land by way of law and had perfected his title by way of adverse possession.

8. Feeling aggrieved, defendant No.1 preferred an appeal.

9. Learned Appellate Court vide judgment and decree dated 13.12.2013, allowed the appeal and set aside the judgment and decree passed by the learned trial Court. Learned Appellate Court held that learned trial Court had erred in deciding the suit on the basis of oral evidence, whereas documentary evidence clearly demonstrated that defendant No.1 stood recorded as a co-sharer and in the revenue record, Jalam Ram was duly recorded as joint owner in possession over the suit land and said entries were not rebutted by the plaintiff by leading cogent and convincing evidence. Learned appellate Court further held that plaintiff had not placed on record any agreement to the effect that defendant Jalam Ram had ever undertaken to transfer his share in his name as he was seven to eight years old when the land was purchased by his father in the name of five brothers. Learned appellate Court also held that presumption of truth was attached to the revenue entries and co-sharers could not be permitted to take the plea of adverse possession, more so when the plea of adverse possession was being claimed by the plaintiff. On these basis, learned Appellate Court dismissed the suit and allowed the appeal.

10. Feeling aggrieved, the plaintiff/appellant has filed the present appeal, which was admitted by this Court on the following substantial question of law:-

> "1. Whether on account of mis-appreciation of the pleadings and misreading of the oral as well as documentary evidence available on record, the findings recorded by the lower appellate Court are erroneous and, as such, the judgment and decree impugned in this appeal being perverse and vitiated is not legally sustainable?

11. I have learned counsel for the parties and have also gone through the judgments and decrees passed by both the learned Courts below as well as record of the case.

12. It is not in dispute that the genesis of the claim put forth by the plaintiff before the learned trial Court was the plea of adverse possession. His claim was that defendant No.1 never remained in possession of the suit property and as the same remained under the cultivating possession of the appellant/plaintiff, therefore, he had perfected his title by way of adverse possession.

13. Learned Appellate Court after correct appreciation of the evidence on record set aside the judgment and decree passed by the learned trial Court, vide which the learned trial Court held that plaintiff had perfected his title over the suit land by way of adverse possession. While setting aside the said judgment and decree, learned Appellate Court not only has correctly held that the evidence on record, demonstrated that as per the revenue record, suit land was recorded in the name of defendant No.1 as owner in possession as a co-sharer, but it further rightly held that plaintiff could not otherwise have filed a suit on the plea of adverse possession.

14. During the course of arguments, learned counsel for the appellant could not demonstrate that the findings returned by the learned Appellate Court that documentary evidence on record, demonstrated that it was defendant No.1 who was recorded as owner in possession of the suit land as a co-sharer, were perverse findings not borne out from the record.

15. Not only this, as the suit of the plaintiff was based on the plea of adverse possession, the same otherwise could not have been decreed in view of the law laid down by the Hon'ble Supreme Court in ***2014 (1) SCC 669 titled as Gurdwara Sahib*** Versus ***Gram Panchayat Village Sirthala and Another***, in which the Hon'ble Supreme Court has been pleased to held as under:-

> **"**8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/ defence".

Substantial question of law No.1 is answered accordingly.

16. In view of the discussion hereinabove, as there is no merit in the present appeal, the same is accordingly dismissed, so also, pending miscellaneous application(s), if any. Interim order, if any, stands vacated.

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

Raghu Nath Sharma …..Petitioner.
Versus
Union of India & others ….. Respondents.

CWP No.2006 of 2016
Date of decision: 07.08.2019

Constitution of India 1950-Articles 14 & 226 – Past army service – Counting of towards pension etc- -Writ jurisdiction – Delay – Effect – Petitioner got discharge from Army in 1966 – Joined SSB and superannuated in 1997 from there - Filing Writ in 2016 and seeking counting of his past army service rendered with Army from May 1960 to December 1966 for purposes of increments, pension etc– Held, there is no cogent explanation from petitioner for the delay in filing Writ– Simply because his belated representation stands responded by the authorities, it shall not condone delay, which exists in petitioner's approaching court for the relief prayed. (Paras 3 & 4)

For the petitioner Mr. Ashwani Sharma, Advocate.
For the respondents Mr. Balram Sharma, Senior Panel Counsel.

The following judgment of the Court was delivered:

<u>Ajay Mohan Goel, J. (Oral)</u>

By way of this petition, the petitioner has prayed for the following relief:-

> "i) That a Writ of certiorari may kindly be issued for the quashing of impugned communication made by the respondent authorities vide Annexure P-12 stating therein that the petitioner is not entitled for increments and pensionary benefits for past Army services from 12th May, 1960 and discharged on compassionate grounds w.e.f. 30th December, 1966 as he was not reemployed under ex-servicemen quota and was already disbursed with service gratuity for the aforesaid period.
>
> ii) That a Writ of Mandamus be issued by directing the respondent authorities to count past Army Services of the petitioner from 12th May, 1960 to 30th December, 1966 for a period of six years 7 months and 19 days for the purpose of increments, pensionary and other consequential benefits".

2. In brief, case of the petitioner is that the service which was rendered by him as a driver (MT) in the Armed Cop Regiment with the Indian Armed Forces w.e.f. 12.5.1966 to 30.12.1966 have to be counted for the purposes of determining his pension, to which he was entitled to, having served with the Sashastra Seema Bal (SSB) from 13.10.1967 to 31.11.1997. The petitioner is also aggrieved by communication dated 6.8.2015 Annexure P-12, vide which his representation for counting of his Military service for grant of pensionary benefitsstands rejected by respondent No.3.

3. Learned counsel for the respondents has challenged the maintainability of the present petition, *inter alia* on the ground that the same was grossly hit by delays and latches. He has argued that cause of action, if any, arose in favour of the petitioner when he superannuated from Sashastra Seema Bal (SSB) in the year 1997 and no cogent explanation has been given by the petitioner as to why the representation which was filed by him and

which stood rejected vide Annexure P-12, was filed in October, 2014 i.e. approximately after 17 years of his superannuation.

4. In my considered view, there is merit in the said objection which has been taken by learned counsel for the respondents, with regard to the maintainability of the petition. Simply because a belated representation of the petitioner stands responded by the authorities, the same in my considered view shall not condone the delay which exists inthe petitioner approaching the appropriate authorities/ this Court for the relief already enumerated hereinabove.

5. Faced with the situation, learned counsel for the petitioner submits that as there are certain factual inaccuracies in order dated 6.8.2015, he may be permitted to withdraw this petition with liberty to bring those factual inaccuracies into the knowledge of the authorities concerned, so that appropriate action upon the same be taken by them. Petition is accordingly dismissed as withdrawn. As far as liberty prayed for by the petitioner is concerned, this Court cannot stop the petitioner from filing any representation and hence, if any representation is filed by the petitioner, but of course, the respondents shall deal with it in accordance with their rules. Pending miscellaneous application(s), if any, stand disposed of, accordingly.

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

Kewal Singh …… Petitioner/defendant.
Versus
Raju Ram …… Respondent/plaintiff.

CMPMO No.537 of 2018
Date of decision: 08.08.2019

Constitution of India, 1950 – Article 227 – Supervisory jurisdiction – Nature of – Held, in exercise of jurisdiction under Article 227 of Constitution of India, High Court in routine does not re-appreciate findings returned by lower courts – It will interfere only if there is any perversity in the order which if not cured would result in grave injustice to party – If view arrived at by lower court is one of possible view which could have had been arrived at on basis of factual matrix before it, then High Court need not interfere with view so taken by lower court. (Paras 11 & 12)

Case referred:
Shakunthalamma & others vs. Smt. Kanthamma & others, AIR 2015 Karnatka 13

For the petitioner : Mr. Rupinder Singh, Advocate.
For the respondent : Mr. Prakash Sharma, Advocate.

The following judgment of the Court was delivered:

<u>Ajay Mohan Goel, J. (Oral)</u>

By way of this petition, filed under Article 227 of the Constitution of India, the petitioner has challenged order dated 3.8.2018, passed by the Court of learned Civil

Judge, Rajgarh, District Sirmaur, H.P. in Civil Miscellaneous Application No.147 of 2018, titled as Raju Ram Versus Kewal Singh and Civil Miscellaneous Application No.168 of 2018 titled as Kewal Singh Versus Raju Ram, as also judgment dated 27.10.2018, passed by the Court of learned Additional District Judge, Sirmaur, District at Nahan, District Sirmaur, H.P. in Civil Miscellaneous Appeal Nos.21-N/14 of 2018, titled as Kewal Singh Versus Raju Ram and Civil Miscellaneous Appeal No.22-N/14 of 2018 titled as Kewal Singh Versus Raju Ram.

2. Brief facts necessary for the adjudication of present petition are that a Civil Suit has been filed by the respondent/plaintiff Raju Ram (hereinafter to be referred as the "plaintiff) in the Court of learned Civil Judge, Rajgarh, District Sirmaur, H.P. i.e. Civil Suit No.153/1 of 2017 for permanent prohibitory injunction for restraining the defendant (present petitioner) from raising construction and causing any interference over the suit land comprised in khasra No.552/1 and 555/3, kita-2, measuring 336.55 square metres, situated in revenue village Rajgarh 1st, Tehsil Rajgarh, District Sirmaur, H.P., either by himself or through his agents, servants etc.

3. Alongwith the suit, an application under Order 39, Rule 1 and 2 of the Code of Civil Procedure was filed by the plaintiff, praying for an interim injunction against the defendant from raising construction and from changing nature of the land comprised in khasra No.552/1 and 555/3 i.e. the suit land. Petitioner also preferred application under Order 39, Rule 1 & 2 of the Code of Civil Procedure before the learned trial Court.

4. Both these applications were disposed of by the learned trial Court vide order dated 3.8.2018. While the application filed by the present petitioner was dismissed as not maintainable in the absence of there being any Counter Claim filed by the defendant, the other application filed by the respondent herein was allowed by the learned trial Court and the petitioner was restrained from interfering and raising construction on the land comprised in khasra No.552/1/2and 555/3 and parties were further directed to maintain status-quo in respect of khasra No.552/1/1 till the disposal of the main suit.

5. Learned trial Court while allowing the application filed by the plaintiff held that plaintiff had been able to satisfy the tests of prima facie case, balance of convenience and irreparable loss. While disallowing the contention of the petitioner/ defendant therein with regard to the pedency of the partition proceedings, learned trial Court held that the contention of the defendant that the partition proceedings were carried out at the back of the petitioner were contrary to the record, because record demonstrated that after the report of partition was received from Field Kanungo, Assistant Collector, 1st Grade ordered the service of the parties and on 24.11.2016, the presence of the defendant who was arrayed as respondent No.21 in the partition proceeding, was duly marked. Defendant alongwith other respondents, was appearing before the Assistant Collector, 1st Grade and had consented to the partition proposed by the Field Kanungo at the spot, therefore, claim that the partition proceedings were concluded at the back of the defendant stood belied.

6. Learned trial Court further held that it was undisputed that land comprised in khata khatauni No.27/62 to 70, total measuring 4055.45 square metres was joint between the parties and plaintiff had filed an application before Assistant Collector, 1st Grade, Rajgarh for partition of the joint land. The case was decided by the Assistant Collector vide order dated 4.1.2017 and khasra No.552/1, measuring 210.15 square metres and 555/3, measuring 126.40 square metres were allotted to the plaintiff. In the jamabandi for the year 2013-14, defendant along with his brother was shown in possession of khasra Nos. 551 and 552 and a separate khatauni bearing No.69was carved out, but the total area of the said khasra numbers was 400.76 square metres. Defendant and his brother had in

total purchased 6 biswas of land while comes out to 242.7866112 square metres and if instrument of partition was perused then defendant alongwith his brother were allotted 4 khasra numbers namely 551, 552/2, 552/3 and 552/4, measuring 242.98 square metres and thus defendant and his brother were allotted land in proportion to their share in the joint holding. Learned trial Court further held that when the land is joint, a co-sharer can with the consent of other co-sharers be in possession of land more than his share, but when the partition stood conducted by metes and bound, then such co-sharer who was though in possession of more than his share of the joint land will only be allotted such area which falls to his share. It further held that such co-sharer would not be entitled to claim the excess area which is in his possession.

7. Learned trial Court thus held that the plaintiff was able to demonstrate prima facie case, balance of convenience, as also irreparable loss in case his prayer for grant of interim relief was not accepted.

8. Feeling aggrieved, petitioner herein filed appeals before the learned Appellate Court. Learned Appellate Court vide order, dated 27.10.2018, while concurring with the findings returned by the learned trial Court, dismissed the appeals.

9. Learned Appellate Court held that record demonstrated that defendant was in excessive possession of the land then his entitlement and therefore, he and his brother were allotted the land as per their entitlement and excess share was given to the plaintiff and possession thereof was also delivered to the plaintiff on spot. It took note of the fact that defendant had stated that the orders passed in the Partition Proceedings stood assailed by him by way of a Revision Petition before the Divisional Commissioner. It also concurred with the findings returned by the learned trial Court that the petitioner had actively participated in the Partition Proceedings. It observed that as per record defendant was specifically notified that possession on the spot shall be delivered on 29.8.2017 and defendant had signed this document and there was no explanation regarding the same either in the written statement or in the application filed by him. It also negated the plea of the petitioner that the order passed by the Assistant Collector was without jurisdiction and was null and void order by observing that Assistant Collector, 1st Grade was competent to conduct partition proceedings under the H.P. Land Revenue Act and the order passed by the said Authority was a valid order subject to appeal. On these basis, learned Appellate Court while concurring with the finding returned by the learned trial Court, dismissed the appeal filed by the present petitioner.

10. Feeling aggrieved, petitioner/ defendant has preferred the present petition.

11. I have heard learned counsel for the parties and also gone through the impugned orders as well as other documents appended with the present petition. It is settled law that in exercise of the jurisdiction under Article 227 of the Constitution of India, the High Court in routine does not re-appreciates the findings returned by the learned Courts below as an Appellate Court. The High Court interferes only if there is any perversity in the order which if not cured would result in grave injustice to the party. Learned trial Court after appreciation of the contention of the respective parties and after taking into consideration the documents on record, came to the conclusion that the applicant therein had made out a case for grant of interim injunction. The findings so returned by the learned trial Court have been upheld by the learned Appellate Court.

12. Learned counsel for the petitioner on the strength of the documents which have been appended with the present petition made an endeavour to persuade this Court to come to the conclusion that view other than arrived at by the learned trial Court was also

possible in the facts of the case. As per me, this is no ground to interfere with the orders passed by the learned Courts below. If the view arrived at by the learned Courts below is one of the possible view, which could have had been arrived at on the basis of the factual matrix before it, then the High Court need not interfere with the view so taken by the learned Court below under Section 227 of the Constitution of India. As both the learned Courts below have come to the conclusion that in terms of the Partition Proceedings, plaintiff was in possession of the land, which came to him as per the Partition Proceedings, it cannot be said that interim order passed by the learned trial Court and upheld by the learned Appellate Court is bad in law.

13. That being the case, no case for interference with the impugned orders has been made out by the petitioner because it is not the case of the petitioner that either the orders were passed by the learned Courts below by not adhering to the principles of natural justice nor it is the case of the petitioner that the learned Courts below were not having any authority or jurisdiction to pass the impugned orders.

14. Now, I will deal with the contentions of the learned counsel for the petitioner that the order passed by the learned trial Court that the application filed by the defendant therein under Order 39, Rule 1 and 2 of the Code of Civil Procedure was not maintainable, is a perverse finding.

15. Learned counsel for the petitioner has argued that it is not as if under the provisions of order 39, Rule 1 and 2 of the Code of Civil Procedure, it is only the plaintiff, who can approach the learned trial Court for grant of interim relief and said an application can also be filed by the defendant. He submitted that this important aspect of the matter was ignored by the learned trial Courts while holding that in the absence of there being a counter claim, application filed under order 39, Rule 1 and 2 of the Code of Civil Procedure on behalf of the defendant was not maintainable. Learned Counsel has relied upon the judgment of the High Court of Karnataka, titled as ***Shakunthalamma & others*** Versus ***Smt. Kanthamma & others*** reported in ***AIR 2015 Karnatka 13***.

16. Order 39, Rule 1 and 2 of the Code of Civil Procedure reads as under:-

> “1. Cases in which temporary injunction may be granted- Where in any suit it is proved by affidavit or otherwise-
>
> (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
>
> (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,
>
> (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]
>
> the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.
>
> 2. Injunction to restrain repetition or continuance of breach- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either

> before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.
>
> (2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit".

17. A perusal of the said statutory provisions demonstrates that Court can grant a temporary injunction in case the eventualities which have been culled out in Clauses 'a', 'b' and 'c' thereof are fulfilled.

18. Clauses 'b' and 'c' of Rule (1) clearly contemplates passing of a restraint order against the defendant. However, Clause 'a' does not uses the word "defendant". The word used therein is "any party to the suit".

19. By interpreting the said provisions of Order 39, Rule 1 of the Code of Civil Procedure, the full Bench of the High Court of Karnataka in Shakunthalamma & others (supra). has held, and rightly so, that in case a defendant approaches the trial Court and makes out a case under the provisions of Order 39, Rule (1) (a) of the Code of Civil Procedure, then the Court can consider such application filed by the defendant on merit. This Court concurs with the findings so returned by the High Court of Karnataka.

20. However, coming to the facts of the present case, the application was so filed by the present petitioners before the learned trial Court was not in terms of provisions of Order 39, Rule (1) (a) of the Code of Civil Procedure. Prayer made in the application which was filed under Order 39, Rule 1 and 2 of the Code of Civil Procedure before the learned trial Court by the petitioner, reads as under:-

> "It is, therefore, prayed that the application may kindly be allowed and respondents may be directed not to interfere in the suit land either themselves or through their agents, servants, assignee etc."

The entire thrust of the application was that the learned trial Court may direct the respondents i.e. the plaintiff therein, not to interfere in the suit land either himself or through his agents etc. Such an application in my considered view on behalf of the defendant is not envisaged under the provisions of Order 39, Rule 1 and 2 of the Code of Civil Procedure. A defendant can maintain an application only if he is able to prove that <u>any property in dispute in a suit is in danger of being wasted, damaged or alienated</u>. This was not the case made out in the application by the defendant.

21. Therefore, in view of above findings, as this Court does not finds any merit in the present petition, the same is dismissed. However, it is clarified that the observations which have been made by this Court in this judgment are only for the purposes of the adjudication of the present petition. It is clarified that the proceedings which have been initiated by the present petitioner before the Revenue Authority, shall be decided by the said Authority on its merit, completely influenced by any observation made by this Court in the present case. Petition stands disposed of in above terms so also pending miscellaneous application(s), if any.

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

Himachal Pradesh State Electricity Board Ltd.. ...Petitioner.
Versus
HCL Infotech Limited ....Respondent.

CARBC No. 7 of 2018
Reserved On : 26.7.2019
Decided on : 13th August, 2019

Arbitration and Conciliation Act, 1996– Section 34– Award– Objections thereto– Maintainability– Held, Arbitrator had complied with principles of natural justice before announcing award– Award ex-facie not arbitrary or suffering from any vices as encapsulated in judgment titleled Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49- It is a reasonable award and is accordingly validated– Objections dismissed. (Paras 10 & 11)

Case referred:
Associate Builders vs. Delhi Development Authority, (2015)3 SCC 49

For the Petitioner: Mr. J.S Bhogal, Sr. Advocate with Mr. Satish Sharma, Advocate.
For the Respondent: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The Board/petitioner herein, is aggrieved, by the impugned award, rendered by the sole Arbitrator on 11.5.2018, wherethrough, the dispute engaging, the, parties at contest, vis-a-vis, the insistences made by the Contractor/respondent herein, upon, the petitioner herein, for, issuance of C-Forms or differential tax, to, the tune of Rs.1.56 crore, with, apposite interest levied thereon, was/were answered, vis-a-vis, the contractor, hence by the learned sole arbitrator. Necessarily hence, the respondent-Board, in, the apposite arbitration case, being aggrieved therefrom, has, hence through, the, instant application, cast under the provision of Section 34 of the Arbitration and Conciliation Act, strived for, begetting reversal thereof.

2. The crux of the dispute, whereon, the legal contestants are embroiled, is, encapsulated in the interpretation, to be afforded, to the phrase "the purchaser will provide Central Sales Tax Form-C, whenever applicable". Clause 6(c) of the award letter, and, clause 15.3 of General Conditions of Contract, for, enabling the making, of, an appropriate interpretation thereof, is/are, extracted hereinafter.

> "Clause 6(c) and clause 15.3: For goods supplied from within the Purchaser's country, the supplier shall be entirely responsible for all taxes, duties, entry tax, license fees, other levies etc, incurred until delivery of the Goods and Related service to the Purchaser. The Purchaser will prove Central sales tax Form C, whenever applicable."

3. Before making an adjudication, vis-a-vis, the afore requisite clause(s), and, also, prior, to, making an adjudication, vis-a-vis, the rival contention(s) reared, by the learned counsel(s), for, the contesting litigants, it, is imperative, to, grasp qua the gravamen

of the afore dispute, as, appertains, to, the necessity, of, the afore insistence(s), being made, by the contractor/respondent herein, upon, the Board/petitioner herein, hence standing engendered from (a) upon issuance of C-Forms, in, respect, of all requisite supplies, and, appertaining to the works awarded, vis-a-vis the contractor, thereupon, the liability of indirect sale/sale tax or the compliment, of, sale tax, being borne by the purchaser board, and, concomitantly, for, absence of issuance of C-Forms, the liability of tax, appertaining to penalty, and, qua interest, borne in a sum of Rs. 1,53,64,649/-, rather standing borne, by the respondent/contractor, (b) liabilities whereof reiteratedly, upon, issuance of requisite C-Forms, rather being both avoidable or baulkable. Significantly, hence the board/petitioner herein, has strived to escape, the afore liability, and, has maintained a firm espousal qua there being no necessity, for, issuance of C-forms, by it, vis-a-vis, the contractor/respondent herein.

4. Be that as it may, the afore extracted clauses, carried in the apposite contract, and, whereto, an, interpretation, is to be afforded, obviously are enjoined to be read alongwith, the mandate borne in Section 2(19) of the Electricity Act, 2003 (for short the Electricity Act), (i) wherein the afore relevant phrase “distribution system” stands defined, and, provision(s) whereof, stands extracted hereinafter, (a) given only upon, a, pointed interpretation, being made, of, the afores', rather would constrain this Court, to, conclude qua there being merit in the petition or it being unmeritworthy.

> “ Section 2(19) of the Electricity Act, 2003 distribution system” means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.”

5. Any affording of, an, interpretation, vis-a-vis, all the afore requisite, canons, and, qua the, hereinbefore extracted requisite provisions, also enjoins, an understanding, of, the innate signification, of, the phrase “distribution system”, defined in the Electricity Act, (i) wherein all the afore enumerated system(s) hence carry the statutory parlance, of “distribution system”, and, all the afore whereof appertain(s), vis-a-vis, “the system of wires, and, associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers”.

6. Be that as it may, it is also imperative, to, allude, vis-a-vis, the scope and domain, of the relevant contract, domain whereof, finds reference, in, clause 6 (c), of, the apposite contract, clause whereof stands extracted hereinbefore, (i) nowat, for, gauging whether the afore supplies, of various power related equipments, under, the R-APDRP' (Restructured-Accelerated Power Development Power Development Reform Program), as, made by the respondent/contractor, vis-a-vis, the board/petitioner herein, hence fall within the afore statutory signification, meted to, the, phrase, “distribution system”, as, defined in the Electricity Act, and, for hence an appropriate interpretation, being meted thereto, also enjoins an allusion being made, vis-a-vis, the, evidence adduced, before the learned Arbitrator. Significantly RW-1(Shri Sanjeev Maria) in his affidavit, comprised in Ex.RW-1/A, though, has not rendered, a, further testification, vis-a-vis, the afore supplies, of, various power related equipments, under, the R-APDRP, by the respondent, vis-a-vis, the petitioner, stricto sensu, falling, within, the, ambit of the phrase “distribution system”, embodied in the Act, (a) yet, when both CW-1(Shri Manas Kumar Dass), and, CW-2 (Shri Virender Kumar Pasricha), in their respective affidavits, embodied in Ex. CW-1/A, and, in Ex. CW-2/A, make clear echoings, qua the services rendered, by the claimant/respondent herein, under, the apposite contract comprising, supplies of various power related equipments, under, the R-APDRP Project plan, (b) and, when the latter, is, the prime project

of R-APDRP project, and, when the afore echoings, borne in Ex. CW-1/A, and, in Ex. CW-2/A respectively, authored by CW-1, and, by CW-2, remained uncontested, during, the course of theirs' being cross-examined by the learned counsel, for the authorized representative, of the board, thereupon, it generates an inevitable sequel, qua, the afore echoings, borne in the afore affidavits, embodied respectively, in Ex. CW-1/A, and, in Ex. CW-2/A hence, carrying, the apt, tenacity, and, apposite vigor.

7. Further thereonwards, even if RW-1, in his affidavit comprised in Ex. RW-1/A, has omitted, to, therein making any echoings, rather bearing absolute concurrence, with, the statutory connotation, meted to the phrase "distribution system", as occurs in the Electricity Act, (i) even rather the afore omission is of no aid to the petitioner/Board, to contend therefrom, that the afore requisite ingredients remaining unsatiated. Conspicuously, reiteratedly, when CW-1 and CW-2, in their respectively tendered affidavit(s), comprised in CW-1/A, and, in CW-2/A, (i) make therein explicit echoing, qua, hence all the ingredients appertaining, to, the phrase "distribution system", as, defined in the apt provision, of, the Electricity Act, being hence meted satiation, (ii) and, when the afore echoings, acquire clout, for, want of theirs, being thereon, hence cross-examined, also, (iii) thereupon, the, Board, is to be concluded, to, acquiesce, vis-a-vis, the afore, requisite ingredients borne, in the apposite provisions, of, the Electricity Act, rather being satiated by CW-1, and, CW-2, through their respectively tendered affidavits, borne in Ex. CW-1/A, and, in CW-2/A.

8. Moreover, even the petitioner/Board, has through, Annexure A, placed on record, before the learned Arbitrator, and, Annexure whereof, was appended by the claimant, in his rejoinder, to the reply of the Board, hence made echoings qua issuance, of C-Forms, vis-a-vis, the contractor, and, though the vigor, of, the afore admission, as strived to be stripped, of, its tenacity, by the Board/petitioner herein, contending qua its being erroneously issued, (i) yet, when no material exists on record, qua, disciplinary action being initiated, against, the Officer, who issued Annexure A, (ii) and, when from the afore discussion, this Court, draws a firm conclusion, vis-a-vis, the petitioner/board, acquiescing, vis-a-vis, the apposite echoings, borne in Ex. CW-1/A and in Ex. CW-2/A, (iii) cumulatively hence with Annexure A also carrying the afore requisite, acquiescences of the petitioner/board, does fortify, the afore inference, made by this Court, inference whereof, for, the afore reasons, are anvilled, upon, the uneroded echoings rendered, by, CW-1, and, by CW-2 in their respectively tendered affidavits, comprised, in Ex. CW-1/A, and, in Ex. CW-2/A.

9. Lastly the learned counsel for the aggrieved petitioner, has contented with much vigor, before this Court, that, with the commissioner concerned, (i) in the apposite affidavit borne in Ex. RW-1/A, opining, that the distribution system(s)/gadgets, supplied by the claimant/respondent herein, to the board/petitioner herein, rather not falling within the domain, of, the, statutory definition of "distribution system", occurring in the afore Act, (ii) thereupon, vigor if any, of the afore inference being blunted, and, maimed. However, when the apposite echoings borne in Ex.RW-1/A stood rendered, dehors, the Commissioner concerned meteing compliance, vis-a-vis, the principle(s) of natural justice, (iii) thereupon, it looses its sanctity, and, also when the Commissioner concerned, is not an expert, to render an opinion, vis-a-vis, the afore apposite therewith res controversia, rather when for the aforestated reasons, the petitioner had an opportunity to rebut the echoings, made in Ex. CW-1/A, and, in Ex.CW-2/A, wherethrough the ingredients borne, in the Electricity Act, beget satiation, (iv) whereas theirs neither cross-examining the afore, vis-a-vis the afore facet, (v) nor, thereafter best expert evidence, being adduced, (vi) thereupon for non-availment of the afore requisite steps, by the board/petitioner herein, rather constrains a

conclusion, qua, the petitioner being estopped, to, merely on anvil of Annexure R-1/A, contend that the supply(s) of afore gadgets/equipments/system, under, the R-APDRP, made by the contractor, vis-a-vis, the board/petitioner herein, not falling within the domain, of, the definition, of, "distribution system" as finds, occurrence in the apt provisions of the Electricity Act.

10. Even otherwise the view taken by the learned sole arbitrator, is, a reasonable view, and, when it is not ex-facie evident from the perusal of the records, vis-a-vis, the award being arbitrary, rather when the award is preceded, by the Arbitrator meteing compliance, vis-a-vis, the principle(s) of natural justice, thereupon when the requisite interfere-able vices, as, encapsulated in a judgment of the Hon'ble Apex Court, reported, in, (2015)3 SCC 49, titled as Associate Builders versus Delhi Development Authority, rather are not borne, in, the impugned award, thereupon, the impugned award before this Court, is, validated.

11. In view of the above, the instant petition is dismissed, alongwith all pending applications. The impugned award is maintained and affirmed. No costs.

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

Mohinder Singh and others …Appellants.
Versus
Roshan Lal and Others ….Respondents.

RSA No. 40 of 2007
Reserved on: 31.7.2019
Decided on : 13.8.2019

Specific Relief Act, 1963– Sections 34, 38 & 39– Suit for declaration, permanent prohibitory and mandatory injunction(s)– Grant of- Plaintiff claiming 'share am raasta' over suit land since long and alleging said land to have been wrongly included in land of defendants – Plaintiffs seeking removal of structure raised by defendants over said path– Trial court dismissing suit and first appellate court dismissing plaintiff's appeal– RSA- Held, on facts, revenue entries prepared at time of settlement showing existence of path over suit land ordered to be corrected by Settlement Officer– His order upheld by Financial Commissioner (Appeals) in revision and by High Court in Civil Writ Petition – Claim of 'share am raasta' over suit land thus can not be accepted – RSA dismissed. (Para 9)

For the Appellants: Mr. N.K Thakur, Sr. Advocate with Mr. Karanvir Singh, Advocate.

For the Respondents: Mr. R.K Gautam, Sr. Advocate with Ms. Megha Kapur Gautam, Advocate, for respondents No. 1,2,5(a), 6 to 8, 9(a), 9(b) and 10.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The plaintiffs/appellants' herein (for short the plaintiffs), suit for, rendition of a declaratory decree, as well as, for, rendition of a decree of mandatory, and, permanent injunction, stood dismissed, by the learned Sub Judge, 1st Class, Court No. II, Amb, District Una, H.P. (for short "trial Court"). In an appeal cast therefrom, by the aggrieved plaintiffs, before the learned Additional District Judge, Una, H.P (for short "first appellate Court"), the latter affirmed the findings recorded, by the learned trial Court.

2. The aggrieved therefrom, the plaintiffs, hence rear the instant RSA, before this Court, wherefrom, they strive to beget reversal, of, the impugned verdict(s).

3. The brief facts of the case are that the suit filed by the plaintiffs, for, a decree of declaration to the effect that area marked by letters ADLKJIA shown as such in the site plan measuring 0-00-99 hectares comprised in Khewat No. 128 min Khatauni No. 435 min with present khasra No. 1522 and area marked by letters ABDCGHFA measuring 0-00-80 hectares comprised in Khewat No. 129 min Khatanui No. 436 with present khasra No. 1509 as per misal Hakiyat Bandobast for the year 1986-87 situated in village Nari, Tehsil Amb, District Una, H.P (for short the suit land) are part of old khasra No. 630, 638 and 639 and as such are owned by the plaintiffs and are used as Shareaam rasta by the plaintiffs as well as other inhabitants of the village since ancestors. Settlement order of 21.5.1998 is prayed to be declared wrong, illegal and void. By way of mandatory injunction plaintiffs have prayed to remove super structure marked by letters ABCDEFG shown shown in red colour in the site plan and to restore the same to its original position. In a prayer of permanent injunction the plaintiffs have prayed for restraining the defendants from raising further construction and obstructing, blocking said passage marked by letter KLDCGHFAIJ in any manner. The land comprised in old khasra No. 630, 638 and 639 was owned by the plaintiffs, and, during settlement process in the village, new numbers were carved out of same and measurement was converted into metric system. Area marked by letters ADLKJIA shown in the site plan of the plaintiffs measuring 0-00-99 hectares now comprised in new khasra number 1522 is in actual part of old khasra Nos. 638 and 639 and in a similar manner area marked by letters ADCGHFA measuring 0-00-80 hectares comprised in new khasra No. 1509 is part of old khasra No. 630 and 638. Said land was used as Shareaam passage by the plaintiffs and other inhabitants of the village to egress and ingress to their abadis, cattles shed as well as to Bazar and fields. Settlement staff during settlement process without any basis has shown land comprised in khasra No. 1509 in the ownership of defendant No.4 and land comprised in khasra No. 1522 in the ownership of defendants No. 3,5,10 and 11 which is wrong and illegal. However, nature of said land was rightly shown by the settlement staff as shareaam passage as per actual and factual position. In case the said suit land is not found to be Shareaam passage of the plaintiffs, in that case the plaintiffs have acquired a easementary right in the passage by way of prescription. The passage in question is essential for the beneficial enjoyment of the abadies of the plaintiffs, which is situated over new khasra No. 1510 towards northern side of the passage. The settlement Collector Kangra, during the pendency of the suit has passed the order of correction of entries in respect of the suit land which is wrong and illegal and the appeal against the order of settlement collector Kangra is pending before Additional Commissioner (Appeals) Shimla. The defendants have no right and title to raise the construction forcibly and block the passage. Therefore the plaintiffs have prayed for declaration and injunction.

4. The defendants have contested the suit of the plaintiffs and have taken preliminary objections of maintainability, estoppel, non-joinder of necessary parties, bar of Section 10 of CPC, valuation and limitation. On merits the defendants have alleged that no such shareaam rasta is situated over the suit land and the same is in the possession of the defendants. The site plan filed by the plaintiffs is incorrect. During the settlement operation

wrong and illegal measurement was carried out on the spot and the nature of the Khasra No. 1522 has been wrongly written as Shareaam rasta, whereas, in fact the same is abadi. The defendants have already moved an application for correction of khasra Girdwari entries before the settlement authorities much prior to the filing of the suit. There is no question of acquisition of easementary right as alleged by the plaintiffs. Therefore, the defendants have prayed for the dismissal of the suit of the plaintiffs.

5. In the replication, the plaintiffs have reiterated and reasserted the contents the facts enumerated in the plaint and have controverted that of the written-statement.

6. From the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. Whether the suit land is owned by plaintiffs as alleged and used as 'Share-aam Rasta'? OPP
2. Whether the plaintiff is entitled to the relief of mandatory injunction, as prayed for? OPP
3. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP
4. Whether the suit is not maintainable? OPD
5. Whether the suit is bad for non-joinder of necessary parties? OPD
6. Whether the suit is liable to be stayed u/s 10 of the CPC? OPD
7. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction ? OPD
8. Whether the suit is time barred? OPD
9. Whether the suit is bad for mis-joinder of parties? OPD (1,4,6,7,8,9)

9-A Whether the order dated 21.5.1998 of settlement Collector, Kangra is wrong, illegal and void as alleged? OPP

10. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the suit of the plaintiffs. In an appeal, preferred therefrom, by the plaintiffs, before the learned First Appellate Court, the latter Court, hence, affirmed the findings recorded by the learned trial Court.

8. Now the plaintiffs have instituted the instant Regular Second Appeal before this Court, wherein, they assail the findings recorded, in the impugned verdicts, hence by both the learned Courts below. When the appeal came up for admission, on 14.12.2011, this Court, admitted the appeal, on the hereinafter extracted substantial question, of law:-

2. Whether the impugned judgments are un-sustainable, in view of the fact that one side the learned trial Court has found that the record prepared by the settlement authorities is not correct, on the other hand, declining the relief of declaration that the record of the settlement is not correct, in view of the above the self contradictory judgments are illegal and erroneous?

3. In the face of the admission of the defendants that there exists passage as claimed by the plaintiffs, the relief qua the use of passage can be denied, such conclusion of the Courts below are unsustainable?

4. Whether the presumption attached to the revenue record is rebuttable, when the learned trial Court found that preparation of the record is wrong, in such a situation the presumption of correctness is rebutted, findings to the contrary are unsustainable in the eyes of law?

Substantial questions of law:-

9. The plaintiffs' contention, vis-a-vis, a "Shareaam Raasta" being borne in site plan, appended to the plaint, and, it being comprised in new khasra Number 1522, and, the old khasra Numbers thereof, bearing numbers 638, and 639, and, in the old khasra numbers, also, the afore path hence existing, and, being reflected, in, the requisite classification column, (i) and, his further contention qua, at the stage of preparation of records, by the settlement authorities, the afore "Shareaam Raasta", existing, upon, the old khasra numbers 638 and 639, and, wherefrom new khasra number 1522 stood purportedly carved, the authorities concerned, rather making unauthorized alternations or deviations, hence, through, theirs' adding, the area, of, old khasra numbers, on to, the land, reflected to be in the ownership, of, defendant No.2, (ii) alongwith all concomitant detrimental effects, of, precluding, the, right of user by the plaintiffs, of, the afore "Shareaam Raasta", is, thoroughly effaced, and, blunted (a) given the afore contention(s) standing negated, by the learned Courts below, (b) on, anvil of the settlement collector concerned, in his apposite orders, hence, repulsing the afore contention (c) besides when a perusal of the orders thereafter rendered by the Financial Commissioner (Appeals), HP Shimla-2, upon Revision Petition No. 98/2007, and, copy whereof, is, placed on record, and, whereto which hence, judicial notice, can be made, (d) and, wherethrough, the, order rendered by the Settlement Collector hence stands affirmed, (e) besides, when thereafter, as, evident from the order rendered also in affirmative thereto, by this Court, upon CWP No. 4650 of 2010, a copy whereof is placed, on, record, and, qua wherewith hence judicial notice is taken, thereupon, the afore conclusively rendered findings, in negation of, the, espousal of the plaintiffs, acquire firm conclusivity, and, the requisite binding effects.

10. Lastly the learned counsel appearing for the plaintiffs has contended with much vigor, before this Court, (i) that, with his raising a plea of the plaintiffs acquiring by prescription, hence, an easementary right of passage, upon, the relevant portion, of, the suit land, (ii) thereupon dehors the afore conclusive findings, being rendered, yet, the afore espousal holding immense vigor. However, the afore submission cannot be accepted by this Court, as no issue, in respect thereof is framed, nor, obviously any evidence in concurrence therewith, stood adduced, and, (i) preeminently also when the afore espousal, is, grossly antithetical, vis-a-vis, the afore prime espousal, and, when the right of easement, of any, genre, is, exercisable, upon, a servient heritage, or, vis-a-vis, a servient owner, (ii) and, when contrarily, the plaintiffs principium prime espousal, is, rested, upon, the mis-drawing of the areas, of, suit khasra land, rather by the settlement authorities concerned, during, the course of settlement proceedings, being, held in the halqua concerned, (iii) and, when the afore espousal, is, for the reasons ascribed hereinabove, fully blunted, (iv) thereupon any claim of the plaintiffs qua theirs holding any prescriptive easementary right of user, of, the relevant portion of the suit land, rather, as a path, is wanting in any vigor, (v) as, reiteratedly, it striving to blunt the relevant conclusivity, and, binding effects, of, the afore revenue records, wherein rather the defendants, are, reflected owners, and, obviously no compatible reflections, of, "Shareaam Rasta" are borne therein nor when any evidence qua prescriptive user thereof,, rather by the defendants, hence exists, on, the records.

11. In sequel the concurrently recorded verdict(s) by the learned Courts, are, well merited, and, theirs' not warranting any interference by this Court. The impugned verdict(s)

are accordingly maintained and affirmed. Substantial questions of law are answered accordingly. All pending applications stand disposed of accordingly.

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

M/s Diamond Traxeim Pvt. Ltd. …Plaintiff.
Versus
Sunil Kumar Sood & another …Defendants.

OMP Nos. 415 of 2017 & 184, 128, 455 and 637 of 2018 in COMS No. 8 of 2017 and OMP Nos. 269, 285, 459, 490 and 640 of 2018 in COMS No. 23 of 2018.
Reserved on : 1.8.2019
Decided on : 13.8.2019

Code of Civil Procedure, 1908– Order XXIII Rule 3– Compromise deed- Plaintiff challenging sale deed executed by defendant no.1 in favour of defendant No.2 on ground that it was he (Plaintiff) who had paid sale consideration to defendant No. 1– Held, compromise deed executed between plaintiff and defendant No.1 was accepted by Hon'ble Delhi High court– Suit land was also subject matter of compromise between them– Compromise not shown to be result of fraud or mis representation– Violation of compromise intentionally by defendant No.1 also not alleged– Prima facie no ground is made out to hold that said sale deed was illegal. (Para 1)

<u>COMS No. 8 of 2017</u>

OMP No. 415 of 2017 and 184 and 455 of 2018

For the Applicant: Mr. G.D Verma, Sr. Advocate with Mr. Atul G Sood, Advocate.

For the non-applicants: Mr. Neeraj Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate, and, Mr. B.C Negi, Sr. Advocate, with Mr. Suneet Goel, Advocate.

OMP Nos. 128 and 637 of 2018

For the Applicant: Mr. B.C Negi, Sr. Advocate, with Mr. Suneet Goel, Advocate.

For the non-applicants: Mr. Neeraj Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate, and, G.D Verma, Sr. Advocate with Mr. Atul G Sood, Advocate.

<u>COMS No. 23 of 2018</u>

OMP No. 269 and 459 of 2018

For the Applicant: Mr. Ankush Dass Sood, Sr. Advocate with Mr. Rakesh Kumar, Advocate.

For the non-applicants: Mr. B.C Negi, Sr. Advocate with Mr. Suneet Goel, Advocate.

OMP No. 285, 640 and 490 of 2018

For the Applicant: Mr. B.C Negi, Sr. Advocate, with Mr. Suneet Goel, Advocate.

For the non-applicants: Mr. Ankush Dass Sood, Sr. Advocate with Mr. Rakesh Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

Through COMS No. 8 of 2017, and, through COMS No. 23 of 2018, respectively constituted by the plaintiff(s), the latters' hence impugn the validity of execution of registered deed, of, conveyance, executed, inter-se, one Suneel Kumar Sood and M/s Nirvana Woods and Hotels Pvt. Ltd, vis-a-vis, the suit property. However, before proceeding to determine, the, prima-facie validity, vis-a-vis, the contention reared against M/s Nirvana Woods and Hotels Pvt. Ltd, by the plaintiff in COMS No. 8 of 2017, for, its therethrough impugning, the, apposite sale deeds, on, anvil of, despite, the sale consideration, being purveyed by it, vis-a-vis, one Suneel Kumar Sood, arrayed therein as co-defendant No.1, the latter proceeding, to, execute a sale deed, vis-a-vis, the suit property, with, co-defendant No.2 M/s Nirvana Woods and Hotels Pvt. Ltd. However, given, the existence on record, of, Annexure A-1, a compromise deed, executed inter-se one Suneel Sood, and, the plaintiff i.e M/s Diamond Traexim Pvt. Ltd., in sequel whereto, an order, vide annexure A-2, was, rendered by the Hon'ble Delhi High Court, hence accepting, the, afore compromise deed, and, with the suit land being also embodied in Annexure A-1, and, also obviously in Annexure P-2, is of utmost, and, conspicuous significance, (i) thereupon, at this stage the plaintiff in COMS No. 8 of 2017, prima-facie does not hold any valid espousal, for, impugning, the, sale deeds, unless, of course evidence surges forth during the course of the apposite suit being put to trial, before the competent Court, vis-a-vis, the compromise borne in Annexure A-1, and, in pursuance whereof Annexure P-2 was rendered, rather being a sequel of fraud or misrepresentation, given, the contents borne therein, being intentionally infracted by co-defendant No.1, one Suneel Sood.

2. Be that as it may, an acerbic contest, has emerged inter-se the plaintiff one Suneel Kumar Sood, and, M/s Nirvana Woods and Hotels Pvt. Ltd, both of whom whereof, are, respectively pleaded, as, plaintiff, and, co-defendant No.1 in COMS No. 23 of 2018, (i) and, wherethrough the plaintiff therein, the, afore Suneel Sood, has, impugned the validity of execution of registered deeds, of conveyance inter-se him and co-defendant No.1 M/s Nirvana Woods and Hotels Pvt. Ltd, (ii) on, anvil of recitals in the impugned registered deeds of conveyance, vis-a-vis, payment of sale consideration, from, M/s Nirvana Woods and Hotels Pvt. Ltd, to, one Suneel Kumar Sood, occurring, in contemporaneity, vis-a-vis, the execution of registered deed of conveyance, being, false recitals. For resting the vigor of the rival contention(s) reared by the learned counsel, for the contesting litigants, who, respectively contended, that, the apposite recitals, as are, carried in the registered deed, of, conveyance, being fraudulent or otherwise, (a) hence this Court had pronounced an order, on, 4.5.2019, order whereof stands extracted hereinafter, and, in compliance, with the afore directions rendered upon HDFC Bank, and, also upon the Income Tax Officer, concerned, both placed on record their respective affidavits, with, echoings borne therein, vis-a-vis, in contemporaneity qua execution, of, the apposite impugned sale deeds, the apposite sale consideration being reflected, to be, entered, into the accounts of one Suneel Kumar Sood arrayed as plaintiff in COMS No. 23 of 2018. Even though the afore echoings, borne in the compliance affidavits furnished before this Court, by the Manager of the HDFC Bank, and, by the Income Tax Officer of the ward concerned, do, prima-facie rest the afore res-controversia, engaging the contesting litigants, (i) nonetheless Mr. Ankush Dass Sood, Sr. Advocate, assisted by Mr. Rakesh Kumar, Advocate, has contended qua the apt disclosures borne therein rather being falsified, (ii) in as much, as, in contemporaneity, vis-a-vis, the execution, of, sale deeds amongst the afore litigants, hence, the apposite sale consideration, being retransmitted into the accounts, of, co-defendant M/s Nirvana Woods, and, Hotels Pvt. Ltd, and, (iii) in succoring the afore espousal, he relies, in consonance therewith

pleadings borne in COMS No. 23 of 2018. However, the afore espousal is benumbed, and, would not underwhelm, the, echoings, borne in the afore affidavits, furnished before this Court, as, in the written-statement furnished thereto, by the learned counsel for contesting defendants No.1 and 2, (i) an, averment is borne in paragraph 31 thereof, qua the afore remittance, in, contemporaneity, vis-a-vis, the execution of the registered deed of conveyance inter-se the plaintiff, and, contesting defendants rather being a sequel to, or, appertaining to a commercial transaction, other, than, the one embodied in the impugned sale deed. Since the plaintiff, has not, contested the afore contention by preferring any replication thereto, thereupon, the afore contention/espousal, carries tenacity, and, obviously nails the afore contention, reared by the counsel for the plaintiff. In aftermath, prima-facie, at this stage, the impugnings made by the learned counsel for the plaintiff, vis-a-vis, the apposite sale deeds, and, hinged, upon, no sale consideration in contemporaneity, vis-a-vis, the execution of registered sale deed, passing from vendee to the vendor hence is rudderless, and, obviously is rejected.

> "The core controversy, which has arisen interse the parties at contest, before this Court, more particularly, interse one Sunil Sood, defendant No. 1 in COMS No. 8 of 2017, and, M/s Nirvana Woods & Hotels Pvt. Ltd, is embodied (a) in the sale consideration recited in the apposite registered deed, of conveyance, executed interse Sunil Sood, and, M/s Nirvana Woods & Hotels Pvt. Ltd, passing or not passing, in contemporaneity, vis-à-vis, execution thereof, and, qua the afore. (b) The importance of the afore, upon an affirmative decision being made, either, vis-à-vis, the afore Sunil Sood, or vis-à-vis, M/s Nirvana Woods & Hotels Pvt. Ltd., (c) is, qua this Court, proceeding to either make absolute the order, rendered on 18.12.2017, or vacate it. Mr. Suneet Goel, Advocate, makes a submission, before this Court, qua the recited sale consideration, rather in contemporaneity, vis-à-vis, the execution of, a, registered deed(s) of conveyance, hence passing from the vendee, to the vendor, and, his submission is rested, upon, an affidavit, existing at page No. 1085 of the paper book, of, COMS No. 23 of 2018, and, wherein the details, of, the amounts transmitted through, cheques mentioned therein, hence purportedly entered into the accounts, of, Mr. Sunil Sood.
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> However, Mr. Ankush Dass Sood, learned senior Advocate, and Mr. Neeraj Gupta, Advocate, appearing for the afore Sunil Sood, both contest the validity of the recitals, borne in the afore affidavit, (i) and for repelling all the recitals, borne therein, and, also qua the afore factum, they, place reliance, upon Annexure A-C, occurring at page No. 243 of the paper book, of COMS No. 23 of 2018, (ii) wherein contrary reflections qua the cheques, mentioned in the affidavit, relied upon by Mr. Suneet Goel, Advocate, and theirs' purportedly rather working towards passing, of, sale consideration, interse the afore, rather stand embodied or rather contrarily therefrom hence stand reflected to flow, into, the accounts of entities,/individual other than M/s Nirvana Woods & Hotels Pvt. Ltd. However, before meteing credence either to the submission, of, Mr. Suneet Goel, Advocate, or, of Mr. Ankush Dass Sood, Senior Advocate, and, of Mr. Neeraj Gupta, Advocate, (i) imperatively qua passing or non-passing of the apposite sale consideration, in, contemporaneity, vis-à-vis, execution of the requisite sale deeds, (ii) in sequel(s) whereof, the contract of sale would be construable to void or not void, (iii) and when further there, onwards rather, a, conclusion may emanate qua the order pronounced, on 18.12.2017, being amenable, vis-a-

vis, it being made absolute or, it, being vacated, (iv) thereupon, it is deemed imperative, that, the banker concerned, i.e. HDFC Bank Ltd.SCO 52, Sector-11, Panchkula, be ensured by the Registry of this Court, that it, vis-à-vis, the afore factum, and,vis-à-vis, the veracity, of, Annexure-C, existing at page No. 243, of, the paper book, of, COMS 23 of 2018, is hence dispatched rather all photo copies thereofs, along with, a requisite request thereto, to, on affidavit, it making a certificate, within two weeks before this Court, and, with a disclosure therein, qua all the bills and cheques, mentioned in the affidavit, relied upon by Mr. Suneet Goel, Advocate, appertaining or not, to, transfer of money, disclosed therein, to Mr. Sunil Sood, or to the persons/entities, individuals, other than Mr. Sunil Sood.

The Registry is also directed to make a request upon the Income Tax Officer concerned, that he also makes, within the afore period, a disclosure on affidavit, whether income tax returns filed before him, vis-à-vis, PAN No. ACJPS6744E, being a valid, and, authentic document or not. For facilitating the afore emanation(s), from, the afore Income Tax Officer, the Registry shall transmit, the photo copy, of Annexure D-4, to the afore Income Tax Officer. List on 28.5.2019."

3. Be that as it may, the rejection of the afore espousal of the plaintiff in COMS No. 23 of 2018, would not relieve M/s Nirvana Woods and Hotels Pvt. Ltd, of, the dire obligation, of, its ensuring its raising construction, upon, the suit land, upon, its/theirs holding, a, valid sanction, from the authorities concerned, vis-a-vis, the proposed construction. In sequel the contesting defendants are permitted to raise construction, only upon, its holding a validly meted sanction, by the authorities concerned, and, also if construction is commenced by M/s Nirvana Woods and Hotels Pvt. Ltd, yet with the authorized person hence, on, behalf of M/s Nirvana Woods and Hotels Pvt. Ltd, filing an affidavit with a clear disclosure therein, that, it would not claim any equities, in, the construction raised, upon, the suit land, (a) even if a verdict adverse to it is pronounced, upon, COMS No. 8 of 2017, and, upon COMS No. 23 of 2018, (b) thereupon, the afore espousal made in the affidavit furnished, on behalf of M/s Nirvana Woods and Hotels Pvt. Ltd, shall obviously carry the requisite binding effects, upon, it. Since accordingly prima-facie case is loaded in favour of the applicants/defendants concerned, balance of is convenience also is loaded in favour of the applicants/defendants concerned, and, also since, the, continuance of the order, strived to be modified rather would encumber hardship and injury, upon, the applicants/defendants concerned, hence not recompensable in monitory terms thereupon, the relevant order(s), is/are, with the afore observations hence modified.

In view of the afore, all the applications stand disposed of. Any observations made in this order shall not affect the merits, of the lis embodied, in, both the COMS. No costs.

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

New India Assurance Company Ltd. …Appellant.

Versus

Rohit Kumar Sharma and others. ….Respondents.

FAO No. 293 of 2018
Reserved On : 31.7.2019
Decided on : 13.8.2019

Motor Vehicles Act, 1988– Section 166 – Motor accident– Rash and negligent driving– Proof– On basis of contents of FIR insurer contending that accident was result of rash driving of deceased himself and being so it has no liability to indemnify award – Held, FIR does not constitute a substantive evidence – Person who lodged FIR not examined by insurer as witness – Eye witness to accident examined by claimants giving uneroded testification vis-a-vis commission of tort of negligence by driver of offending vehicle – Averments made in FIR ascribing commission of tort of negligence qua deceased stand blunted and maimed. (Para 2)

For the appellant:	Mr. Ashwani K Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For the Respondents:	Mr. Divya Raj Singh, Advocate, for respondents No. 1 and 2. Mr. Sanjeev K Suri, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed, against, the impugned award, rendered by the learned Motor Accident Claims Tribunal- Una, District Una, H.P.(for short "MACT), upon, MACP No. 38 of 2015 (a) wherethrough, compensation amount borne, in a sum of Rs.20,56,380/- alongwith interest at the rate of 9% per annum, commencing, from the date of filing, of, the afore claim petition, till realization thereof, (b) was assessed, vis-a-vis, all the petitioners therein, and, (c) the apposite indemnificatory liability thereof, stood fastened, upon the appellant herein/respondent No.3, in, the afore claim petition.

2. The learned counsel for the appellant/insurer, contests, the validity of the findings recorded, vis-a-vis, the issue appertaining, to, the rash, and, negligent driving, of, the offending vehicle, and, his afore argument is rested, upon, the factum qua with the FIR embodied in Ex.P-2, proven by RW-2 (HC Rajeev Kumar), making echoings, hence, vis-a-vis, the relevant tort, hence being committed, by the deceased driver of, the ill-fated vehicle. However, the afore argument(s) is unmeritworthy, (a) as, the afore echoings, do not, constitute any substantive piece of evidence (b), and, also with the informant, not, stepping into the witness box, despite, his being the best person to prove the genesis, of, the occurrence embodied in the apposite FIR, (c) rather when PW-1 (Navdeep Kashyap), an eye witness, to, the occurrence, upon, his stepping in to the witness box, and, his rendering, an, uneroded testification, vis-a-vis, the commission, of, tort of negligence, hence by the driver of the offending vehicle, (d) thereupon, also the afore echoings, borne in, the FIR embodied in Ex. P2, wherein echoings are borne, rather ascribing, the, commission, of, tort of negligence qua, the deceased driver, is/are, squarely, and, fully blunted, and, maimed.

3. The learned counsel for the insurer/appellant herein, has, also contended with much vigor, before this Court, qua, the driving licence of the deceased driver, being, fake, as, evident, from a perusal of Ex. R-1, exhibit whereof, is, a report, made, by the Investigator. However, the afore submission, is, falteringly made, given it being made, upon, his being unmindful, vis-a-vis, the best evidence, qua the validity of driving licence, borne,

in, Ex. P-6, and, cogently proven by the deposition, hence rendered by RW-3 (Daleep Kumar), the, official, of, the DTO Office, Hoshiyarpur.

4. Be that as it may, the, learned counsel, for, the insurer has also proceeded, to, make a contention before this Court, that, since the claimants at the time, of, happening of the relevant mishap, hence, were not dependent, upon, the income of the deceased, and thereupon, they are not entitled, for, any determination, of, compensation amount,(a) in making the afore submission, he has alluded, to the admission, occurring in the cross-examination of PW-3 (Rohit Kumar), with, echoings therein, vis-a-vis, in contemporaneity, vis-a-vis, the ill fated occurrence, wherein, his father met his end, his drawing, a, per mensem salary of Rs.35,000/-, (b) and, thereafter, his further echoings qua his sister, the daughter of the deceased, holding an employment in a private school, and thereafter hers being married. The afore submission, is, meritworthy, and, unless evidence stood adduced qua, despite, the requisite remunerations drawn by the afore, from their apposite employment(s), yet theirs' being dependent, upon, the income of the deceased, (a) whereas with the afore requisite echoings, remaining unarticulated by PW-3, (b) thereupon it is to be concluded, that, the claimants were not, at, the relevant time, hence, dependent upon the income of the deceased, hence computation of compensation made qua them, under, the head loss, of, income, is interfered with.

5. Nowat from the afore, the impugned award is also modified, only, to the extent, qua, the claimants, being only entitled to a sum of Rs.30,000/- each, under, the head filial consortium, and, to a sum of Rs. Rs.15,000/-, under, the head "loss of estate", and, to a sum of Rs. 15,000/- under the head "funeral expenses". For the foregoing reasons, the appeal filed by the insurer, is, partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. The claimants are now entitled to a sum of Rs.90,000/- (15,000+15000+60,000) alongwith interest at the rate of 9% per annum from the date of filing of the claim petition i.e. 1.4.2015 till realization thereof. Compensation amount be apportioned amongst the claimants in the manner, as, made by the learned Tribunal. All pending applications stand disposed of accordingly.

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

The Himachal Pradesh State Industrial Development Corporation Limited
....Plaintiff.

Versus

M/s Himachal Air Products (P) Ltd and others. ....Respondents.

Civil Suit No. 26 of 2005
Reserved On : 24.7.2019
Decided on : 13.8.2019

Indian Contract Act, 1872– Sections 128, 129 & 131– Liability of guarantor– Extent of- Predecessor of defendant standing guarantor for the Principal towards repayment of loan – Death of guarantor and suit for recovery filed against his legal representative - Defendant denying his liability as well as liability of his predecessor on ground that after execution of revival plan between Corporation and Principal debtor, there was novation of contract and his father was not a party to it– Held, defendant not adducing any evidence showing that after execution of revival plan and handing over of assets back to Company his predecessor-

in- interest remained only a share holder and consequently his being absolved of his coextensive liability as a guarantor– Plea of novation of contract not proved – Liability of guarantor since is co-terminus with original borrower, hence defendant is jointly and severally liability towards decreetal amount. (Para 19)

For the Plaintiff:	Mr. Balwant Kukreja, Advocate.
For the Defendants:	Mr. Suneet Goel, Advocate, for defendants No. 1 to 3 and 5. Mr. Dinesh Kumar Sharma, and, Mr. Y.Paul, Advocate, for defendant No.6. Defendants No. 4,7 and 8 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Through the instant Civil Suit, the plaintiff seeks rendition, of, a decree, hence, for recovery from the defendants, of, Rs.1,41,82,110.55 alongwith future interest.

2. The plaintiff casts averments in the plaint qua it being a company incorporated, under, the Companies Act, 1956, and, its holding its registered office at New Himrus Building, Cart Road, Shimla 171001 (H.P), and, Mr. P.K Bali, Manager Project (legal) of the corporation, being duly authorized by the Managing Director of the plaintiff, through, resolution No. 12 of 18.6.1997, to, sign, verify and institute suits on behalf of the plaintiff company, and, to appoint advocate etc. for prosecuting suits etc.

3. Further thereonwards, it is averred in the plaint, that, defendant No.1 applied for term loan of Rs.60.00 lacs on 11.7.1981, for, the construction of factory building, purchase of land and plant and machinery and other assets for setting up an industrial unit for the manufacture of oxygen/nitrogen gas at Nalagarh, District Solan in the State of Himachal Pradesh. On 14.1.1982, defendant No.1 was sanctioned a term loan of Rs. 60.00 lacs. The interest agreed to be paid by defendant No.1 on loan amount was @ 4.5% per annum over the IDBI refinance rate of 9% with a rebate of 1% per annum for prompt payment of principal and interest on due date subject to minimum of 12.5% per annum with half yearly rests. For securing the repayment of the said loan and interest thereon, defendant No.1 through its Directors i.e defendants No. 2 to 4, executed a promissory note, loan agreement on 30.8.1985 with respect to term loan of Rs.60.00 lacs, and, Hypothecation Agreement regarding Land, Building, Plant and Machinery and other asset was also executed on 30.8.1982. Apart from this, equitable mortgage was created by deposit of title deeds of the properties of the industrial concern of defendant No.1 in favour of the plaintiff on 30.8.1982 with proforma defendant No. 7, who was co-financer with the plaintiff. The defendants were also provided term loan by defendant No. 8 and had pari-passu charge with the plaintiff and proforma defendant No.7. Agreement for pari-passu charge was entered on 12.2.1987.

4. It is also averred in the plaint that defendants No. 2 to 5 stood guarantee to defendant No.1, and, consequently Deed of Guarantee was executed on 30.8.1982. The loan was also guaranteed by late Shri Y.D Sharma, who is survived by his son, Shri Deepeshwar Sharma, defendant No. 6 herein, and, right to sue survives against him, being a legal heir of late Sh. Y.D Sharma. Defendants No. 2 to 6 being guarantors are liable to pay the outstanding loan amount alongwith interest to the plaintiff. The loan was also guaranteed by late Shri M.L Sethi, who is survived by his son, wife and two daughters i.e defendant No.3 (a) to (d), and right to sue survive against them being the legal heirs. The liabilites of

defendant No.2, 3 (a) to (d), 4,5 and 6 is joint and several with defendant No.1. Date of the agreement and hypothecation deed is 30.8.1982. Defendant No. 3 (a) to (d), and, defendant No.6 are also liable to pay the suit amount. Name of mortgagee/hypothecatee is HP State Industrial Development Corporation Limited, Shimla (plaintiff). Name of the mortgagor/hypothecator is M/s Himachal Air Products (P) Ltd., Nalagarh, District Solan, H.P, and the sum assured is Rs.60.00 lacs and interest thereon. Rate of interest was 4.5% above IDBI refinance rate of 9% with a rebate of 1% for timely payment subject to minimum of 12.5% p.a with half yearly rests. Land, Building, plant and Machinery and other assets are property mortgaged/hypothecated, and, deed of guarantee was of 30.8.1982.

5. The plaintiff casts further averments in the plaint that as per loan documents, the loan alongwith agreed interest was to be paid in half yearly installments, commencing from 10.6.1984, for, loan of Rs. 60.00 lacs, and, the last installment was payable on or before 10.6.1989. The repayment of loan was averred to be rescheduled on 9.2.1985 and 20.4.1986, and, as per that, the loan was allowed to be repaid in half yearly installments commencing from 10.12.1987 and last installment was repayable on 10.6.1991. The defendants also failed to pay the installments of the principal amount and interest thereon in accordance with the repayment schedule. Defendant No.1 defaulted in the repayment of dues with the plaintiff and also with proforma defendant No.7, as such, the hypothecated/mortgaged assets of industrial concern of defendant No.1 were taken over on 9.3.1988 by proforma defendant No.7 under the provision of Section 29 of the State Financial Corporation Act, 1951. The defendants preferred a Civil Writ Petition bearing number 309 of 1988 before this Court, the afore petition was dismissed, and, a Special Leave Petition arising therefrom, preferred before the Hon'ble Apex Court, also stood dismissed. During the intervening period, the defendants also filed reference before the Board for Industrial and Financial Reconstruction Under Sick Industrial Companies (Special Provisions) Act, 1985, and, also filed appeal before Appellate Authority for Industrial and Financial reconstruction, which was dismissed on 3.12.1990. In compliance to the directions rendered by the Hon'ble Apex Court, the sale of the industrial Unit of the defendant was re-advertised, by the Himachal Pradesh Financial Corporation. The defendants thereafter submitted proposal to re-start the factory and also paid Rs. 7.00 lacs. On receipt of payment, and, in view of proposal to revive the unit, the possession of assets was restored in December, 1993 to the defendants. The defendants continued to operate the plant, but, neither remitted payments nor submitted any plan for revival of the unit inspite of various opportunities being provided to them. The plaintiff finally on 31.1.1998 decided to take over the unit under Section 29 of the State Financial Corporations Act, 1951, and, possession of assets was taken over on 17.2.1998. The possession of assets was also averred to be delivered to the plaintiff by defendant No.2, Managing Director of defendant No.1. The taken over assets were evaluated, and, thereafter put to auction number of times and in January, 1999 offer of Rs. 50.00 lacs was received. The said offer was averred to be accepted by the plaintiff. The purchaser did not deposit the amount and earnest money of Rs. 3.00 lacs was forfeited which has been credited to the account of defendant No.1.

6. It is further averred in the plaint that the assets i.e land, building, plant, Machinery and other misc assets of Industrial concern of defendant No.1 were again put to auction, and, were sold on 7.7.2004, for, a sum of Rs. 79.00 lacs. These sale proceeds of Rs. 79.00 lacs were shared between plaintiff, proforma defendant No. 7 and Excise and Taxation Department, H.P Government, as under:-

(a) H.P Financial Corporation	Rs.24,14,830.00
(b) Excise & Taxation Deptt. H.P Govt.	Rs, 2,20,000.00
(c) HPSIDC Ltd.	Rs. 52,65,170.00

Rs. 79,00,000.00

It is also averred in the plaint that proforma defendant No. 7 was co-financer with the plaintiff and had pari-assu charge on the assets of defendant No.1. The Excise and Taxation Department had also to recover sales tax dues from defendant No.1 and sales tax being first charge, were entitled to its dues from the sale proceeds. Defendant No. 8 was not given its share as its loan account stands settled by defendants when their case before Debt Recovery Tribunal. It is further averred that the total outstanding amount was Rs.10,95,12,287/- and after adjustment of sale proceeds between the plaintiff, proforma defendant No.7 and Excise and Taxation Department, the liability of defendants was calculated on simple interest basis and a sum of Rs.9,07,39,454/- on account of penal/compound interest was waived off. It is further averred that there was shortfall to the tune of Rs.1,45,28,263, and, for the payment of which defendant No.2 to 6, being guarantors are liable to pay, to, the plaintiff. Defendants No. 2 to 6 were asked to payment the balance amount alongwith the future interest from 10.12.2004 till its final payment vide notice dated 19.1.2005 within one month from the receipt of notice, however, the said period has expired, and, the afore defendants failed to pay the afore sum. It is also averred that after issuance of notice on 19.1.2005, the accounts of defendant No.1 were reconciled and a sum of Rs. 3 lacs on account of forfeiture of earnest money and Rs.46,152.00 lying credited in Misc receipts were credited to the account of defendant No.1, and, balance amount now recovered is Rs. 1,41,82,110.55 (Rs. 37,54,263/- on account of principal and Rs. 1,04,27,847 on account of interest). It is also averred that liability of the defendants is joint and several to pay the suit amount. Besides this, the defendants are also liable to pay interest at the agreed rate of interest @ 12.5% per annum on Rs. 1,41,82,110.55 with half yearly rests and other misc. expenses from 10.12.2004 till realization of entire amount. It is also averred that since the transaction between the plaintiff and the defendants is of commercial nature, hence the plaintiff is entitled to pendente lite and future interest at the contractual rate of interest as per the loan agreement. It is also averred that the cause of action arose first on 17.2.1998 when the mortgaged/hypothecated assets were taken over by the plaintiff and then on 7.7.2004 when the assets were sold and sale proceeds of assets were received by the plaintiff, and, then on 19.1.2005, when the final notice was issued. It is also averred in the plaint that the suit of the plaintiff is within time because the demand was made on defendants on 19.1.2005 in terms of their contract of guarantee and when they committed breach of the contract after 19.1.2005 in not paying the demanded amount. It is also averred that this Court has jurisdiction to try and determine the suit. It is also averred that the plaintiff has not filed any other suit before any other Court. Hence, the present suit.

7. Defendants No. 2 and 5 contested the suit, and, filed a joint written-statement, wherein, they have taken preliminary objections, regarding, (a) suit is bad for non-joinder of necessary parties (b) the suit stands abated in as much as it was filed against a dead person (c) suit has not been filed by a properly authorized person as envisaged under law (d) the suit is not properly valued for the purpose of court fee and jurisdiction (e) the plaintiff is estopped from filing the present suit by his acts and conduct, (f) suit is not maintainable (g) the suit is time barred. On merits, it is averred that the the suit has not been filed by a duly authorized person nor verified in accordance with law. It is further submitted that unit in question was established, financial assistance was raised by defendant No.1, from, the plaintiff as well as proforma defendants No. 7 and 8. Besides this, the promoters of defendant No.1 having contributed towards the project substantial amounts. It is also averred that unfortunately, the unit got jinxed from day one. Despite best efforts on the part of the defendants, unit did not become commercially viable. It is also averred in the written-statement that defendants No. 2 and 5 pumped in substantial money

into it after it was taken over and after the unit was returned to them for running it. Some amount was paid to the plaintiff, but so far interest claimed is concerned it is highly excessive and unreasonable and unconscionable. The plaintiff and defendant No. 7 are not entitled to enforce the alleged personal guarantees because there was novation of contract when the assets of defendant No.1 were taken over and handed back and repayment schedule by both of them was revised. No personal guarantee was obtained from answering defendants at any such point of time, hence the present suit is not maintainable. It is also denied that liability of answering defendants being joint or several on the basis of continuing guarantee. It is also pleaded that as per the own showing of the plaintiff, defendant No.1 committed default in repayment of installments to it and to defendant No.7, thereafter the repayment schedule was revised and again defendant No.1 committed default(s), as such the so called original continuing guarantee executed by answering defendants stood novated and the alleged continuing guarantees came to an end. It is also submitted that action of plaintiff and proforma defendant No.7 not to sell the taken over assets promptly on one hand and allowing the interest to amount, makes action of both of them malafide being based on extraneous reasons. It is also submitted that the sale of assets on 7.7.04 as alleged is neither bonafide nor depicts the true market value of the assets of defendant No.1. It is further submitted that the total value of assets come to Rs. 99.90 lacs, therefore even if the plaintiff and defendant No.7 succeed in their claim, if any, after setting off their alleged claim, a decree of Rs. 10,05,000/- may be passed against the plaintiff and proforma defendant No.7. It is also pleaded that there is noting on record to suggest that land buildings, fittings, plant and machinery, fixtures etc of defendant No.1 was effected as a single lot or in different lots. It is also submitted that it is not understood on what basis a sum of Rs. 2,20,000/- has been paid by defendant No.7. It is admitted that defendant No.7 had pari-passu charge on assets of defendant No.1. However, defendants No. 2 and 5 are not admitted the averments regarding recovery of sales tax dues. It is also submitted that the plaintiff and defendant No. 7 be put to strict proof of all averments qua their respective claims as alleged. It is further prayed that a decree in respect of the counter claim be passed after setting off the claim of the plaintiff. In the alternative and without conceding, it is also submitted in the written-statement that the claim is highly excessive because on principal amount of Rs. 37,54,263/- and on it almost three times interest is being claimed by the plaintiff. It is also pleaded that the defendants are not liable to pay either the amount claimed or the interest as claimed much less with half yearly rests. It is also averred that the plaintiff is not entitled to claim interest at contractual rates as alleged, and, it be put to strict proof of averments made therein. It is also submitted that an amount of Rs. 1,51,65,000/- is due and payable to the answering defendants, on account of recovery of cylinders Rs.1,30,65,000/-, and, Rs. 20,90,000/- being the amount for which the property was Short sold, as such, these amounts deserve to be set off against the plaintiff.

8. The defendants No.2 and 5 have also filed a counter claim, and, they pray that the same may kindly be decreed in their favour. In the counterclaim, they reasserted and reaffirmed the grounds taken in their written-statement. Further they have pleaded in their counter claim that there is nothing on record to suggest that the land buildings, fittings, plant and machinery, fixtures etc. of defendant No.1 were sold in a single lot or in different lots. It is also averred that if any attempt in this direction been made, it would have certainly fetched a much higher price because the rate of land increased manifold in mid 2004 after declaration of the industrial package in the Nalagarh Tehsil and the industry flourished by leaps and bounds where defendant No.1-company was situated. It is further pleaded that it is not understood that on what basis, a sum of Rs. 2,20,000/- has been paid by defendant No.7. It is also pleaded that the taken over assets of defendant No.1 were valued at Rs. 99.90 lacs by the agency of the plaintiff in the year 1998, however, the same were sold in the year 2004, for, an amount of Rs. 79.00 lacs, therefore a sum of Rs.20.90

lacs is due and liable tobe adjusted in the amounts claimed by the plaintiff. It is also pleaded that the plaintiff while taking over the assets of defendant No.1 did not account for cylinders which also formed a part of the assets of defendant No.1. The said cylinders were in the custody of the customers of defendant No.1 and are valued at Rs. 1,30,65,000/-. A total sum of Rs.1,51,65,000/- is due and payble to the defendants No. 2 and 5. It is also submitted that after setting off the amount of Rs.1,51,65,000/- against the amount of Rs.1,41,82,110.55 being claimed by the plaintiff, a sum of Rs.9,72,889.45 is due and payable to the answering defendants which may kindly be decreed in their favour. It is also pleaded that the interest on the said amount @ 12% per annum from the date of its sale is also payable by the plaintiff. It is also pleaded that the cause of action is accrued in favour of the answering defendants initially when the assets of defendant No.1 were taken over the plaintiff on 17.2.1998 and thereafter it again arose when assets of defendant No1 company were put to sale in January 1999 and thereafter on 7.7.2004 when the plaintiff conducted a distress sale of the assets of defendant No.1 company for an amount of Rs. 79 lacs without intimating the answering defendants. It is also submitted that the counter claim of the answering defendants is valued at Rs. 9,72,889.45 with 12% interest from the date of its sale i.e 7.7.2004 which comes to Rs. 1,94,577.88 till the date of the filing of counter claim, however, the claimants/defendants concerned restrict the counter claim to Rs. 10,05,000/-.

9. Defendant No.6 contested the suit, and, filed written-statement, wherein he has taken preliminary objections qua suit being barred by limitation, plaintiff is estopped by its acts, conduct deed and acquiescence etc. from filing the present suit. On merits, it is averred that the he has no knowledge that a loan of Rs.60,00,000/- with interest at the rate mentioned in the plaint was sanctioned in favour of defendant No.1. It is also averred that he has no knowledge about the fact that promissory note was executed by defendants No.2,3 and 4 with regard to the loan agreement, and, so the hypothecation agreement, and, also he has no knowledge about creation of equitable mortgage. It is also denied that late Sh. Y.D Sharma was the guarantor of the afore loan. According to the knowledge of defendant No.6, it is pleaded that, there were disputes with regard to management, assets, liabilities and other matter of M/s Himachal Air Product. As per defendant No.6, Mr. Y.D Sharma was not a party to the revival pan nor at any point of time he entered into any agreement in pursuance whereof any liability can be fastened upon Mr. Y.D Sharma. It is also pleaded by him that neither late Sh. Y.D Sharma nor he is a party to any contract in pursuance whereof the suit for recovery may be maintained by the plaintiff. It is also denied that defendant No.6 is a guarantor as alleged. On account of revival plan and execution of subsequent documents, the documents on the basis of which suit can be filed are subsequent documents, as earlier documents stands superseded at the time of revival plan. It is further pleaded that in case some of the defendants have substituted earlier agreements by subsequent agreements, in that eventuality those defendants may be responsible to discharge the liability, but neither late Sh. Y.D Sharma nor he is liable to make payment of any amount to the plaintiff. It is also averred that no letter or notice of demand has ever been received by him. It is also pleaded that he has not received the notice of 19.1.2005. It is also denied that liability of defendant No.6 is joint and several with other defendants, as alleged. Defendant No.6 and his predecessor in interest are not party to the revival plan. It is also denied that there is any cause of action in favour of the plaintiff and against the replying defendant or the same initially arose on 17.2.1998 and subsequently on 19.1.2005. It is also prayed that the defendant No. 6 is not liable to make payment of any amount to the plaintiff, hence, the suit may kindly be dismissed.

10. The plaintiff herein filed replication to the written-statement of the defendants No.2 and 5, wherein he denied the contents of the written-statement and reaffirmed and reasserted the averments made in the plaint. It is also averred that the

plaintiff came to know about the death of late Shri M.L Sethi on 13.7.2005. Thereafter the plaintiff engaged services of investigating agency to find out the date of death and LRs of deceased defendant No.3. The plaintiff thereafter moved an application under order 22 Rule 4 and 9 CPC and such application was allowed by this Court and LRs of Shri M.L Sethi have been arrayed as defendant No.3 (a) to (d). In the written-statement of the plaintiff to the counter claim of the defendants, it is pleaded that the counter claim is false frivolous and vexatious and the defendants have no locus standi to file the counter claim on account of its own act, deed, conduct commission omission and acquiescence. It is also pleaded that the counter claim has not been properly valued for the purpose of court fee and jurisdiction. It is also pleaded that the mortgaged assets of defendant No.1 company were evaluated after its take over in March, 1998 and the assessed value was Rs.99.90 lacs and realizable value in parts was assessed at Rs.60.00 lacs by HIMCON. The assessed value was mentioned in the auction notice published in the various newspapers by the plaintiff. It is also averred that the defendants are not entitled for any sum of Rs. 20.90 lacs as alleged. It is further averred that defendants are not entitled for any amount on account of cylinders from the plaintiff. The plaintiff took over the mortgaged and hypothecated assets under Section 29 of the State Financial Corporations Act, 1951 in order to realise the outstanding loan amount advanced by the plaintiff and proforma defendants No. 7 and 8 to the defendant No.1. The alleged cylinders which were financed by the plaintiff and defendant No.7 were not handed over by defendant No.2 to the plaintiff. It is also averred that after taking over the assets, it was observed that some items of plant and machinery and other misc fixed assets were not available at the factory premises. A notice was served upon the defendants to produce all the missing items. In response to that notice, defendant No.2 informed that some of the items are for repairs, and, regarding cylinder, it was informed that empty gas cylinders are in rotation with their customers and dealers and it will take time to collect empty cylinders from customers. Thereafter it was requested to give them three time months time to restore. Defendant No.2 did not restore the cylinders and as such another notice was issued on 4.8.1998. On failure of the defendants to restore the missing assets an FIR was also lodged with the police Station, Nalagarh on 9.9.1998. It is also averred that the investigation also reveals that defendant No.2 had also filed an FIR against the dealers, and, it was found that defendant No.1 has given the cylinders to the dealers/customers, and, in lieu thereof, the defendants have taken security amounts from them. It is also also averred that when the factory was closed, and, taken over by the plaintiff, the Managing Director of defendant No.1 did not return the securities to the dealers. It is also revealed during investigation that 2-3 dealers had filed civil suits against defendant No.2. It is also pleaded that the defendants are neither entitled for set off of the amount nor any interest as claimed. The defendants are not entitled for any decree whatsoever against the plaintiff. The alleged claim on account of cylinders is not maintainable. It is also specifically denied that the plaintiff conducted any distress sale as alleged. It is also pleaded that the counter claim has not been properly valued for the purpose of court fee and jurisdiction. It is also prayed that counter claim of the defendants being false and frivolous be dismissed with costs.

11. The defendants No. 1,2 and 5 herein filed replication to the written-statement of the counter claim, wherein they denied the contents of the written-statement of the counter claim and reaffirmed and reasserted the averments made in the counter claim.

12. On the contentious pleadings of the parties, this Court framed the following issues:-

1. Whether the plaintiff is entitled to the suit amount? OPP
2. Whether the suit is filed by an authorized person? OPP

3. Whether the plaintiff has claimed interest at an exorbitant rate? If so, what should be the reasonable rate of interest in the facts and circumstances of the case? OPD
4. Whether the plaintiff is estopped to file the suit by the acts and conduct of the functionaries of the plaintiff and defendant No.7? OPD
5. Whether the suit is bad for non-joinder of necessary parties, as alleged? OPD
6. Whether the assets of defendant No.1 were sold at a price lower than the prevailing price, as alleged? If so, its effect? OPD
7. Whether the suit is barred by time? OPD
8. Whether the defendants are entitled to the amount claimed in the counterclaim, together with interest at the rate of 12%? OPD
9. Whether the counterclaim is liable to be dismissed on account of suppression of true facts, as alleged? OPP
10. Whether the defendants do not have the locus standi to file the counter claim? OPP
11. Whether the counterclaim has not been properly valued for the purpose of court fee and jurisdiction? OPP
12. Relief.

13. For the reasons to be recorded hereinafter, my findings on the aforesaid issues are as under:-

Issue No.1	Yes.
Issue No.2	Yes.
Issue No.3	No, contractual rate of interest.
Issue No.4	No.
Issue No.5	No.
Issue No.6	No.
Issue No.7	No.
Issue No.8	No.
Issue No.9	Yes.
Issue No.10	Yes.
Issue No.11	No.
Relief:	The suit of the plaintiff is decreed as per the operative portion of the judgment, whereas, the counter claim filed by the defendants No. 2 and 5 is dismissed.

<u>Reasons for findings:</u>

<u>Issues No. 1 to 6</u>

14. Since issues No. 1 to 6, are interconnected, and, hence are being amenable for common findings being recorded thereon.

15. In proof, of, the relevant issues, the, plaintiff relied, upon, the deposition of PW-1 (Shri Pawan Kumar Bali), who, during the course of his examination-in-chief, tendered

into evidence, the, apposite resolution, of, the board of directors, of, the plaintiff, as, comprised in Ex. PW-1/A, (i) wherethrough, he stood authorized, to, institute the present suit, and, also to engage, hence, counsel(s). He also tendered into evidence Ex. PW-1/B, exhibit whereof, comprises the requisite authorization bestowed, upon, him, and, loan application comprised in Ex. PW-1/C is also tendered, into evidence, and, the sanction meted thereon, is, comprised in Ex. PW-1/D, and, terms of loan conditions, as accepted, by the defendants, is, embodied in Ex. PW-1/E, and, also, all afore stood tendered into evidence, by the afore PW. The promissory note, executed by the defendants, is, borne in Ex. PW-1/F, loan agreement in Ex. PW-1/G, and, hypothecation agreement, is, borne in Ex. Pw-1/H, Ex. PW-1/J is the guarantee executed by defendants No. 2 to 5, and, the father of defendant No.6. It is also testified by PW-1, in his examination-in-chief qua the defendants also making borrowings from Punjab National Bank, Nalagarh, and, from the Himachal Pradesh Financial Corporation. He also further testified qua the plaintiff, entering on 12.2.1987 into a pari-passu agreement with the Punjab National bank, as, also with the Himachal Pradesh Financial Corporation. The apposite copy of the agreement, is, comprised in Ex. PW-1/K. Further he testifies qua in pursuance thereto, the defendants availing the loan facility, and, withdrawing a sum of Rs.56.31 lacs. Even though, despite defaults being made by the defendants, yet, repayment of loan being ordered, through, Ex. PW-1/L, and, yet also the defendants making defaults, and, thereupon, the industrial Unit of defendant No.1, being taken over, by the Himachal Pradesh Financial Corporation, under, the provisions of Section 29 of the State Financial Corporation Act, 1951, (i) and, the afore action being challenged before this Court through CWP No. 309 of 1988, and, the afore CWP being dismissed, under, order borne in Ex. PW-1/M, (ii) and, a Special Leave Petition arising therefrom, before the Hon'ble Apex Court, also standing dismissed, through orders contained in Ex. PW-1/N. He further deposes qua in compliance to the directions rendered by the Hon'ble Apex Court, the sale of the industrial Unit, of, the defendant being re-advertised, by the Himachal Pradesh Financial Corporation, yet, the defendant preferring an application before the BIFR, registered as Case No. 261/1988 , and, the afore application being dismissed, on 19.10.1989, and, the appeal reared therefrom also suffering, dismissal, and, the afore orders, being, respectively comprised in Ex. PW-1/O, and, in Ex. PW-1/P. He further testifies qua on 30.6.1993, the defendants approaching the plaintiff, through, Ex. PW-1/Q , for, restoration of the assets to them, and, for sanction of rehabilitation package, and, the afore request being acceded to by the plaintiff, and, an additional sum of Rs.7 lacs, being sanctioned, however, with a promise that they would clear the entire outstanding loan amount. The afore promise, is, testified, to remain uncomplied with, by the defendants, given, the defendants, as testified by PW-1, omitting to submit, a, rehabilitation package. Consequently, notice under Section 29 of the State Financial Corporation Act, as, embodied in Ex. PW-1/R, stood issued, upon the defendants, and, for lack of response thereto, by the defendants, hence, the assets being taken over by the plaintiff, on, 17.2.1998 and in contemporaneity therewith, an, inventory of assets being also prepared. He also testifies that the defendants vide Ex. PW-1/T responding to the notice issued, by, the plaintiff. He furthers testifies, qua, the plaintiff granting requisite extension, to, the defendants vide Ex. PW-1/U, However, for want of, the, defendants, not, keeping their promise, a complaint embodied in Ex. PW-1/V, being lodged against them at police Station, Nalagarh. The police responded, by three communications, borne respectively in Ex. PW-1/W-1, Ex. PW-1/W-2 and in Ex. PW-1/W-3. He further testifies qua the bids being invited for the sale of the assets of the defendants, and, an offer of Rs. 50 lacs, being made by Quadricon Private Limited, offer whereof was accepted by the plaintiff. He further testifies qua the defendant Company not fulfilling its undertaking and thereupon, the, earnest deposit of Rs.3 lacs being forfeited by the plaintiff, and, the amount was credited to the account, of, the defendants. He also testifies that the assets were again put to sale by invitation of bids, this

time, a consideration of offer, of, Rs. 79 lacs, was made by S.K Mineral, offer whereof was finalized, and, accepted on 11.6.2004, copy of letter accepting the bid, is, comprised in Ex. PW-1/K. He also testifies that they paid the entire amount, and, therefore, the auctioned assets were handed over to them. He also testifies that the plaintiff appropriated a sum of Rs.52,65,170/- to Himachal Pradesh Financial Corporation, Rs.24,40,830 to itself, and, Rs. 2,20,000/- to the Excise and Taxation Department. He also testifies that notice embodied in Ex. PW-1/Y was issued for recovering the balance amount. During his cross-examination, he testifies qua the rate of interest being not charged, on, a compounding basis. He also testifies qua the assets of the defendant-company, standing evaluated, from the HIMCON, on March, 1998, copy whereof, is comprised in Ex. D-1. He also testifies in his cross-examination qua no notice being issued to the defendants either individually or jointly, however, a notice being issued in the newspaper, making echoings, qua the maximum bid, of, Rs. 79 lacs, standing received. He denied the suggestion qua it being the plaintiff's responsibility to recover the assets/liabilities etc. of the industrial unit, qua wherewith possession was assumed by the plaintiff. He also denied qua it being the duty of the plaintiff to recover 3250 cylinders valuing Rs. 1,30,65,000/-, from, the various dealers, after, the assets of defendant No.1 had been taken over by the plaintiff. He also stated it to be correct that the revival plan Ex. PW-1/Q is not signed by defendant No.6.

16. PW-2 Shri Rajinder Prasad, Senior Manager (Projects) HPSIDC Ltd. testifies, in his examination-in-chief qua the accounts of the all the loanees being maintained under his supervision. He has also brought ledger account, comprised in Ex. PW-2/A. He also testifies qua letters respectively comprised in Ex. PW-2/B and in PW-2/C, being sent, for, publication of notice in the newspaper(s), regarding the maximum bid, received by the plaintiff. During, the course of his cross-examination, he denied the suggestion qua Ex.PW-2/A, and, the books of accounts, standing prepared incorrectly, or, qua theirs not reflecting the true and proper accounts.

17. DW-1 (HC Harvinder Kumar) has produced the FIR register in respect of P.S Nalagarh, for, the period 19.3.1998 to 26.4.1998. He testifies qua Ex. DW-1/A being the true and correct copy of FIR No. 65 of 1998.

18. DW-2 Deepeshwar Sharma testifies in his examination in chief qua his father expiring in the year 1996. He also testifies qua his unknowing qua his father signing the documents comprised in Ex. PW-1/G , in Ex. PW-1/H and in Ex. PW-1/J. He further testifies qua his, not, receiving any notice comprised in Ex. PW-1/Y. In his cross-examination, he stated that he cannot recognize the signatures of his father Mr. Y.D Sharma. He also can not say that whether defendants No. 1 to 5 had taken loan from the plaintiff-corporation, and, that his father was also one of the guarantor.

19. Since the material averments, cast in the application, are, proven by the testification of PW-1, and, by the testification of PW-2, and ,when the predecessor-in-interest, of, co-defendant No. 6, is, a signatory of Ex. PW-1/J,and, when no evidence has been adduced by co-defendant No. 6, that, after revival of the defendant No.1/company, his predecessor in interest, remaining only a share holder therein, and, consequently his being absolved, of his, coextensive liability, as a guarantor, vis-a-vis, the borrowings made by co-defendant No.1, from the plaintiff, and also from all consequential therewith liabilities, (i) thereupon, any argument addressed before this Court, by, the learned counsel for the defendant No. 6, qua, on the afore anvil co-defendant No. 6 being absolved, of, his liability, obviously is both blunted, and, maimed, (ii) conspicuously also on the principle of liability, of, the guarantor, being, co-terminus, with, the original borrower hence, defendant No. 6, is, jointly and severally liable alongwith the principal borrower, hence to face a conjoint decree, being pronounced, vis-a-vis, the plaintiff, in the instant suit, (iii) and, even if the

predecessor-in-interest of defendant No. 6 has died, yet, the assets inherited by defendant No. 6, from his predecessor-in-interest, are, yet available for enforcing the afore principle of coextensive, and, coterminous liability, of, the apt successor-in-interest, of, the guarantor, alongwith, the principle borrower, vis-a-vis, the loan amount. Hence, the afore issues are decided in favour of the plaintiff and against the defendants.

Issue No. 7

20. Since the accruable causes of action commenced from the date enumerated in the plaint and since therefrom, for the various reasons delineated, in the plaint, the cause(s) of action survived, up to, the date, of, institution of the suit, thereupon the suit is within limitation.

Issues No. 8 to 10

21. Since PW-1 has denied the suggestion, put to him, by the learned counsel, for, the defendants concerned, that, it was a solemn responsibility, of, the plaintiff to collect, the cylinders, from the entities/persons concerned, and, has also denied the further suggestion, put to him, qua monetary value(s) thereof being amenable for being recompensed, vis-a-vis, the defendants, besides when no cogent evidence comprised in apt therewith recitals or covenants being borne in the relevant contract, remains un-adduced, thereupon the afore issues are decided in favour of the plaintiff, and, against the defendants, and, the amount claimed in the counter claim, is, declined to be decreed qua the defendants.

Issue No. 11

22. The counterclaim has been properly valued for the purpose of Court fee and jurisdiction, hence the afore issue is decided in favour of the defendants and against the plaintiff.

Relief:-

23. In view of the above, the present suit is decreed for a sum of Rs.1,41,82,110.55 with costs and interest at the rate of 12% per annum with half yearly rests from 10.12.2004 till its realization, and, also jointly and several amongst the defendants, whereas the counter claim filed by defendants No. 2 and 5, stands dismissed. Decree sheet be prepared accordingly.

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

Zabar Singh and others ...Appellants.
Versus
Atma Ram and others ....Respondents.

RSA Nos. 174 and 175 of 2007
Reserved on: 5.8.2019
Decided on : 13.8.2019

Indian Evidence Act, 1872 – Sections 107 & 108 – Presumptions thereunder – Applicability –Held, if a man is proved to be alive for thirty years then burden of proving qua his being

dead is to be discharged by apposite espousing litigant and he may relieve the rigors thereof by cogent evidence being adduced qua said person remaining unheard of by his relatives for seven years – In that eventuality, onus shifts to litigant making a proclamation vis-a-vis the factum of his being alive. (Para 12)

For the Appellants: Mr. R.K Bawa, Sr. Advocate with Mr. Ajay Kumar Sharma, Advocate.

For the Respondents: Mr. G.C Gupta, Sr. Advocate with Mr. Ramakant Sharma, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeals are directed, against, a common verdict recorded by the learned District Judge, Kinnaur Civil Division at Rampur Bushehar, H.P. (for short first appellate Court), upon, Civil Appeal No. 77 of 2004, and, upon Civil Appeal, No. 3 of 2004, wherethrough the plaintiff's appeal stood allowed, and, their suit was decreed, and, the defendants cross-objections stood dismissed.

2. The appellants herein (for short the defendants) being aggrieved from the verdict(s) recorded by the learned first appellate Court, hence, preferred the instant RSAs before this Court.

3. Since common questions of law, are, involved in both the instant appeals, hence these are amenable for, hence, a common verdict being rendered thereon.

4. The Brief facts of the case are that the plaintiff one Benj Ram (predecessor-in-interest of the respondents No.1 and 2 herein, for short "the plaintiff") has sought a decree of possession of land comprised in khata No. 17 Khatauni No. 27 measuring 21.15 bighas situated in Mauza Labana Sadana and land comprised in khata Khatauni No. 20/30 measuring 8.10 bighas situated in Chak Molgee, as mentioned in jamabandi for the year 1973-74 (for short the "suit land") on the ground that he is owner of the suit land, and, at one point of time he had been residing in this part of the area before migrating to village Nail of Tehsil Karsog of 30-40 years ago. Devi Saran, Predecessor-in-interest of defendants No. 1 to 8 was his brother and he was residing at village Labana Sadana. Before leaving this place, he handed over the suit land to his above named brother for cultivation with the understanding that as and when he would return, the suit land would be handed over to him. In fact he inducted Devi Saran as a licencee over the suit land. On the basis of the above, he has challenged the correctness of the revenue entries showing Tikam Ram, predecessor-in-interest of defendants No. 3 to 8 and Tulsi Ram and defendant No.1 Sheeshi Ram as Gair Mauroosi (Tenant in will) in respect of the suit land. As per him, he had at no point of time had inducted them as tenants over the suit land, nor, he had he ever received any rent from them, or, their predecessors-in-interest, either in kind or in cash. Prior to the demise of his brother namely Devi Saran, he used to come to village Labana Sadana frequently, but, after his demise he did not come to his village so frequently. By taking advantage of his absence, the defendants wrongfully got attested mutation No. 14 dated 19.4.1989 in their favour on the ground that since he has not been heard of for the last 40-50 years so, he be presumed to be dead, when he came to know about the afore mutation, he moved an appropriate application before the revenue authority concerned, and, thereafter afore mutation stood reviewed by the Assistant Collector, 2nd Grade, Rampur on 28.9.1994, and, the entry qua ownership was restored in his name. Thereafter, he requested the

defendants to handover the possession of the suit land to him, but, they did not accept his request. Hence, the present suit.

5. The contesting defendants have contested the suit of the plaintiff. They initially filed written statement on 27.10.1998 which was subsequently got amended by them by moving an application under order 6 Rule 17 CPC which was allowed in revision by this Court, vide, order dated 19.6.2000. The defendants raised preliminary objections of locus standi, misjoinder of cause of action, jurisdiction, valuation and limitation. On merits they admitted that previously Benj Ram who was real brother of Devi Saran was recorded owner of the suit land, however, they denied that the present plaintiff is the same person, and, has pleaded that in fact the present plaintiff is shiv Ram. As per them the present plaintiff is impostor. They further pleaded that present story has been invented by his attorney, in, connivance with certain persons in the village, who, intend to grab the suit land, and, thus he is not entitled to file the present suit. According to them, about 55/60 years ago Benj Ram, left this place but he inducted Devi Saran and Sheeshi Ram, as, non-occupancy tenant over the suit land, and, the rent agreed inter-se them was the land revenue and other cessies. Thereafter Devi Saran and Sheeshi Ram cultivated the suit land and paid the land revenue and other cessies to the appropriate authority. Thereafter a family partition took place inter-se the contesting defendants somewhere in the year 1951-52, and, the land situated in chak molgi fell into the share of defendant No.1, and, thereafter he remained in possession thereof. Initially, this parcel of the land was Banjar, and, was used for the purpose of Gasni, however, lateron the defendants planted apple plants over this part of the suit land too. Since then, they were non-occupancy tenants over the suit land, therefore, proprietary rights in respect of the suit land were conferred upon them, as, per the mandate of section 104 of H.P Tenancy and Land Reforms Act, 1962, and, in this behalf a mutation was also attested on 17.5.1977. On the afore basis, they further pleaded that they have now become absolute owners of the suit land. In the alternative, it has been pleaded that since the land situated in chak Molgi was in open, peaceful and un-interupted possession of the defendants to the very knowledge of Benj Ram, so they have perfected their title in respect thereof by way of adverse possession. They also admitted that Assistant Collector, IInd Grade, vide his order of 28.9.1994 had reviewed the earlier order of 19.4.1989, however, they have pleaded that the same is illegal, as, the same was done behind their back. They have also taken the plea that an apple orchard exists on the suit land, with a market value of not less than Rs.6,00,000/-. They have also pleaded that the suit is not properly valued for the purpose of court fees and jurisdiction, they have also pleaded that Civil Court is not competent to hear and decide the matter, as, the dispute is inter-se the tenant and a landlord. They have also taken the plea of the suit being not maintainable.

6. In the apt replication, the plaintiff controverted the contentions of the defendants, and, reiterated his stand taken in the plaint. It is also averred in the replication that late Shri Benj Ram had left his native village in the year 1940 and settled in village Nail Panchayat Kalashan, Tehsil Karsog, as, he had solemnized marriage with a Harijan lady, and, it was not possible for him to reside and live in his native village, as, in those years, during the rule of Ex-Raja of Bushehar the Rajput marrying Harijan woman was not allowed to live in Rajput Society and in the afore circumstances, Benj Ram left his village.

7. From the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. Whether the plaintiff is entitled to recover possession of the suit land? OPP

2. Whether the suit is not competent on the ground mentioned in preliminary objections No.1 and 2? OPD No. 1 to 8.
3. Whether the suit is bad for mis-joinder of cause of action? OPD No. 1 to 8.
4. Whether the suit is not maintainable ? OPD 1 to 8.
5. Whether the plaintiff is estoped by his act and conduct to file the present suit? OPD 1 to 8.
6. Whether this Court has got no jurisdiction to try the preset suit, as there exists relationship of land lord and tenant between the parties, s alleged? OPD 1 to 8.
7. Whether the suit has not been property valued for the purposes of jurisdiction and Court fees, if so, what is correct valuation of suit property? OPD 1 to 8.
8. Whether the suit is barred by limitation? OPD 1 to 8.
9. Whether the defendants were in possession of the suit land as non-occupancy tenant and are entitled to the conferment of proprietary rights, as alleged? OPD 1 to 8.
10. If issue No. 9 is not proved, whether the defendants have become owner of the suit land by way of adverse possession? OPD 1 to 8.
11. Relief.

8. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the plaintiffs' suit. In an appeal, preferred therefrom, by the plaintiff, before the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court, and, dismissed the cross-appeal/ cross-objections reared therebefore, hence, by the defendants.

9. Now, the, contesting defendants, have instituted, the instant Regular Second Appeal before this Court, wherein, they assail the findings recorded, in its impugned judgment(s), and, decree(s), by, the learned first Appellate Court. When the appeal(s) came up for admission, on 28.12.2007, this Court, admitted the appeal(s), on the hereinafter extracted substantial questions, of law:-

4. Whether once the plaintiff has pleaded that he had left the suit land in the year 1940 and since then the defendants are in possession of the suit land, the suit filed by the plaintiff in the year 1996 is hopelessly time barred?

5. Whether the findings of the learned first appellate Court below are dehors and contrary to the provisions of Section 108 of the Indian Evidence Act especially when it is proved that Benj Ram has not been heard of or seen after the year 1940 by those who would naturally have heard of him if he had been alive?

6. Whether there has been misreading or evidence, oral as well as documentary, by the learned first Appellate Court?

<u>Substantial questions of law:-</u>

10. The defendants, stand aggrieved, by the disaffirmative findings recorded, upon, issues No. 8,9 and 10, appertaining respectively to (a) the plaintiffs' suit being barred by limitation, and, (b) qua the defendants holding the status, of, non-occupancy tenant, vis-a-vis, the suit land, and, theirs being entitled to automatic conferment of proprietary rights thereon, besides (c) appertaining to the defendants acquiring title, by adverse possession,

vis-a-vis, the suit land. The defendants' resistance to the plaintiff's suit, for, possession, vis-a-vis, the suit land, is, contended in the apposite written-statement, to, arise from the plaintiff one Benj Ram not being the original Benj Ram, rather, his impersonating the identity and personality, of, the original Benj Ram. The afore resistance made by the defendants, is, anvilled, upon, (i) the afore being the real brother of Devi Saran, and, uncle of Shishi Ram, (ii) and, also with the afore being, close relatives, of, one Benj Ram hence both holding an intimate knowledge, vis-a-vis, the factum of his being alive, or his not being heard, of, for seven years, and, also with affirmative echoings being borne in the oral testifications, and, in, the, documentary evidence, thereupon the apt provisions of Section 107, and, 108 of Indian Evidence Act, provisions whereof stand extracted hereinafter, standing satiated, vis-a-vis them (iii) and, conspicuously qua, the plaintiff impersonating the identity and personality of their respective brother and uncle one Benj Ram, given his being proven to be dead, his, remaining unheard since past so many years, and, thereupon they strive, to, validate the mutation of inheritance attested, in, their favour.

> "S. 107 Burden of proving death of person known to have been alive within thirty years-When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.
>
> S. 108 Burden of proving that person is alive who has not been heard of for seven years-Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

11. The plaintiff had instituted, a, replication to the afore contention, reared by the defendants in their written-statement, instituted to the plaint, and, therein reared a contention, (i) qua since he had contracted a marriage with a Harijan woman, one Seeta, and, hence for avoiding the ill consequences, of, his being ostracized, thereupon, his shifting his abode from his native village, to, village Nail at Karsog, and, also his changing his name, from, Bainj Ram to Shiv Ram.

12. For making a correct appreciation, of, the afore extracted relevant provisions of the Indian Evidence Act, and, also for invaliding or validating the respective discharging evidence adduced hence, by the contesting parties, upon, the issues appertaining therewith, it is incumbent upon this Court, to, discern the subtle nuance thereof. The innate rubric embodied in the apt provisions, of, the Indian Evidence Act, (i) is, qua upon contentious issue(s) emerging inter-se the litigants, vis-a-vis, the trite factum, of, a man being alive or dead, and, it making vivid disclosure therein, that, his being alive for thirty years, (ii) thereupon, the burden of proving qua his being dead, being enjoined to be discharged by the apposite espousing litigant, and, though the apt excepting thereto statutory provisions, embodied in Section 108 of the Indian Evidence Act, may relieve the rigor thereof, by cogent evidence being adduced, qua given his remaining unheard, of, by his relatives, rather for seven years, thereupon the onus (a) qua therewith shifting, upon, the litigant making a proclamation, vis-a-vis the factum of his being alive (b) succinctly, the litigant making the afore proclamation(s), vis-a-vis, the, person concerned, being alive or his not being impersonated, is, enjoined to adduce hence consonant thereto discharging evidence, at, the apt stages, of, trial of the suit, and, requisite therewith onus(s), upon contra therewith evidence being adduced, hence, shifting upon each of the litigants, hence making the requisite proclamation(s).

13. Be that as it may, having culled the innate rubric, of, the apt statutory provisions, borne in the Indian evidence Act, and, combining them, with, the afore contention reared, by the contesting litigants, (i) thereupon it is incumbent to discern, from, the oral evidence adduced, by the defendants', as, comprised in the, the person(s) who are close relatives, of, purportedly deceased Bainj Ram, and, who would naturally have heard of him, of, him, if, was alive, and, (ii) evidence whereof, is, comprised in their oral statements, wherethrough they succor the apposite espousal made by them, in, their written-statement furnished to, the plaint, (iii) besides they strive to establish the afore, from, Ex. DA (abstract of Pariwar Register), and, Jamabandi Ex. D-A1 (iv) wherefrom, the afore Bainj Ram, though, is contended in the apposite replication, to shift, for, hence avoiding his being ostracized, rather for, marrying a Harijan lady, hence from his native abode to village Nail, in Karsog, (v) and, with rather reflections being cast, in the afore register, qua for avoiding his detection at village Nail, the, afore Bainj Ram changing his name to Shiv Ram, (vi) yet all-effects, if any, of, theirs is/are oustable, given, with, his natural father being one Tholi Ram, and, with the afore exhibits, reflecting qua his being fathered, by one Jagat Ram, hence the afore changing, of, apt parentage, rather inviting suspicion. Consequently, on anvil of the afore documentary evidence, combined, with the oral depositions, of, the defendants, they strive to take benefit of section 108 of Indian Evidence Act, (a) and, espouse qua given theirs' being close relatives of Bainj Ram, and, theirs having not heard of him, for seven years, (b) thereupon he is presumed to be dead, hence theirs discharging the onus of proving qua his being dead and, they contend, that the decreeing of the plaintiff's suit, and, dismissal of their cross appeal/objections, hence warranting interference, as, upon, the, apposite onus being discharged, the afore hence shifting, vis-a-vis, the plaintiff, and, rather, the latter rather failing to adduce consonant therewith evidence.

14. However, in making the afore submission, the, learned counsel for the appellants, has, remained unmindful, vis-a-vis, upon, the apt onus shifting, upon, the plaintiff, to, prove qua his being alive or his being the original Bainj Ram, and, whether he, is, impersonating the identity and personality, of, the afore Bainj Ram, (i) hence, the plaintiff placing reliance, upon, an order of mutation of 18.5.1994, with echoing therein qua Bainj Ram, furnishing an affidavit, before the Officer, who, reviewed the earlier mutation, and, his therebefore being identified by Ram Chander s/o Gura Nand R/o village Molgi 15/20, (ii) besides, with echoings borne therein, qua his not visiting his native home, (iii) and, also the affidavit furnished before the Officer, who reviewed the earlier mutation, rather carrying echoings qua since thirty years preceding therefrom, his not, visiting his native home, (iv) and, that upon his acquiring knowledge, after five years, vis-a-vis, the apt, proclamation, being issued, hence rather with a false echoing qua his being dead, hence the earlier mutation obviously warranting its being reviewed, (v) and, also, with Zabar Singh being echoed qua his recording, his, presence before the Revenue Officer concerned, and, his making a statement, before the Revenue Officer concerned, that the earlier mutation, being erroneously recorded, (vi) and, the afore statement being made, for himself, and, as attorney for other co-defendants, and, conspicuously with the order made on 18.5.1994, hence making the afore emphatic clear enunciation qua the plaintiff, being the original Bainj Ram, and, his personality not being faked nor misrepresented, by the person cast, as, plaintiff in the extant suit, thereupon, and, therethrough the plaintiff has, upon, the requisite onus shifting, upon, him rather, hence proven qua his being alive, and, his being the genuine or original Bainj Ram.

15. Be that as it may, the, defendants have contended, that, the recording of the afore mutation, is, insignificant. However, the afore contention would carry weight, only upon, (a) the person who identified the afore Bainj ram before the Revenue Officer concerned, being ensured to be produced, in, the witness box, for, hence his ripping the

tenacity of his therebefore hence identifying the afore Bainj Ram, to be, the original Bainj Ram. The aggrieved defendants falsifying, the recitals borne in the order recorded on 28.9.1994, qua, hence the defendant Jabar Singh, for, himself, and, as attorney, for other co-defendants acquiescing vis-a-vis, the earlier mutation, rather being erroneously recorded. However, the afore evidence, for eroding the presumption of truth enjoyed by the orders recorded, on 18.5.1994, and, on 28.9.1994, rather remains unadduced, (a) and, when the afore orders are made by the revenue officer, during, his discharging his official duties, (b) and, hence when thereto, a, rebuttable presumption of truth is attached, given, the apt statutory ingredients, in consonance therewith, standing borne in Section 35 of the Indian Evidence Act, (c) thereupon reiteratedly the afore apt presumption, gathers an aura of veracity hence within the ambit of the afore provisions. Conspicuously, for want of, potent discharging evidence, rather, for benumbing the afore inference, hence coming to be adduced by the defendants, (a) concomitantly therefrom it is concluded qua the evidence of the defendants being incredible, whereas, the evidence of the plaintiff, being credible, dehors documentary evidence borne in Ex. DA, whereunder the parentage of the plaintiff, is, different, than, the earlier reflections in the records appertaining to the suit land, (b) given the afore difference arising, from, his avoiding his detection at Nail whereto he shifted, for, avoiding his suffering ostracization, given, his contracting marriage with a harijan girl. However, the learned counsel, for the defendants contended with much vigor before this Court, that, the suit of the plaintiff, is, outside limitation, as, it is instituted beyond 12 years, since the making, of, an order of 1994. However, even if prima-facie the suit, is, instituted beyond 12 years, since the making of an order hence respectively, by the revenue officer, in the year 1994, (i) yet the afore purported delay, is, rendered inconsequential, (ii) given, the plaintiff averring qua the relevant overt act of invasion, vis-a-vis, the suit land, arising initially in the year 1989, and, thereafter in the year 1994, (iii) and, when the commission of the relevant overt act, of invasion or usurpation, upon, the suit land, in respect whereof, he has an order of mutation, hence declaring qua his holding a valid title thereon, rather constitutes apt tenacious germination of causes of action, for, his instituting therefrom, a, suit for possession, hence, reckonings therefrom make his suit, to, fall within limitation. Substantial questions of law are answered accordingly. The appeals stand dismissed, and, impugned judgment is maintained and affirmed. Records be sent back.

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

Dropti Devi (deceased through Legal Representative) ....Appellant/ plaintiff.

Versus

Purshottam Singh (deceased through LRs & another ...Respondents/defendants.

RSA No: 636 of 2014
Decided on: 19.08.2019

Specific Relief Act, 1963–Section 38– Permanent prohibitory injunction– Grant of- Plaintiff filing suit for permanent prohibitory injunction on allegations of unauthorized interference by defendants in her possession over suit land– Suit dismissed by trial court and her appeal by District Judge– RSA– Held, grant of permanent prohibitory injunction is discretionary and court may grant this relief to plaintiff in case it is satisfied that there is interference being caused by defendants – Plaintiff failing to substantiate allegations of interference whatsoever being caused upon suit land by defendants – Present suit is nothing but an addition to long process which involved filing of numerous such suits unsuccessfully by

plaintiff against defendants– RSA dismissed with costs assessed at Rs. 3000/- Decrees of lower courts upheld. (Paras 14 to 20)

For the appellant : Mr. Ajay Dhiman, Advocate.
For the respondents : Mr. Naresh K. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this appeal, the appellant has challenged the judgments and decrees, passed by the Court of learned Civil Judge (Junior Division), Court No.2, Ghumarwin, District Bilaspur, H.P. in Civil Suit No.12/1 of 2010, titled as Daropati Versus Purshottam and another, decided on 30.12.2013 and by the Court of District Judge, Bilaspur, H.P, in Civil Appeal No.1/13 of 2014, titled as Dropti Devi Versus Purshottam Singh & another, decided on 01.05.2014, vide which the suit as well as appeal filed by the present appellant against the respondents herein stand dismissed.

2. Brief facts necessary for the adjudication of the present appeal are that appellant/ plaintiff (hereinafter to be referred as the "plaintiff") through her General Power of Attorney Shri Atma Ram, filed a suit, praying for a decree of permanent prohibitory injunction against the defendants for restraining them from causing any interference over the suit land measuring 22-7 bigha, comprised in khasra No.697 khata khatoni No.202/248 min, situated in village Badgaon, Pargna Sunhani, Tehsil Jhandutta, District Bilaspur, H.P.

3. The case of the plaintiff was that she was exclusive owner in possession of the suit land. The defendants were strangers to the suit land who were having no right, title or interest thereupon. On 12.01.2010, defendants had started causing interference over the suit land by digging the same as also by destroying the crops and grass standing upon the same, hence the suit.

4. The suit was contested by defendants, who besides taking preliminary objections with regard to the maintainability of the suit, on merit, while admitting the factum of the plaintiff being exclusive owner in possession of the suit land, denied that they had caused any interference over the same. According to the defendants, the plaintiff was a habitual litigant, who had filed suit after suit against the defendants, claiming the same relief, which stood dismissed. It was also the case of the defendants that suit was barred by the principle of res-judicata.

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

> "1. Whether the plaintiff is entitled for decree of permanent prohibitory injunction as prayed for? OPP.
> 2. Whether the suit of plaintiff is not maintainable in the present form as alleged? OPD.
> 3. Whether the plaintiff has no cause of action to file the present suit as alleged? OPD.
> 4. Whether the plaintiff has no locus standi to file the present suit as alleged? OPD.
> 5. Whether the plaintiff is estopped from filing the present suit by her own acts, conduct, omissions and commissions, as alleged? OPD.

6. Whether the suit of the plaintiff is bad for mis-joinder and non-joinder of necessary parties as alleged? OPD.
7. Whether the suit of the plaintiff is time barred, as alleged? OPD.
8. Whether the suit of plaintiff is barred by principle of res-judicata, as alleged? OPD.
9. Whether the suit of plaintiff is not properly verified, as alleged? OPD.
10. Whether the suit of plaintiff is not properly valued for the purpose of Court fee and jurisdiction, as alleged? OPD.
11. Relief".

6. On the basis of evidence led by the parties in support of their respective contentions, learned Trial Court returned the following findings on the issues so framed:-

"Issue No.1	:	Negative.
Issue No.2	:	Negative.
Issue No.3	:	Affirmative.
Issue No.4	:	Negative.
Issue No.5	:	Negative.
Issue No.6	:	Negative.
Issue No.7	:	Negative.
Issue No.8	:	Negative.
Issue No.9	:	Negative.
Issue No.10	:	Negative.
Relief	:	The suit is dismissed per operative part of the judgment".

7. The suit was thus dismissed by the learned trial Court by holding that plaintiff had miserably failed to demonstrate that any fresh cause of action had accrued in her favour, enabling her to maintain the suit against the defendants. Learned trial Court held that it was a matter of record that various civil suits were filed with regard to the suit land itself, praying for the same relief against the defendants, which stood dismissed by the Civil Courts.

8. Learned Court further held that three witnesses who were examined to prove her case by the plaintiff i.e. PW-2 Onkar Singh, PW-3 Jamit Singh and PW-4 Sardar Deen, were not able to demonstrate that there was any interference being caused upon the suit land by the defendants. Learned Court held that Onkar Singh had categorically stated in his cross-examination that the statement which he was making pertained to the events which had accrued somewhere in the year 1985 and he was neither aware nor conversant with the dispute presently going on between the parties. Similarly, PW-3 Jamit Singh stated in his cross-examination that he was a witness to a demarcation which was conducted about 25 to 26 years back perhaps in the year 1985 and since then he had no idea about the suit land. Learned trial Court also held that PW-4 Sardar Deen deposed that he was not aware as to against whom the suit was filed and he had no idea about the dispute regarding suit land. Learned trial Court further held that statement of the Power of Attorney holder of the plaintiff was equally balanced by the statement of the defendant i.e. DW-1 Purshottam Singh and the allegations made by the plaintiff that defendant had cut and sold big trees from the suit land, could not be substantiated by way of any cogent evidence on record. Learned trial Court also held that the Power of Attorney holder of the plaintiff had failed to demonstrate

and prove that any trees standing upon the suit land were felled by the defendants or that defendants had dug up portion of the suit land and had destroyed the crops and grass.

9. On these basis, learned trial Court dismissed the suit by holding that plaintiff had not led cogent and reliable evidence to prove interference allegedly being caused by the defendants over the suit land.

10. In appeal, findings returned by the learned trial Court were upheld. Learned Appellate Court while dismissing the appeal, held that record clearly demonstrated that repeated suits were unsuccessfully filed by plaintiff against defendants qua the suit land. Learned Appellate Court observed that plaintiff had filed Civil Suit No.1/1 of 1988 for possession of the suit land, but said suit was withdrawn on 14.06.1988. Thereafter, Civil Suit No.163-1 of 1988 was filed, in which same suit land was involved. Said suit was dismissed vide judgment dated 03.04.1991 (Ext.D-4). Thereafter, Civil Suit No.361/1of 1995/94 was filed and that suit was also dismissed vide judgment Ext.D-5/DE dated 18.10.2001. Appeal filed against the same was also dismissed vide judgment Ext.D-6 dated 19.04.2005. The plaintiff did not relent and went on to file another suit i.e. Civil Suit No.112-1 of 2002, for possession of the suit land, which was also dismissed vide judgment Ext.D-1 dated 23.03.2006.

11. Learned Appellate Court, thus held that plaintiff unnecessarily was filing one suit after another with regard to the claim upon the same property, which matter already stood finally decided between the parties. Learned Appellate Court held that no doubt, in the fresh suit filed, plaintiff had mentioned different date with regard to the accrual of the cause of action, but none of the witnesses examined by the plaintiff corroborated her case as none of them were aware about the existing position at the spot and PW-2, PW-3 examined by the plaintiff had categorically stated that they were not aware about the factual position of the suit land except the demarcation which had taken place as far back as in the year 1985 and PW-4 had categorically stated that he was not aware about any dispute between the parties. Learned Appellate Court thus held that the evidence led by plaintiff did not support her case that defendants had interfered with the suit land and on these basis, it held that the learned trial Court had rightly come to the conclusion that plaintiff was trying to beat the bush by needlessly filing one suit after another.

12. Feeling aggrieved, appellant/ plaintiff had filed the present appeal.

13. I have heard learned counsel for the parties and have also gone through the judgments and decrees passed by both the learned Courts below.

14. The suit filed by appellant/ plaintiff was for permanent prohibitory injunction. It is settled law that the said relief is a discretionary relief, which the Court may grant to plaintiff in case it is satisfied that there is interference being caused by defendants.

15. In the present case, there are concurrent findings returned by the learned Courts below that plaintiff had failed to substantiate that any interference whatsoever was being caused upon the suit land by defendants. It is further evident from the record that as far as the factum of plaintiff being owner in possession of the suit land is concerned, even defendants are not disputing it. However, they have categorically maintained that they are not causing any interference whatsoever upon the suit land and filing of the suit is nothing, but an addition to a long process which involved filing of numerous such suits unsuccessfully by plaintiff against defendants. It is duly borne out from the record that about four to five Civil Suits were filed by plaintiff against defendants, seeking same/similar relief, which stood prayed for in the last suit filed by her, out of which this appeal has arisen. In none of the earlier suits, there was any adjudication in favour of plaintiff. Though

few cases were withdrawn by plaintiff, however, other cases stood decided by the learned Court (s) against plaintiff on merit.

16. As the allegation of plaintiff was that defendants were interfering upon the suit land, onus, but obvious, was upon plaintiff to have had proved this fact in the present case. There are again concurrent findings returned by both the learned Courts below that none of the witnesses examined by plaintiff to prove her case i.e. PW-2 Onkar Singh, PW-3 Jamit Singh and PW-4 Sardar Deen, have corroborated the case of plaintiff that defendants were interfering with the suit land.

17. During the course of arguments, learned counsel for the appellant could not point out that the findings returned by both the learned Courts below were perverse and not borne out from the record. Similarly, learned counsel for the appellant also could not demonstrate the concurrent findings returned by the learned Courts below that even the Power of Attorney holder of the plaintiff was not able to prove any interference over the suit land by defendants, were perverse findings and not borne out from the record.

18. This Court is not oblivious to the fact that filing of previous suits, claiming relief of permanent prohibitory injunction is no bar for filing a fresh case in case a fresh cause of action accrues in favour of a party, but in the present case, plaintiff has miserably failed to demonstrate that any fresh cause accrued in her favour to file and maintain the suit in hand.

19. Whether or not, there was interference upon the suit land by defendants being a question of fact has been decided in favour of defendants and against plaintiff by both the learned Courts below. It is also borne out from the record that appellant/ plaintiff is a chronic litigant who has dragged the respondents in numerous litigation unsuccessfully. Therefore, as no substantial question of law is involved in this appeal, the same is accordingly dismissed.

20. This Court also concurs with the findings returned by the learned Courts below that filing of the suit was nothing but an abuse of process of law and an endeavour to unnecessarily harass defendants. Thus, this appeal is dismissed by imposing cost of ₹30,000/- upon appellant/ plaintiff. Pending miscellaneous applications, if any, stand dismissed. Interim order, if any, also stands vacated.

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

Prithvi Singh …… Petitioner.
Versus
The Executive Engineer, HPSEB Ltd. Division Rajgarh,
District Sirmaur,H.P. & others …… Respondents.

CWP No.4847 of 2015
Date of decision: 26.08.2019

Industrial Disputes Act, 1947– Section 25F– Illegal retrenchment– Prayer for reinstatement– Delay in raising dispute– Effect– Industrial Tribunal-cum-Labour Court dismissing application seeking reinstatement- Writ petition– Held, there is no plausible explanation on part of petitioner as why a demand notice was served by him on employer

after two decades since he ceased to serve the employer– Even if there is no period of limitation within which an Industrial dispute has to be raised by workman but this does not mean that workman can continue to sleep over his rights for decades together and thereafter on one fine day he can wake up and approach court without explaining delay on ground that there is no limitation prescribed in law to approach it - Even in case, where no limitation is prescribed, the court can presume period of about three year, as a reasonable time within which litigant must approach it for redressal of his grievances. (Paras 9 to 11)

For the petitioner	Mr. A.K. Gupta, Advocate and Ms. Babita Thakur, Advocate.
For the respondents	Mr. Vikrant Thakur, Advocate, for respondent No.1. Mr. Dinesh Thakur, Additional Advocate General with Mr. Amit Kumar Dhumal, Ms.Divya Sood, Deputy Advocate Generals, for respondents No.2 & 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

By way of this Writ Petition, petitioner has challenged the order passed by the Court of learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, H.P., in application No.27 of 2012, titled as Prithvi Singh (Ram) Versus The Executive Engineer, HPSEB Ltd., Division, Rajgarh, District Sirmaur, H.P., decided on 05.11.2015, vide which a Claim Petition filed by him under the Industrial Disputes Act for reinstatement in service with all benefits, stands dismissed.

2. Brief facts necessary for the adjudication of the present petition are that petitioner herein approached the learned Court below with the grievance that he was engaged as a daily waged beldar/ T-mate in the year 1986 and worked as such upto October, 1991, thus completing 240 days in each calendar year, yet his service were retrenched in October, 1991 without complying with the statutory provisions of Section 25-F of the Industrial Disputes Act. It was also the grievance of the petitioner that after his arbitrary termination many new hands were engaged by therespondent, in violation of the mandatory provisions of Section 25-H of the Act. A demand notice was served upon the respondent by the petitioner on 16.12.2011 and a copy of the same was also endorsed to the Labour-cum-Conciliation Officer. However, as the matter was not referred to the Court within a period of 45 days, hence, petitioner himself filed application before the learned Court below, seeking relief already referred to hereinabove.

3. The application was contested by respondent therein *inter alia*, on the ground that there was delay on the part of the workman in approaching the learned Court and that there also was suppression of material facts. As per respondent/ employer, petitioner had worked only for 211 days in between 16.12.1986 to 15.01.1998 and had not worked till the year 1991 and had never completed 240 days in a calender year. It was further case of the employer that petitioner had left the job of his own free will, hence, the department was not to comply with the provisions of Industrial Disputes Act.

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

> "1.Whether the retrenchment of the petitioner is bad in the eyes of law as alleged? OPP.

2. If issue No.1 is proved in affirmative, to what service benefits the petitioner is entitled to? OPP.

3. Whether this petition is time barred as alleged? OPR.

4. Relief".

5. On the basis of evidence led by the parties in support of their respective contentions, learned Trial Court returned the following findings on the issues so framed:-

"Issue No.1	:	No.
Issue No.2	:	Not entitled to any relief.
Issue No.3	:	Decided accordingly.
Relief :		Application dismissed, per operative part of order".

6. The Claim Petition of the workman was thus dismissed by learned Court below *inter alia*, on the ground that petitioner had raised the industrial dispute after a lapse of 23 years and had remained silent during this period without any plausible explanation and also that record demonstrated that he himself had abandoned the job.

7. Learned counsel for the petitioner has argued that the order so passed by the learned Court below is not sustainable in the eyes of law as the Court was bound to have had returned its findings on merit and ordered reinstatement of petitioner as it stood proved on record that services of the petitioner were terminated in violation of the provisions of Section 25 of the Industrial Disputes Act and there were subsequent violation of provisions of the Industrial Disputes Act as after his illegal retrenchment, many fresh hands were engaged by the respondent, ignoring the petitioner. He has further argued that it is settled law that because retrenchment is a continuous cause of action, therefore, there is no limitation within which a workman is to approach the Court of Law for redressal of his grievance.

8. On the other hand, learned counsel for the Respondent Board has argued that there was no infirmity with the order passed by the learned Court below and as there was no explanation qua delay of two decades in filing of the Claim Petition by the workman, the same was rightly dismissed by the learned Court below on the ground of delay and latches. He further argued that workman had voluntarily left the job which is evident from the fact that it took him two decades to approach to the Court of Law because if his services would have had been illegally terminated by the Board, he would have approached the Court at the earliest.

9. Having heard learned counsel for the parties, in my considered view, there is no merit in the present petition. Though there is a dispute between the workman and the employer as to whether services of the petitioner came to an end in the year 1988 or 1991, however, assuming that services of the petitioner were put to an end in the year 1991, yet there is no plausible explanation on the part of petitioner as to why a demand notice was served by him upon the employer only on 16.12.2011 i.e. after two decades since he ceased to serve the Respondent Board. Though an attempt was made by learned counsel for the petitioner to submit that the reason as to why he did not raise any demand notice or he did not approach any Court of Law during the said two decades was that he was continuously meeting the employer and he was being assured by the employer that he will be reengaged sooner and later, however, there is no material on record from which this fact can be substantiated. It is also evident that workman did not approach the learned Court below with clean hands. He incorrectly made out a case that his services were illegally retrenched

in October, 1991, whereas in the course of his cross-examination, he admitted that he had worked with the Respondent Board from the year 1986 only up till the year 1988.

10. It is settled law that before a party calls upon the Court of Law to adjudicate its lis on merit, it has to satisfy the Court on the point of maintainability of the lis. Even if, there is no period of limitation within which an industrial dispute has to be raised by a workman, but this does not mean that the workman can continue to sleep over his rights for decades together and thereafter, one fine day, he can wake up and approach the Court without explaining delay, on the ground that there is no limitation prescribed in law to approach the Court.

11. Where the principle of limitation does not governs as to within what period a litigant has to knock the doors of justice for redressal of his or her grievance, the settled principle is of delays and laches. Even as far as the principle of delays and laches is concerned, in such like situations, settled law is that maximum time which the Court can presume to be a reasonable time for a litigant to approach the Court is of about three years. Here the petitioner chose to raise the industrial dispute after two decades.

12. As already mentioned above, there is no explanation worth its name as to why the claim was filed by workman before the learned Court below after two decades. The only conclusion which can be arrived at by this Court is that there is force in the contention of the Respondent Board that petitioner voluntarily abandoned the job and filing of the Claim Petition after two decades was nothing, but an attempt to indulge in a litigation in which the workman had nothing to loose. Learned Court below has rightly held that the factum of workman remaining silent for more than 23 years without plausible explanation clearly demonstrated that he himself had abandoned his job and the case would not fall within the definition of retrenchment.

13. In view of the discussion held hereinabove, as this Court does not finds any merit in the present petition and further as this Court does not finds any infirmity in the order passed by the learned Court below, this petition is dismissed, so also pending miscellaneous applications, if any.

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