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Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Section 20 of the Hindu Succession Act, 1925- Whether the provisions of Hindu Succession Act apply to the agricultural land – **Held** – Yes –Succession Act falls under the scope of entry No.5 of list III i.e. the concurrent list and as such the provisions of Section 20 of the Hindu Succession Act shall apply even on agricultural land- The words 'property' as well as 'interest in Joint Family Property' held to be wide enough to cover agricultural land.

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Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Order 22 Rule 6- Held- that in case the death took place in between the time, arguments were heard and the judgment was pronounced, the judgment will have the same force and effect, as it had been pronounced before the death took place.

Title: Bhupinder Singh Vs. Gola Devi & Ors. Page-78

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Order 22 Rule 6- Will- An unregistered Will purported to have been made three days prior to the death of the testator and executed on 17.11.1991, set up against a registered Will executed about 15 years earlier i.e. 16.12.1976 – **Held** - to be shrouded in mystery as the defendants themselves first submitting the registered will and thereupon submitting the unregistered Will dated 17.11.1991- Apparently the second Will was prepared by the defendants after the death of the executants- The recital in the unregistered Will also held to be doubtful as there was no vacant space between writing and signatures of the testator and the witnesses- The entries in the rapat roznamcha Ex.PW-2/A also falsifying the very existence of the unregistered Will- The un-explained late production of the unregistered Will also held be another suspicious circumstance surrounding the genuineness and due execution of the unregistered Will- Consequently, defendants were held to have failed to prove the subsequent unregistered Will- The findings recorded by the Learned Trial Court and the 1st Appellate Court affirmed and the property was held to have been rightly succeeded intestate by the parties, as directed by both the courts below.

Title: Bhupinder Singh Vs. Gola Devi & Ors. Page-78

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Appellant/plaintiff seeking recovery of Rs.2,43,088/- and the defendant on the other hand by way of a counter-claim seeking a sum of Rs. 86,483/- the Learned Trial Court dismissed the suit of the plaintiff- It, however, allowed the counter-claim of the defendant for the recovery of Rs. 86,483/- In appeal too the said findings affirmed by the Learned 1st Appellate Court- While deciding the Regular Second Appeal the Court **Held-** that promisee could not extract pure resin as per the stipulation of the contract due to heavy rain fall- Resultantly the defendant could not abide by the terms of the Contract and as per Section 56 of the Indian Contract Act it was permissible in law- the frustration of the contract, thus, was due to the supervening circumstances and beyond the control of the defendant – Hence, the conclusion arrived at by the learned trial Courts below was based upon a proper appreciation of evidence on record- Consequently, appeal dismissed.

Title: H.P. State Forest Corporation Vs. Kahan Singh (since deceased) through his legal heirs

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Title: Rajesh Kumar Vs. Ravinder Kumar & Ors. Page-145

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Indian Succession Act, 1925- Section 63- The marginal witness DW-2 proving the endorsement made by the Sub Registrar concerned occurring in Ex.DW-2/A - **Held-** that the endorsement, thus made enjoys the presumption of truth, more particularly as no evidence was led to disapprove the said fact- The sub Registrar concerned summoned by the plaintiff but was omitted to be examined- the presumption of truth, thus, enjoined by the endorsement Ex.DW-2/B borne in Ex.DW-2/A. Will thus duly held to be proved.

Title: Rajesh Kumar Vs. Ravinder Kumar & Ors. Page-145

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Indian Succession Act, 1925- Section 63- Suspicious Circumstances- Beneficiary of the testamentary disposition actively participated, in the preparation and execution of the Will - **Held** not to be suspicious circumstances- the marginal witness being a P.A. in the office of the District Collector also held not be a suspicious circumstance- **Further held-** that the testator going to the Hospital for some medical tests from the Sub Registrar's Office - Also held not to be a suspicious circumstance.

Title: Rajesh Kumar Vs. Ravinder Kumar & Ors. Page-145

Code of Civil Procedure, 1908- Order 5- The process issued returned back with a report that the addressee not residing at the mentioned address, stated to be residing in Shimla – Oblivious of the report the respondent ordered to be served by way of proclamation and eventually proceeded against exparte- **Held –** that the authority concerned acted mechanically, without even perusing the report of the Process Server- In fact, the only course available to the authority was to have directed the applicants to file the correct address of the parties in issue and then effect the service accordingly- the order of service by way of proclamation held to be wrong- Consequently, order dated 16.5.2017 whereby the respondent proceeded exparte, quashed and set aside.

Title: Ajay Sharma Vs. Assistant Collector 1st Grade, Ghanari, Tehsil Ghanari District Una and others Page-127

Code of Civil Procedure, 1908- Order 6 Rule 17- An application under Order 6 Rule 17 CPC filed for the amendment in the reply after the commencement of trial- **Held-** that amendment after the commencement of trial are controlled by the proviso to Order 6 Rule 17 CPC- amendment in the pleading should, however, normally be allowed, even a prayer in this regard is made at some belated stage, in case the same is essential and required for just and effective decision of the pending lis as possibility of a bonafide omission to raise such plea at the relevant time and realization of such omission at a later stage cannot be ruled out as happened in the instant case, wherein issues were framed on 31.3.2014 and application for amendment was filed on 5.7.2014 before any evidence was recorded- application partly allowed and petition disposed of accordingly.

Title: Surinder Mohan Vs. Raj Kumar Mehra & anr. Page-116

Code of Civil procedure, 1908- Order 15 Rule 1 CPC- Section 6 of the Specific Relief Act, 1963- Civil Revision- Suit of the plaintiff-respondent decreed at the stage of framing of issues directing the defendant/petitioner to remove locks from the property rented to the plaintiff-

respondent- **Held-** that Section 6 of the Specific Relief Act provides an instant remedy to the possessor of the premises for restoration of the possession in case he is dispossessed by anyone, including the owner of the property- the said proceedings are summary in nature.

Title: Devender Thakur and another Vs. Hardayal Khimta Page-106

Code of Civil procedure, 1908- Order 15 Rule 1 CPC- Section 6 of the Specific Relief Act, 1963- Civil Revision- Further held that keeping in view the nature and scope of the suit filed under Section 6 of the Specific Relief Act and the conjoint reading of Order 15 rule 1, Order 14 Rule 1, Order 10 Rule 1, 2 and 3, as there was no denial of the assertion and the facts pleaded by the respondent-plaintiff with respect to the possession of the premises in question and the locking of the same by the petitioner-defendant, without taking recourse to law, there was no issue in dispute and as such, the learned Trial Court could have passed the judgment and decree at that stage itself- no material illegality, irregularity, infirmity or error of jurisdiction found to have been exercised by the learned Trial Court- Consequently, revision dismissed.

Title: Devender Thakur and another Vs. Hardayal Khimta Page-106

Code of Criminal Procedure, 1973- FIR- Section 173 Cr.P.C.- Indian Penal Code, 1860- Sections 420, 467, 468 and 120-B- Cancellation report submitted by the Investigating Officer accepted by the Learned Magistrate based on the findings recorded by the Company Law Board vis-à-vis share holdings of the parties- High Court, however, **held-** that the findings recorded by the Company Law Board pertained only to half share of 2000 share holdings held by Ashish Das Gupta and one Satvinder Singh, but did not pertain to the transfer of 2000 shares individually held by Ashish Das Gupta in the Company – the findings arrived at by the Company Law Board were, thus, not conclusive at least qua the share individually held by Ashish Das Gupta – the continuation of criminal proceedings against the accused vis-à-vis the individual share of Ashish Das Gupta, thus, were permissible- Consequently, orders passed by the Learned Trial Court set aside.

Title: Ashish Dass Gupta Vs. State of H.P. & others Page-135

Code of Criminal Procedure, 1973- Section 311- Re-summoning and re-examination of witnesses- Held- To recall and re-examine witnesses and that too for the limited extent of identifying the case property cannot be termed to be an exercise for filling up a lacuna- It would in any case though depend upon the circumstances of each case- It has been further reiterated that a witness can be recalled and re-examined, if it is necessary for the proper adjudication of the case.

Title: Irshad Vs. State of Himachal Pradesh Page-39

Code of Criminal Procedure, 1973- Section 311- Re-summoning and re-examination of witnesses- Further Held- That the plausible explanation in the application moved under Section 311 Cr.P.C that the contraband was required to be identified by the prosecution witnesses and the re-examination was confined to that limited purpose, held to be justified- Further Held- that a lacuna in prosecution is not be equated with the fallout of an oversight committed by the prosecutor or Investigating Agency.

Title: Irshad Vs. State of Himachal Pradesh Page-39

Code of Criminal Procedure, 1973- Section 374- Appeal Against Conviction- Sections 20 and 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985- Held- that the contraband recovered from the bag concealed under the front seat of the car over which accused was sitting- Same cannot be construed as a recovery from the person of an accused and as such provisions of the Section 50 of the N.D.P.S. Act were not applicable- Further Held- that simply because accused were also searched after the recovery of the contraband, the fact would not

vitiate the trial, for no prejudice stands shown by the accused in the search of their in person, in violation of the provisions of Section 50 of the NDPS Act- Section 50 of the Act not attracted- Consequently, appeal dismissed.

Title: Saleem Mohamad Vs. State of Himachal Pradesh (D.B.) Page-34

Code of Criminal Procedure, 1973- Section 374- Appeal against Conviction- Section 302 of I.P.C- Circumstantial Evidence- Appellant convicted under Section 302 of I.P.C to undergo life imprisonment and to pay a fine of Rs.20,000/- - conviction and sentence challenged- While dismissing the appeal **Held**- legal parameters to appreciate the circumstantial evidence reiterated, as were held in criminal Appeal No.242/2016 titled as **Hikmat Bahadur versus State of Himachal Pradesh** decided on 19th September, 2017- The principle laid down by the Supreme Court of India in **Sharad Birdhichand Sarda versus State of Maharashtra, (1984) 4 SCC 116** reiterated that the conclusion of guilt is to be barred or "must or should be", and not merely "may be" fully established- The facts so established should be consistent only with the hypothesis of the guilt of the accused- The circumstances should be of conclusive nature and should exclude every possible hypothesis except the one to be proved and the chain of evidence must be so complete as to leave no reasonable grounds for the conclusion consistent with the innocence of the accused- Based on the aforesaid, on facts the circumstances culled out by the Learned Trial Court held to be consistent with the chain of circumstances so complete, but to establish the hypothesis of the guilt of the accused alone and the chain of evidence was held to be so complete as to leave any reasonable ground to come to the conclusion consistent with the innocence of the accused- Consequently, the appeal dismissed.

Title: Rakesh Kumar Vs. State of Himachal Pradesh (D.B.) Page-88

Code of Criminal Procedure, 1973- Section 374- Sections 452, 364, 376(2)(f) and 302 of the IPC- The accused convicted and sentenced under the aforesaid provisions- Appeal against the conviction and sentence- Appeal dismissed **holding**- that the Court must adopt a very cautious approach in appreciating the circumstantial evidence and such circumstances must be conclusive in nature, fully connecting the accused with the crime- All the links in the chain of circumstances must be established beyond reasonable doubt and the proved circumstances should be consistent only with the hypothesis of the guilt of the accused- On facts the narration of the independent witnesses held to be trustworthy, true and inspiring confidence, which were duly corroborated by the documentary evidence including the medical evidence- The plea of false implication was also held to be not probable.

Title: Anil Chauhan alias Anu Vs. State of Himachal Pradesh (D.B.) Page-72

Code of Criminal Procedure, 1973- Section 374- Sections 452, 364, 376(2)(f) and 302 of the IPC- The version of the eye witnesses supporting the prosecution held to be ably corroborated by the circumstantial evidence being the disclosure statement, it even resulting in the recovery of the body of the deceased- the ocular version and the documentary evidence, thus, ably corroborated by the circumstantial evidence clearly establishing the complicity of the accused- consequently, the conviction upheld- Appeal dismissed.

Title: Anil Chauhan alias Anu Vs. State of Himachal Pradesh (D.B.) Page-72

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- Section 20 of the N.D.P.S. Act, 1985- Respondent acquitted by the learned Trial Court- State challenged the acquittal while re-affirming the findings so recorded - **Held-** that the bag containing contraband held not to have been recovered from the conscious possession of the accused/respondent as it was alleged to have been in between the legs of the accused beneath the seat No.14- On facts, based on the testimony of PW-2 Satvir Singh, an independent witness- All four passengers sitting on Seat Nos.12, 13 and 14 had come out off the bus and were questioned by the police regarding ownership of the bag in question- The said fact coupled with the discrepancy in timings- held- did

not prove that the contraband was recovered from the conscious possession of the accused – Consequently, acquittal of the accused-respondent upheld.

Title: State of Himachal Pradesh Vs. Om Parkash (D.B.) Page- 100

Code of Criminal Procedure, 1973- Section 389- Appeal against Conviction- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 42 and 50- Independent Witnesses- One of the independent witnesses fully supporting the prosecution case and his version supported by official witnesses- conviction sustained- Further Held- That Section 42 of the N.D.P.S. Act not attracted, if there was no prior information with the police- Section 50 of the N.D.P.S. Act also held to be not applicable, in case of a chance recovery- Conviction upheld- Appeal dismissed.

Title: Harish Kumar Vs. The State of Himachal Pradesh Page-24

Code of Criminal Procedure, 1973- Section 397- Appellant was apprehended with 600 boxes of country made liquor of make "Sirmaur No.1"- he was sentenced to undergo simple imprisonment for one year and to pay fine of Rs. 5000/- under Section 61 (1) (a) of Punjab Excise Act by Learned Trial Court – only 6 pouches were sent for chemical analysis out of the allegedly recovered liquor – **Held-** that the recovery allegedly effected by the police stands vitiated as it is not proved that boxes were containing liquor except 6 pouches sent for chemical analysis- prosecution failed to prove that accused was carrying liquor beyond permissible limit- Judgments passed by the Courts below quashed and set aside- accused acquitted.

Title: Subhash Vs. State of HP Page-161

Code of Criminal Procedure, 1973- Section 397 read with Section 401- Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985- The petitioner alongwith one Mr. Mathias apprehended with 165 grams of MDA including Indian and foreign currency while travelling in the Car- Driver Mathias on being signalled to stop was alleged to have thrown waist money bag, black in colour, towards the back seat of the car- the petitioner aggrieved by framing of the charges against her sought quashing of the same on the ground that the contraband was not recovered from her conscious possession nor there was any evidence that she abetted the commission of the crime- **Held-** that the petitioner was accompanying the accused for the last many days and there was prima facie evidence that they had purchased the contraband from Rishikesh, and, as such, it cannot be said that the petitioner did not have knowledge of the narcotic substances being carried by the co-accused for the last so many days- Thus, at this stage, there was sufficient material to proceed against the petitioner- consequently, framing of charge upheld.

Title: Maya Kalsi Vs. State of H.P. Page-111

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- Sections 341, 323, 307, 504, 506 read with Section 34 of I.P.C- Cross FIR registered by both the parties- Investigation complete, though, challan had not been filed in the Court- parties sought quashing of the FIR- **Held-** that since the parties have decided not to prosecute the cases and since the evidence is yet to be led in the Court- there are minimal chances of the witnesses coming forward in support of the prosecution case in view of compromise arrived at between the parties- chances of conviction of the accused in both the case are bleak – Cases are at the initial stage and even report under Section 173 Cr.P.C has yet not been filed to allow the criminal proceedings to continue would be an abuse of the process of law- Consequently, FIR ordered to be quashed.

Title: Rajesh Kumar Chauhan & ors. Vs. State of Himachal Pradesh & anr.

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Code of Criminal Procedure, 1973- Section 482- Sections 23 & 25, read with Section 28 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act,

1994 (PC and PNDT Act)- Sections120-B & 201 of **Indian Penal Code, 1860—**Petitioner-Doctor seeking quashing of the complaint filed under the aforesaid provision- **Held-** that from the statement of the victim it was clear that when she was three month pregnant her husband and mother-in-law had forcibly got conducted a sex determination test- Statement of the victim coupled with other evidence on record show that there is prima facie case against the petitioner- it cannot be also said that chances of ultimate conviction of the petitioner are bleak, thus, held that petitioner was prima facie culpable- Accordingly, petition dismissed- parties directed to appear before the learned Trial Court.

Title: R.D. Sharma Vs. V.K. Chaudhary and another Page-65

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Section 28-A of the Land Acquisition Act, 1894- Held- The application for the re-determination of compensation does not necessarily mean from the "first award" made by the Court and, as such, the limitation to file the said application will run from the date of the award on the basis of which re-determination of compensation is sought.

Title: Union of India Vs. Krishan Lal & others Page-58

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Section 28-A of the Land Acquisition Act, 1894- Further Held- It is permissible for the collector to keep the application for re-determination in abeyance if the award in question is in an appeal before the higher Court- The Collector can keep the application under Section 28-A of the Land Acquisition Act pending till the matter is finally decided by the High Court or Supreme Court, as the case may be.

Title: Union of India Vs. Krishan Lal & others Page-58

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Service Law- Penalty of reduction to a lower stage for a period of two years without cumulative effect, without adversely affecting the pension of the petitioner ordered by the Disciplinary Authority- **Held-** That in case a statutory representations and submissions made to the Disciplinary Authority are rejected and the same is duly affirmed by the material placed on record, the courts cannot interfere with the findings recorded by the Disciplinary Authority, moreso, when the Disciplinary Authority has recorded the detailed reasons in forming a conclusion contrary to the one drawn by the Inquiry Officer

Title: Beli Ram Sharma Vs. High Court of H.P. (D.B.) Page-1

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Service Law- Rule 15(4) of the CCS & CCA Rules does not enjoin upon the disciplinary authority to given an opportunity of personal hearing to the delinquent.

Title: Beli Ram Sharma Vs. High Court of H.P. (D.B.) Page-1

Constitution of India, 1950- Article 226- Deceased employee died in an accident while serving as accountant in the office of the respondent- Petitioner, wife applied for appointment on compassionate ground- the application was rejected- **Held** – that the order of rejecting application is non-speaking and uninformed order- It does not reveal that the scheme contained in the office memorandum dated 9th October, 1998 for determination and availability of vacancies for such decision was adhered to or not- non-speaking and uninformed decision smacks mala fide and arbitrariness- petition was allowed and the communication rejecting the claim of the petitioner quashed- respondents were directed to reconsider the claim of the petitioner in the light of the aforementioned office memorandum.

Title: Chinta Devi Vs. The Director of Estates (Regions) and another Page-52

Constitution of India, 1950- Article 226- Deceased/Sandhya Devi admitted in the district Hospital Solan as emergency case as she was bleeding and labour pain had started on 25.4.1996 - she died on 26.4.1996- it is alleged that death has taken place due to negligent behaviour of defendants No.4 and 5, medical officers as they did not attend upon her properly – **Held-** that complainant has to clearly make out a case of negligence whenever a medical practitioner is charged with or proceeded against criminally- the plaintiff has failed to bring any evidence establishing willful negligence on the part of the Doctors concerned – Medical Practitioner is not liable to be held negligent, simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another – there is no merit in the petition, hence, same is dismissed.

Title: State of H.P. and others Vs. Dinesh Chauhan and others Page-217

Constitution of India, 1950- Article 226- Pensionary benefits of the father of the petitioner were withheld- Petitioner sought release of the said benefits along with interest @ 15% per annum- pensionary benefits not released due to penalty of recovery of Rs. 2,51,914/- imposed by the Conservator of Forests- Penalty was, however, waived on representation of the father of the petitioner- Father of the petitioner had, however, died during the pendency of the representation- the amount due has already been released- **Held-** that petitioner would have been entitled for interest had his father being exonerated from charge levelled against him as per Rules 9 and 68 of the CCS (Pension) Rules but it is not so in the present case - Hence, no merits in the petition- petition dismissed.

Title: Pushpender Kumar Vs. State of H.P. and others Page-197

Constitution of India, 1950- Article 226- Petitioner appointed against the post of Khansama on temporary basis was given salary in the pay scale of Rs. Rs.750-1410/-, whereas, other Khansama appointed on the same post on temporary basis was allowed pay scale of Rs. 830-1600/-- **Held-** that there is no justification of giving pay on lower scale to the petitioner, when on perusal of the appointment letters of both the persons, there is no difference in the conditions of the two appointments- Further held that such discrimination is violative of Article 14 of the Constitution- Respondent/Board is directed to pay salary to the petitioner in the higher scale – further directed to pay the arrears inthree months- petition disposed of as allowed.

Title: Raj Kumar Vs. Bhakra Beas Management Board and others Page-206

Constitution of India, 1950- Article 226- Service Matter- Appointment- Appointment denied to the petitioner despite having secured highest marks on the ground that she was disqualified to be appointed as an Anganwadi worker, since, her husband was in Government service- **Held-** that if such a disqualification is not provided under the guidelines, a mere policy decision taken by the Government in this behalf, expressly not contained in the guidelines, will not be sufficient to oust the petitioner from appointment as an Anganwadi worker- The appointment of the respondent set aside- petition allowed.

Title: Santosh Kumari Vs. State of H.P. and others Page-49

Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 26 Rule 9 readwith 151- The appointment of a Local Commissioner sought by the plaintiff before the Learned Trial Court on the basis that the dispute related to a boundary – As per the respondent, plaintiff was trying to create evidence in his favour- the Learned Trial Court had dismissed the application – **Held-** since the dispute related to the possession of "Khatti" (a source of drinking water), one each was alleged to have come into possession of each of the parties – **Further Held-** It was definitely a boundary dispute, though, filed late - The Learned Trial Court ought to have appointed a Local Commissioner – Petition disposed of in the aforesaid terms.

Title: Kangru Ram Vs. Sriram Page-165

Constitution of India, 1950- Civil Writ Petition- Article 226- Code of Civil Procedure, 1908- Order 2 Rule 2- Res-judicata- If the reliefs claimed in the subsequent writ petition and the prayers made therein are in majority the same and if some of the prayers though available had not been claimed in the earlier writ petition- the subsequent writ petition would not be maintainable- It is a hit by the the principles of res-judicata and the principles embodied in Order 2 Rule 2 C.P.C., as, though the provisions of Code of Civil Procedure are not applicable in the writ jurisdiction but the principles enshrined therein are applicable- the principles of res-judicata discussed- further **Held-** that the doctroine is applied so that the lis attained finality- It is not opened and re-opened twice over, which is a fundamental doctroine of law and consequently, writ petition dismissed as not being maintainable since the majority of the reliefs claimed therein had already been decided in the earlier writ petition.

Title: Ravi Azta and others Vs. Union of India & others Page- 129

'I'

Indian Penal Code, 1860- Sections 147, 447, 323 read with Section 149- Petitioner was allegedly assaulted by the respondent - challenged acquittal of the respondents by the 1st Appellate Court reversing the conviction recorded by the Learned Trial Court by way of revision- It transpired during hearing that revision was not maintainable – petition was filed for conversion of revision petition into an appeal- **Held-** that prayer of conversion is legal but same needs to be filed at the threshold – present application has been filed after nine years of filing of revision – Also, respondents have been suffering for last eighteen years in facing the criminal proceedings- no iota of evidence that they had constituted an unlawful assembly or used force or violence against the complainant- no interference is made out- revision petition as well as Cr.M.P (M)s dismissed.

Title: Shakuntla Devi Vs. Lalman & ors. Page-97

'L'

Land Acquisition Act, 1984- Section 4- Petitioners filed reference petitions for enhancement of compensation- petition dismissed by the Trial Court- **Held**- that for determining the market value of the acquired land, purpose of acquisition is relevant and not nature and classification of the land- Hence, the rate awarded on the basis of classification is incorrect- Further, held that since these appeals have arisen from common award passed by the Collector, so owners are entitled to compensation of acquired land @ Rs. 4,69,955/- per bigha alongwith all consequential benefits – petition disposed of.

Title: Harnam Singh Vs. The Land Acquisition Collector Kol Dam and another Page-171

'M'

Motor Vehicles Act, 1988- Motor Accident Claims Tribunal- Insurance cover note executed by the company w.e.f. 14.6.2010 at 3:00 P.M. – The ill fated accident occurred on the same day at about 3:50 p.m. – Reiterating the ratio laid down in ***New India Assurance Co. Ltd. Versus Sita Bai (Smt.), (1999) 7 SCC 575***- **Held-** that since the insurance police itself reflected the recital relating to date/time of the commencement of the policy, which admittedly was 14.6.2010 after 3:00 p.m.- Insurance Company was liable to indemnify for the liability, as the accident had took place at 3:00 p.m.- consequently, appeal dismissed and award passed by the learned MACT upheld.

Title: United India Insurance Company Limited Vs. Shani & others Page-69

Motor Vehicles Act, 1988- Motor Accident Claims Tribunal- Insurance Company challenging the findings returned by the Learned MACT- the driver of the offending vehicle was not holding a valid driving licence at the time of the accident, on the ground that the Government of Nagaland

who had issued the driving licence vide notification dated 1.8.2014 had directed to surrender all the driving licence(s) issued in booklet form after 30th October, 2009, for enabling the digitization of the data and, for the issuance of smart cards in its plea- **Held-** No- It was imperative for the insurer to have placed on record, the aforesaid notification before the learned Tribunal, moreover, when the same had been tendered into evidence as Ex.R-4 the counsel for the insurer had not even contested its validity or authenticity- The conclusions as arrived by the learned tribunal, thus, held to be correct - consequently, appeal dismissed.

Title: National Insurance Company Limited Vs. Onkar Singh & others Page-63

Motor Vehicles Act, 1988- Section 149 and 166- Insurance Company challenged its liability to indeminify the owner/insured when deceased/driver was not having valid driving licence- **Held-** that in view of judgment of Hon'ble Apex Court in **Mukund Dewangan** versus **Oriental Insurance Company Limited,** (2017) 14 Supreme Court Cases 663 if driver of the vehicle has effective driving licence to ply a light motor vehicle and uses such type of vehicle as transport vehicle, then he has no requirement to obtain separate endorsement to drive transport vehicle- There is no merit in the petition- petition dismissed.

Title: Oriental Insurance Company Ltd. Vs. Ram Kali & ors. Page-169

Motor Vehicles Act, 1988- Section 163-A- The learned Motor Accident Claims Tribunal declining relief to the claimants on the ground that the insurer had failed to have the vehicle registered after the expiry of the temporary registration number, which was an infraction of the terms and conditions of the insurance policy- Consequently, even the issues framed not answered by the Learned Tribunals- **Held-** that the insurer seeking permanent registration of the vehicle within one month of the issuance of the temporary registration number, a matter of evidence- adducing evidence in this behalf was imperative and the Learned Tribunals has failed answer the issues framed- The MACT accordingly directed to provide opportunity to the claimants lead evidence in this behalf- Consequently, appeal allowed and matter remanded to back to the Learned Tribunal with the aforesaid directions.

Title: Seema Gajta and others Vs. The National Insurance Company Ltd. Page-151

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs. 18,141/- as per the cogent evidence on record- He was indisputably 38 years old at the time of accident- An addition of 50% in actual salary of the deceased towards the future prospect as he was below 40 years- multiplier of 15 shall be used- Thus, Learned Tribunal has rightly determined the compensation for dependency to the tune of Rs.36,73,440/- - The Learned Tribunal, however, fell in error while awarding compensation on account of loss of love and affection, also amounts awarded qua funeral expenses and loss of consortium need to be modified to Rs.15,000/- and Rs.40,000/- in spite of Rs.25,000/- and Rs.1 lacs as awarded by the Learned MACT below in view of judgment of Hon'ble Supreme Court in ***National Insurance Company Limited*** *v.* ***Pranay Sethi and Ors.***, **AIR 2017 Supreme Court 5157** – there is no thumb rule that interest cannot be granted @ 8% as awarded by the learned Tribunal, however, interest is reduced to 7.5% per annum from the date of filing of the petition till the realization of the whole amount in the circumstances of the present case- Claimants are, thus, entitled to Rs.37,68,440/- as compensation.

Title: United India Insurance Company Limited Vs. Sudarshana Devi and Ors.

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Motor Vehicles Act, 1988- Section 173- Motor Accident Claims Tribunal- Appeal filed by the insurer on the ground that deceased was a gratuitous passenger- **Held-** on facts nothing was proved on record as to how the deceased was a gratuitous passenger, he was not found to be the owner of the vehicle as alleged by the Insurance Company, on the contrary the evidence on record was that the deceased was travelling with his goods in the ill-fated vehicle – on quantum the

award was held to be not excessive as deceased was only 16 years of age- Consequently, appeal dismissed.

Title: New India Assurance Company Vs. Seema Devi Page-84

'N'

N.D.P.S. Act, 1985- Section 20- Accused apprehended by the police party on the basis of suspicion of carrying contraband- His bag was searched without associating any independent witnesses- Charas weighing 800 grams was recovered- **Held-** that non-association of independent witness is not fatal in every case, evidence of the official witnesses can be believed- No honest effort was, however, made to find independent witness in the present case – the same is fatal for the prosecution case specially when there are contradictions in the versions of the official witnesses- non-production of seals by official witnesses with which contraband was sealed and re-sealed has also significant bearing on the fate of the prosecution case, especially in view of non-association of independent witnesses- Further held- that presumption of culpable mental state as contemplated in Section 35 of the N.D.P.S. Act shall come into effect only, once prosecution had successfully proved the recovery of contraband from the possession of the accused beyond reasonable doubt- no case for interference in the judgment of acquittal recorded by the Trial Court is made out- Appeal is accordingly dismissed.

Title: State of Himachal Pradesh Vs. Tharban Lal (D.B.) Page-200

N.D.P.S. Act, 1985- Section 20- Accused persons were convicted by the Learned Trial Court as they were found carrying 1.500 grams charas in the vehicle during the night in the routine checking of the vehicle- Independent witnesses were not associated by the prosecution- **Held-** that non-association of independent witness is not fatal to the prosecution case- obligation to take public witness is not absolute- it may not be possible to find independent witness at odd hours of night on highway in the chance recovery- the learned Trial Court properly appreciated the evidence and rightly convicted the accused persons- no merits in the appeal- appeal dismissed.

Title: Rahul Kumar Vs. The State of H.P. (D.B.) Page-209

'S'

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs alleged that defendant No.2 in connivance with defendantNo.1 executed the sale deed of the land of the plaintiff playing fraud upon them by incorporating unauthorized term having power of executing sale in the power of attorney- **Held-** that in case of fraud, undue influence or coercion the pleadings must disclose full particulars of the same- general allegations are insufficient for making the Court to take notice of such averment in the pleadings- Further held that when there is concurrent findings of the fact and the law of the two courts below, such findings cannot be interfered with unless same are found to be perverse- no merit in the petition and same is dismissed.

Title: Kanta Devi and Ors. Vs. Manju and Ors. Page-190

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

CWP No. 5445 of 2014 along
with CWP No.7955 of 2014.
Reserved on :03.01.2018.
Decided on: 1st March, 2018.

1. CWP No. 5445 of 2014

Beli Ram Sharma ....Petitioner.

Versus

High Court of H.P. ....Respondent.

2. CWP No. 7955 of 2014.

Tara Devi ....Petitioner.

Versus

High Court of H.P. ....Respondent.

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Service Law- Penalty of reduction to a lower stage for a period of two years without cumulative effect, without adversely affecting the pension of the petitioner ordered by the Disciplinary Authority- **Held-** That in case a statutory representations and submissions made to the Disciplinary Authority are rejected and the same is duly affirmed by the material placed on record, the courts cannot interfere with the findings recorded by the Disciplinary Authority, moreso, when the Disciplinary Authority has recorded the detailed reasons in forming a conclusion contrary to the one drawn by the Inquiry Officer. (Para-5 to 8)

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Service Law- Rule 15(4) of the CCS & CCA Rules does not enjoin upon the disciplinary authority to given an opportunity of personal hearing to the delinquent. (Para-9)

Cases referred:

Maharastra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi & Others, (1991)2 SCC 716

Lalit Popli vs. Canara Bank and others, (2003) 3 SCC 583

For the Petitioner(s): Mr. Subhash Sharma, Advocate, in both petitions.

For the Respondent(s): Ms. Jyotsana Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

Since, the incident in sequel whereto articles of charges were formulated against petitioners Beli Ram Sharma and Tara Devi, is common, to both the delinquents, hence, both the aforementioned writ petitions are enjoined to be disposed of, by a common verdict.

2. Through CWP No. 5445 of 2014, petitioner Beli Ram Sharma prays for affording to him, the hereinafter extracted reliefs:-

> **"(i) Ordering penalty of reduction to a lower stage in the time scale of Rs.10300-34800-3800 GP by one stage for a period of two years without cumulative effect without adversely affecting the pension of the petitioner may be quashed and set aside;**

(ii) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to grant full pay and allowances admissible to the petitioner during the period of his suspension.

(iii) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to post the petitioner his parent department, i.e. respondent High Court.

(iv) Writ in the nature of certiorari may kindly be issued thereby quashing and setting the rejection order dated 23.07.2013 on the review petition contained in Annexure P-19.

(v) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to release the incremental benefits due and admissible to the petitioner with consequential benefits with effect from the date of suspension dated 1.10.2011 Annexure P-12.

3. Through CWP No. 7955 of 2014, petitioner Tara Devi prays for affording to her, the hereinafter extracted reliefs:-

"(i) Ordering penalty of reduction to a lower stage in the time scale of Rs.4900-10680/- 1300 GP by one stage for a period of two years without cumulative effect without adversely affecting the pension of the petitioner may be quashed and set aside;

(ii) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to grant full pay and allowances admissible to the petitioner during the period of his suspension.

(iii) Writ in the nature of certiorari may kindly be issued thereby quashing and setting the rejection order dated 23.07.2013 on the review petition contained in Annexure P-15.

(iv) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to release the incremental benefits due and admissible to the petitioner with consequential benefits with effect from the date of suspension dated 1.10.2011.

4. In pursuance to a complaint received against the petitioners, a preliminary inquiry was held against them, in course whereof, on discernment of the material appended therewith, it was concluded that the writ petitioners were enjoined to be subjected to a regular inquiry.,whereafter, the following Article of Charges were framed against petitioner Tara Devi:-

"**ARCTICLE-I**

That on 13.09.2011 Smt. Tara Devi, Peon after marking her present in the attendance register in Rules & Inspection Branch went to the gate of the High Court. While she was standing near the gate at about 10.30/11 A.M., she saw a lady namely Smt. Kashmiri Devi (Complainant) accompanied with her brother Sh. Sanjay Kumar entering the High Court gage. Said Smt. Tara Devi immediately interrupted Smt. Kashmiri Devi and her brother and enquired about the purpose of their visit. Upon this, Smt. Kashmiri Devi disclosed about the case of her husband, who was lodged in the jail. Said Smt. Tara Devi assured them that the problem would be solved through Beli Ram Sharma, Judgment Writer, who according to Smt. Tara Devi, is most helpful of poor people. Said Smt. Tara Devi took Smt. Kashmiri Devi and her brother to the Canteen and asked them to sit there till lunch hours. During lunch ours Smt. Tara Devi alongwith Sh. Beli Ram Sharma, Judgement Writer (under suspension appeared in the canteen and had discussions with them. Sh. Beli Ram Sharma assured Smt. Kashmiri Devi and her brother that their work would be done and a fees of minimum of Rs.7000/- would be charged. Smt. Kashmiri Devi agreed to the proposal and handed over Rs.2000/- to Shri Beli Ram Sharma in the

presence of said Smt. Tara Devi, who told them that he (Beli Ram) would meet them in the evening, as he was busy and kept them sitting with Smt. Tara Devi till evening. In the evening Shri Beli Ram met them again and assured that their work would be done. Sh. Beli Ram Sharma asked them to pay the remaining amount by next Friday. Said Smt. Tara Devi, Peon (under suspension) neglected her duties and remained with Smt. Kashmiri Devi and her brother till evening. Thus, said Smt. Tara Devi committed an act of grave mis conduct, un-becoming of a public servant, thereby rendering herself liable for disciplinary action.

Thus, said Smt. Tara Devi has committed an act of grave misconduct as defined under Rule 3(1)(i) to (iii) of the CCS (conduct) Rules 1964.

ARTICLE-II

That on 16.09.2011, Shri Puppinder Kumar, the brother of the complainant came to Hon'ble High Court with Smt. Kashmiri Devi (complainant) to enquire about the status of the case. Smt. Tara Devi alongwith Beli Ram Sharma met Sh. Puppinder Kumar and Smt. Kashmiri Devi (complainant) in the morning of 16.09.2011 when Sh. Beli Ram Sharma again assured them that their problem would be solved and further told that he was busy at that time. At about 12.30 p.m. when said Sh. Puppinder Kumar etc. failed to find any clue of their case, he again contacted Smt. Tara Devi, Peon on phone and asked her to return her documents and Rs.2000/-. Upon this Smt. Tara Devi, Peon started threatening Sh. Puppinder Kumar. Thus, said Smt. Tara Devi committed an act of grave mis-conduct which amount to unbecoming of a public servant and thereby rendered herself liable for disciplinary action.

Thus, said Smt. Tara Devi has committed an act of misconduct as defined under Rule 3(1) (i) to (iii) of the CCS (Conduct) Rules, 1964.

ARTICLE-III

That as per call-details obtained from the mobile companies, it has been revealed that Smt. Tara Devi had made telephonic conversation with the complainant (Smt. Kashmiri Devi), her brother (Puppinder Kumar) on 13.09.2011. Said Smt. Tara Devi and Shri Beli Ram Sharma had also made frequent telephonic conversation with each other and also Sh. Rupinder Singh, Advocate not only on 13.09.2011 but even prior to that date and subsequently also, which suggests that Sh. Beli Ram Sharma and Smt. Tara Devi, Peon were in hand and glove in sponsoring the litigants to a particular Advocate and had indulged in such activities as are not becoming of a Court Servant.

Thus, said Smt. Tara Devi has committed an act of misconduct as defined under Rule 3(1) (I) to (iii) of the CCS (Conduct) Rules, 1964.

ARTCILE-IV

That on 21.09.2011 Smt. Tara Devi, Peon along with Shri Beli Ram Sharam tried to influence Smt. Kashmiri Devi (Complainant) and her brother Sh. Puppinder Kumar and made them to write a false application for withdrawal of complaint made by Smt. Kashmiri Devi. After writing such application Shri Beli Ram Sharma accompanied by Smt. Tara Devi took the complainant etc. to the chambers of Hon'ble the Chief Justice without obtaining any permission whatsoever to see His Lordship. Thus, said Smt. Tara Devi committed an act of grave mis-conduct, un-becoming of a public servant, thereby rendering herself liable for disciplinary action.

Thus, said Smt. Tara Devi has committed an act of misconduct as defined under Rule 3(1) (I) to (iii) of the CCS (Conduct) Rules, 1964."

The following Articles of charges were framed against petitioner Beli Ram Sharma:-

"**ARCTICLE-I**

That on 13.09.2011 Shri Beli Ram Sharma, while functioning as Judgmeent Writer in the High Court Registry met one Smt. Kashmiri Devi (complainant) who was accompanied by her brother Sh. Sanjay Kumar and had come to Hon'ble High Court in connection with some case of her husband. The complainant and her brother were, infact, introduced to said Shri Beli Ram Sharma by Smt. Tara Devi, Peon (under suspension). Said Shri Beli Ram Sharma met the complainant and her brother during lunch hours in the canteen when Smt. Tara Devi was also accompanying them. Said Shri Beli Ram told them that their problem would be solved and that a minimum fee of Rs.7000/- shall have to be paid by the complainant. The complainant agreed to the proposal and handed over Rs.2000/- to Sh. Beli Ram Sharma in the presence of Smt. Tara Devi, Peon (under suspension) and also gave certain papers relating to the said case. Said Shri Beli Ram Sharma asked the complainant that the balance amount be paid by the next Friday. Said Shri Beli Ram Sharma thereafter contacted Shri Rupinder Singh, Advocate. The petition on behalf of the complainant was prepared and typed in the evening of 13.9.2011 at the residence of Sh. Beli Ram Sharma at Tutu and filed on 14.09.2011 in the Hon'ble Court through Sh. Rupinder Singh, Advocate. Thus, said Sh. Beli Ram Sharma has committed an act of grave mis-conduct, which amount to un-becoming of a public servant, thereby rendered himself liable for disciplinary action.

Thus, said Sh. Beli Ram, Judgment Writer has committed an act of grave misconduct as defined under Rule 3(1)(i) to (iii) of the CCS (conduct) Rules 1964.

ARTICLE-II

That on 16.09.2011, Smt. Kashmiri Devi (Complainant) accompanied by her brother Sh. Puppinder Kumar came to High Court in order to know the status of the case of her husband. On that day, Sh. Beli Ram Sharma and Smt. Tara Devi met them and assured that their work would be done. However, Shri Beli Ram Sharma, told that he was busy. At about 12.30 p.m., when the complainant could not find any clue of her case, she contacted Smt. Tara Devi, Peon who told the complainant that she was unnecessarily making the things complicated. On the said date the complainant again contacted Smt. Tara Devi on telephone and asked to return the documents and Rs.2000/-, but Smt. Tara Devi stared threatening the complainant. In the evening, Sh. Puppinder Kumar gave a call to Sh. Beli Ram Sharma, who told that they have taken a wrong step and his brother-in-law would not be released from the jail.

Thus, said Sh. Beli Ram Sharma, Judgement Writer (under suspension)has committed an act of misconduct as defined under Rule 3(1) (i) to (iii) of the CCS (Conduct) Rules, 1964.

ARTICLE-III

That as per call-details obtained from the mobile companies, it has been revealed that said Shri Beli Ram Sharma had telephonic conversation with Smt. Kashmiri Dev (complainant) and her brother. Said Shri Beli Ram Sharma and Tara Devi had also made frequent telephonic conversation with each other and also with Sh. Rupinder Singh, Advocate. not only on 13.09.2011 but even prior to that date and subsequently also, which suggests that Sh. Beli Ram Sharma and Smt. Tara Devi, Peon were in hand and glove in sponsoring the litigants to a particular Advocate and had indulged in such activities as are not becoming of a court servant.

Thus, said Shri Beli Ram Sharma, Judgement Writer has committed an act of misconduct as defined under Rule 3(1) (I) to (iii) of the CCS (Conduct) Rules, 1964.

ARTCILE-IV

That on 21.09.2011 Shri Beli Ram Sharma alongwith Smt. Tara Devi, Peon tried to influence Smt. Kashmiri Devi (Complainant) and her brother Sh. Puppinder Kumar and made them to write a false application for withdrawal of complaint made by Smt. Kashmiri Devi. After writing such application Shri Beli Ram Sharma alongiwth Smt. Tara Devi took the complainant etc. to the chambers of Hon'ble the Chief Justice without obtaining any permission whatsoever to see His Lordship. Thus, said Shri Beli Ram Sharma committed an act of grave mis-conduct, un-becoming of a public servant, thereby rendering himself liable for disciplinary action.

Thus, said Shri Beli Ram Sharma, Judgement Writer has committed an act of misconduct as defined under Rule 3(1) (i) to (iii) of the CCS (Conduct) Rules, 1964."

5. The Inquiry Officer, on consideration of the evidence placed before him, made a conclusion, that excepting article of charge No. IV, qua other articles of charges standing not proven against the petitioners. Consequently, the matter was placed before Hon'ble the Chief Justice, given his donning the statutory capacity of Disciplinary Authority, whereupon, his Lordship disconcurred with the report of the Inquiry Officer AND ordered that before a verdict in disaffirmation, of, the report of the Inquiry Officer is rendered, representations and submissions, in consonance with sub rule (2) of Rule 15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, be elicited, from each of the writ petitioners, for theirs being placed before the disciplinary authority. The provisions of Rule 15 of the CCS & CCA Rules read as under:-

"15. ACTION ON INQUIRY REPORT:

(1) The disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of Rule 14, as far as may be.

(2) The disciplinary authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the disciplinary authority or where the disciplinary authority is not the inquiring authority, a copy of the report of the inquiring authority together with its own tentative reasons for disagreement, if any, with the findings of inquiring authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the disciplinary authority within fifteen days, irrespective of whether the report is favourable or not to the Government servant.

(2-A) The disciplinary authority shall consider the representation, if any, submitted by the Government servant and record its findings before proceeding further in the matter as specified in sub-rules (3) and (4).

(3) If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in clauses (i) to (iv) of rule 11 should be imposed on the Government servant, it shall, notwithstanding anything contained in rule 16, make an order imposing such penalty:

Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant.

(4) ....."

A thorough rummaging, of, the record reveals (i) that the writ petitioners made statutory representations and submissions before the Disciplinary Authority, wherein they concerted to sustain the exculpatory findings recorded by the Inquiry Officer. However, the Disciplinary

Authority rejected the respective representations and submissions, made before it, by each of the writ petitioners, besides on a thorough and incisive scrutiny, of the evidence adduced before the Inquiry Officer, His Lordship, made a conclusion, that the exculpatory findings recorded vis-a-vis each of the writ petitioners, warrant theirs being reversed and upset.

6. The learned counsel appearing for the writ petitioners has contended with vigour, before this Court, that the essence and substance, of, the apposite sub rule (2) of Rule 15 of the CCS & CCA Rules, stands infringed, (i) whereupon severe prejudice has been caused to the writ petitioners, (ii) hence, he makes a submission that the findings rendered by the Disciplinary Authority in disaffirmation vis-a-vis the the one(s) recorded by the Inquiry Officer, warrant interference by this Court, in the exercise of its writ jurisdiction. However, the aforesaid submission is highly misplaced and is also not borne out, from, the material on record. The material on record makes a clear display (i) of the Disciplinary Authority, prior to His Lordship recording ad nauseam detailed findings, in disaffirmation vis-a-vis the exculpatory findings rendered qua each of the writ petitioners, by the Inquiry Officer, his Lordship proceeding to elicit written representation(s) and submission(s), from, each of the writ petitioners, (ii) also it is borne out, on a perusal of the record, of the each of the writ petitioner(s) in pursuance to the elicitation(s) sought from them, theirs making representations and submissions, before the Disciplinary Authority. In sequel with the spirit, of, the mandatory provisions of sub rule (2), of Rule 15 of the CCS & CCA Rules, hence, begetting the strictest compliance, (iii) thereupon, the submission aforesaid addressed before this Court by the learned counsel appearing for the petitioners, warrants rejection.

7. The learned counsel appearing for the petitioners has contended with vigour that the exculpatory findings recorded by the Inquiry Officer, stand anvilled upon (a) proper appreciation of the material on record and (b) findings in disaffirmation thereto, recorded by the Disciplinary Authority being surmisal and conjectural and (c) hence, he contended that the exculpatory findings recorded by the Inquiry Officer, upon the Articles of Charge concerned, framed respectively against the petitioners, warranting vindication, whereas, the findings in disaffirmation thereto, recorded by the Disciplinary Authority warranting reversal.

8. However, the aforesaid submission, is not sustainable, given a close reading of the order recorded, by the Disciplinary Authority, unveiling (a) of the Disciplinary Authority traversing, through, the entire evidence on record, (b) His Lordship also in making an order in disaffirmation, to the order recorded by the Inquiry Officer, rather proceeding to analyse the worth of the written submissions and representations, respectively submitted before him by each of the writ petitioners; (c) the Disciplinary Authority has recorded detailed reasons, in forming conclusions contrary, to the one(s), drawn by the Inquiry Officer; (d) the reasons afforded by the Disciplinary Authority being anvilled upon appreciation of evidence on record. The evidence attracted by the Disciplinary Authority against the writ petitioners AND in proof of the articles of charge, is both germane and relevant, to the relevant articles of charges, respectively framed against the writ petitioners. (e) The findings rendered by the Disciplinary Authority stand anvilled upon a proper appreciation of apposite thereto evidence besides the reasons supporting them are neither surmisal nor conjectural, rather are probably and possibly drawable, thereupon satiation is meted vis-a-vis the principles enshrined by the Hon'ble Apex Court in ***Maharastra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi & Others,*** reported in ***(1991)2 SCC 716,*** *(i)* qua the standard of proof in domestic/disciplinary proceedings, not, necessitating emanation of proof or eruption of evidence, for ensuring proof of articles of charge concerned, beyond reasonable doubt, (ii) rather the germane evidence, assuring qua, on, anvil of the principle of preponderance of probabilities, an inference being amenable to be probably drawn, of, findings harboured upon an adversarial analysis of evidence vis-a-vis the petitioners, by the Disciplinary Authority, being possibly as well as probably, hence, drawable. (g) Whereupon, with the Hon'ble Apex Court in caste titled as ***Lalit Popli vs. Canara Bank and others,*** reported in ***(2o03) 3 SCC 58***3, mandating, that, the scope of judicial review being impermissible, for, its being extended to reappreciation of evidence, especially for arriving at a conclusion other than the one formed by the Disciplinary Authority, (h) in sequel, with the legal

principle, for the reasons aforestated, mandated in (1991)2 SSC 716, begetting satiation, thereupon, it would be grossly impermissible for this Court, to, in exercise, of, its constitutional jurisdiction, of, judicial review, proceed, to supplant and substitute, the verdict recorded by the Disciplinary Authority. (I) More so, when the view propounded by the Disciplinary Authority is a reasonable and probable view.

9. The learned counsel appearing for the writ petitioners has with vigour contended that prior, to imposition, of, a penalty upon the writ petitioners by the Disciplinary Authority, it was enjoined upon the Disciplinary Authority, to give an opportunity of personal hearing, to the writ petitioners, whereas, with an apposite opportunity of personal hearing being not granted to the writ petitioners, espcially prior to the imposition of penalty vis-a-vis them, thereupon renders the orders impugned, to acquire a stain of vitiation. However, the aforesaid submission is in absolute disconcurrence with the provisions of sub rule (4) to Rule 15 of the CCS & CCA Rules, wherein an explicit mandate, occurs qua prior to the imposition of penalty(ies), upon, the delinquent(s), it being not necessary, for the Disciplinary Authority to give vis-a-vis them, any opportunity, to make representation qua the penalty proposed to be imposed upon them. In sequel, the aforesaid submission is rejected.

10. For the foregoing reasons, there is no merit in the instant petitions which are accordingly dismissed. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE, DHARAM CHAND CHAUDHARY, J.

Roshan Lal (deceased) through his LRs ... Appellants
Versus
Pritam Singh & others ...Respondents

RSA No. 258 of 2012-F and
Cross Objections No. 417 of 2012.
Judgment reserved on : 20.9.2017
Re-heard on : 26.2.2018
Date of Decision : March 1, 2018

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Section 20 of the Hindu Succession Act, 1925- Whether the provisions of Hindu Succession Act apply to the agricultural land – **Held** – Yes –Succession Act falls under the scope of entry No.5 of list III i.e. the concurrent list and as such the provisions of Section 20 of the Hindu Succession Act shall apply even on agricultural land- The words 'property' as well as 'interest in Joint Family Property' held to be wide enough to cover agricultural land. (Para-44 to 56 and 61 to 63)

Cases referred:

Baldev Parkash & others vs. Dhian Singh & others, Latest HLJ 2008 (HP) 599
Vaijanath & others vs. Guramma & another, (1999) 1 SCC 292
Jaswant & others vs. Basanti Devi, 1970 P.L.J. 587
Madan Lal & another vs. Braham Dass alias Brahmu & another, 2008 (1) Shim. LC 427
Amar Singh vs. Baldev Singh, AIR 1960 Punj 666 (FB)
Laxmi Debi vs. Surendra Kumar Panda & others, AIR 1957 Orissa 1
Corpus Juris Secundum – Volume 83 (LXIII), Page 769
Munnalal vs. Rajkumar, AIR 1962 SC 1493
Bhuri Bai vs. Champi Bai & another, AIR 1968 Rajasthan 139

Dalip Chand & another vs. Chuhru Ram, AIR 1989 Himachal Pradesh 44
Hari Singh & others vs. Milap Chand, 2000 (1) Shim. L.C. 403
Madhu Kishwar & others vs. State of Bihar & others, (1996) 5 SCC 125
Union of India vs. Harbhajan Singh Dhillon, 1971 (2) SCC 779
Nirmala & others vs. Government of NCT of Delhi & others, 170 (2010) DLT 577 (DB)
Accountant and Secretarial Services Pvt. Ltd. another vs. Union of India & others, (1988) 4 SCC 324
Velamuri Venkata Sivaprasad (dead) by LRs vs. Kothuri Venkateshwarlu (dead) by LRs, AIR 2000 SC 434

For the appellant	:	Mr. Vivek Singh Thakur-II, Advocate, for the appellants/non-objector.
For the respondent	:	Mr. Ajay Sharma and Mr. Kishore Pundir, Advocates, for respondents No. 1 & 6 and also for the Objector.

The following judgment of the Court was delivered:

Justice Sanjay Karol, ACJ.

The difference of opinion between two learned Judges of this Court, sitting singly in separate proceedings, led the matter to be placed before us for answering the following question:

"Whether the provisions of Hindu Succession Act apply to agricultural lands?"

2. In *Baldev Parkash & others vs. Dhian Singh & others,* Latest HLJ 2008 (HP) 599, the view taken is that the provisions of the Hindu Succession Act, 1956 (hereinafter referred to as the 'Succession Act'), are not applicable to agricultural land, whereas, vide judgment dated 14th October, 2015, rendered in this very case (RSA No. 258 of 2012), by relying upon the decision of the apex Court in *Vaijanath & others vs. Guramma & another,* (1999) 1 SCC 292, a contrary view stands taken.

3. The question at best can be answered by examining the Constitutional provisions qua competence of the Central Government to enact the laws, pertaining to "succession" of agricultural land. In fact, legislative competence of the Central Government is the sole question, which arises for consideration in the present appeal.

4. The sale deed dated 14.3.2005 executed by defendant No. 2 in favour of defendant No. 1 is directly in attack by the plaintiff, claiming preferential rights by virtue of Section 22 of the Succession Act. Plaintiff filed a suit challenging the sale deed for the reason that he had a preferential right to acquire the interest transferred in terms of the instrument of sale. The suit came to be decreed, but in the appeal (RSA), defendant No. 1 by taking recourse to the decision already rendered by the learned Single Judge in *Baldev Parkash* (supra), pressed for setting aside the decree on the ground that the Succession Act, being a Central Legislation, would not and does not apply to agricultural land which falls purely within the domain of the State. Unable to persuade himself to agree with the view taken in *Baldev Parkash* (supra), after relying upon the decision rendered by the apex Court in *Vaijanath* (supra), the learned Single Judge referred the matter to the Division Bench by framing the aforesaid question, which we are called upon to answer.

5. We need not to go into the factual matrix of the case, for the issue is purely legal. The moot point is as to whether succession is a transfer or alienation and would include the expression "transfer of property" or not and as to whether succession with respect to agricultural land falls within item No. 5 of List III of the Constitution or not.

6. We now take note of relevant provisions of the Constitution of India (hereinafter referred to as the Constitution).

7. Part XI, Chapter I of the Constitution deals with the legislative relations i.e. distribution of legislative powers. By virtue of Article 245, territorial jurisdiction of the legislative powers of the Parliament and the State Legislatures is delimited and Article 246 distributes the legislative powers subject wise between the Parliament and State Legislatures. Of course, exceptions are carved out under Articles 247, 249, 250, 252 and 253. Articles 245, 246 and 254 read as under:-

> "245. Extent of laws made by Parliament and by the Legislatures of States. – (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make law for the whole or any part of the State. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.
>
> 246. Subject-matter of laws made by Parliament and by the Legislatures of States – (1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
>
> (2) Notwithstanding anything in Clause (3), Parliament, and, subject to Clause (1), the Legislature of any State [* * *] also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
>
> (3) Subject to Clauses (1) and (2), the Legislature of any State [* * *] has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
>
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included [in a State] notwithstanding that such matter is a matter enumerated in the State list.
>
> … …
>
> 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States – (1) If any provision of law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
>
> (2) Where a law made by the Legislature of State [* * *] with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:
>
> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

8. We may also advert to the historical background of the Constitutional provisions on the issue.

9. Prior to the enforcement of the Constitution, field of legislature of Federal Government and the State Government were governed under the Government of India Act, 1935

(hereinafter referred to as the "1935 Act"). Seventh Schedule, List 2 Provincial List contained subjects for the provincial legislature and List 3 Concurrent Legislative List contained subjects for both federal and provincial legislatures. The relevant entries, under the "1935 Act" are extracted as under:

> "Entry–21 Provincial Legislative List: Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Court of wards; encumbered and attached estates; treasure trove.
>
> Entry–7 Concurrent Legislative List: Wills, intestacy and succession, save as regards agricultural land." [Emphasis supplied]

10. Entries relevant for answering the question, under the Constitution read as under:-

> Seventh Schedule.
>
> List II – State List.
>
> "18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization." [Emphasis supplied]
>
> List III – Concurrent List.
>
> …
>
> "5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." [Emphasis supplied]
>
> "6. Transfer of property other than agricultural land; registration of deeds and documents." [Emphasis supplied]
>
> "7.Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land." [Emphasis supplied]

11. Noticeably the legislatures in their wisdom did not retain the expression "save as regards agricultural lands" so contained in Entry No. 21 of the Provincial Legislative List of "1935 Act" in the corresponding entry No. 5 of the Concurrent List under the Constitution.

12. At this juncture, it would be beneficial to take note of Section 22 of the Succession Act, which reads as under:

> "22. Preferential right to acquire property in certain cases. – (1) Where, after the commencement of this Act, an interest in any immoveable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.
>
> (2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the Court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this Section, that heir who offers the highest consideration for the transfer shall be preferred."

[Emphasis supplied]

13. From the statement of object and reasons of the Succession Act, it is evidently clear that special provisions were included for "regulating succession to the property of intestate" of a Hindu.

14. Chapter II of the Succession Act deals with "intestate succession" whereas Chapter III deals with "testamentary succession".

15. Chapter II provides for the manner in which word "property" of an intestate would devolve upon and partitioned amongst the heirs of a person who dies as an intestate.

16. Noticeably though word "property" is not defined but "intestate" stands defined under Chapter I, Section 3(g), which reads as under:

"3. Definitions and interpretation. –

…

(g) "*intestate*" – a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;

… …"

17. The word "succession" is also not defined under the Succession Act. But from the provisions of Chapter II, it is evidently clear that properties are to devolve upon the surviving heirs and distributed in accordance with the provisions contained therein.

18. We find that learned Single Judge in *Baldev Parkash* (supra), while holding that provisions of the Succession Act would not apply to agricultural land, independently, has not assigned any reason. Simply opinion rendered by the Hon'ble Judges of Punjab & Haryana High Court in *Jaswant & others vs. Basanti Devi,* 1970 P.L.J. 587 (para 8 of the report) stands reproduced.

19. At this point in time, we may observe that the very same learned Judge, while dealing with an identical issue and same provisions, in *Madan Lal & another vs. Braham Dass alias Brahmu & another,* 2008 (1) Shim. LC 427, took the following contradictory view:

"18. The trial Court has dealt with the aspect of the nature of the property as well as the point of legal necessity in detail vide judgment dated 25.8.1989. What has to be seen under Section 22 of the Hindu Succession Act, 1956, is that when an interest in any immovable property of an intestate, devolves upon two or more heirs specified in class 1 of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. The plaintiff and Haria are real brother and have inherited as class-1 heirs the suit land in equal shares after the demise of their father in January, 1975. The land in question was not partitioned. The trial Court as well as the appellate Court have correctly appreciated the oral as well as the documentary evidence brought on record by the parties."

20. At this point in time we may note that the learned Single Judge (in RSA No. 258 of 2012), while framing the question for adjudication, has taken note of several decisions rendered by various courts, both in support and against the point canvassed before us. In a tabulated form, the law of succession either applicable or not application to agricultural land is indicated as under:

Not applicable	**Applicable**
Jaswant & others vs. Basanti	*Basavant Gouda vs.*

Devi, 1970 P.L.J. 587	*Channabasawwa & another,* AIR 1971 Mysore 151.
Prema Devi vs. Joint Director of Consolidation, AIR 1970 Allahabad 238.	*Nahar Hirasingh vs. Mst. Dukalhin,* AIR 1974 Madhya Pradesh, 141.
Jeewanram vs. Lichmadevi, AIR 1981 Rajasthan 16.	*Nidhi Swain vs. Khati Dibya,* AIR 1974 Orissa 70.
Baldev Parkash & others vs. Dhian Singh & others, Latest HLJ 2008 (HP) 599	*Venkatalakshmamma vs. Lingamma,* 1984 (2) Kar. L. J. 296.
Subramaniya Gounder & others, vs. Easwara Gounder & others, 2011 (2) Mad. L.J. 467.	*Tukaram Genba Jadhav vs. Laxman Genba Jadhav,* AIR 1994 Bombay, 247.
Anjali Kaul & another vs. Narendra Krishna Zutshi, 2014 (9) RCR (Civil) 2794.	*Vaijanath & others vs. Guramma & another,* (1999) 1 SCC 292

21. Having analyzed the aforesaid decisions, learned Judge found that insofar as High Courts of Punjab and Haryana, Allahabad, Rajasthan, Madras and this Court in *Baldev Parkash* (supra) are concerned, it categorically held provisions of the Succession Act, more particularly Section 22 not applicable to agricultural land in the matter of succession, for being beyond the competence of Parliament to legislate over agricultural lands, which power, legislative in nature, is traced to Entry 5 of List III of Seventh Schedule of the Constitution, dealing only with devolution and not transfer.

22. Whereas, on the other hand, the High Courts of Mysore, Madhya Pradesh, Orissa and Karnataka while disagreeing with such proposition categorically held the provisions of Section 22 of the Act applicable to agricultural lands.

23. In fact, Bombay High Court found no conflict in the judgments rendered by the High Courts of Punjab, Mysore, Allahabad and Rajasthan, and also held the provisions of 1956 applicable to agricultural land, save and except to the extent provided in Section 4(2) of the Act.

24. In *Jaswant* (supra), while answering the question as to whether Section 22 of the Succession Act applies to agricultural land or not, the Court answered in the negative (para-7 of the report). While forming opinion, in para -8 of the report, Court observed that the words "immovable property" used in the said Section would include agricultural land and that "save and except for the purpose of devolution" which the said Section does not provide for otherwise, agricultural land would fall in entry No. 18 of List II.

25. One may only observe that here we are dealing with succession of an immoveable property of an intestate.

26. In our considered view, in the said decision what weighed with the Court, in forming its opinion, was also the decision of Federal Court in re: *Hindu Women's Right to Property Act,* AIR 1941 Federal Court 72, which incidentally was dealing with the provisions under the "1935 Act", wherein succession qua agricultural land was specifically exempted. Hence, law laid down in *Jaswant* (supra) was in a totally different context, not directly dealing with the issue in hand.

27. A two Judge Bench in *Prema Devi* (supra), has clearly held the provisions of the Succession Act not applicable to the agricultural properties governed by the U.P. Zamindari Abolition and Land Reforms Act. In our considered view, correctness of the decision cannot be doubted in view of the saving clause [sub–section (2) of Section 4 of the Succession Act], which

categorically exempted laws provided for the prevention of fragmentation; fixation of ceiling or devolution of tenancy rights in respect of agricultural holdings. The Court was dealing with a case where by virtue of a compromise decree, a lady was sought to be made a *Bhumidar* i.e. tenure holder of another class. It is in this background, Court observed provisions of sub-section 2 of Section 14 of the Succession Act, not to be applicable.

28. One notices that the view taken by the learned Single Judge in *Jeewanram* (supra) is based on a decision rendered in *Jaswant* (supra). Also Court did not account for statutory exceptions so contained under Section 4 of the Succession Act.

29. A Division Bench of High Court of Mysore in *Basavant Gouda* (supra), by applying the doctrine of "Pith and Substance" held the provisions of the Succession Act to be applicable to agricultural land in the following terms:

> "11. Mr. Savanur lastly contended that the Hindu Succession Act itself is not applicable to agricultural lands because entry 18 in List II of the Seventh Schedule of the Constitution, confers power on the State Legislature to make legislation in respect of agricultural lands. Hence Hindu Succession Act passed by the Parliament could not apply to succession to agricultural lands. This argument is merely to be stated for being rejected. Entry 5 of List III of the Seventh Schedule of the Constitution deals with the power to legislate in respect of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution subject to their personal law. It may be noticed here that the corresponding Entry 7 in the Government of India Act, 1935. List III read as follows:
>
> "Wills, intestacy; and succession, save as regards agricultural land."
>
> It is significant that in Entry 5 in the Constitution the words "save as regards agricultural land" have been omitted. The pith and substance of the Hindu Succession Act is to make a law relating to succession and not to deal with agricultural lands as such. That is the reason why the argument of Mr. Savanur requires no further consideration. The provisions of Section 14 of the Hindu Succession Act are matters which come within the ambit of Entry 5 in List III of the Seventh Schedule of the Constitution and their applicability to agricultural lands cannot be excluded. This view of ours finds support in the decision Amar Singh v. Baldev Singh, AIR 1960 Punj 666 (FB) and Shakuntala Devi v. Beni Madhav, AIR 1964 All 165."

30. At this point in time, it be only observed that the Court referred to and relied upon the decision rendered by a Full Bench of Punjab & Haryana High Court in *Amar Singh vs. Baldev Singh,* AIR 1960 Punj 666 (FB), which incidentally was never noticed by the Division Bench in *Jaswant* (supra).

31. A two Judge Bench in *Nidhi Swain* (supra), by relying upon *Basavant Gouda* (supra), held the provisions of the Succession Act applicable to agricultural land. The Court noticed that saving clause so contained in the entry under the "1935 Act" came to be deleted in the corresponding entry under the Constitution.

32. In *Laxmi Debi vs. Surendra Kumar Panda & others,* AIR 1957 Orissa 1, the Court held that:-

> "14. Mr. Jena further contended that the Act, even if applies retrospectively, will not apply to agricultural lands, and for this he relies upon the Federal Court decision reported in Hindu Women's Rights to Property Act, 1937, In the matter of, AIR 1941 PC 72 (K). That was a case which came up for decision by the Federal court on a reference made by His Excellency the Governor-General of India.

> Gwyer C. J., who delivered the judgment of the Court held that the Hindu women's Rights to Property Act of 1937, and the Hindu Women's Rights to property (Amendment) Act of 1938, do not operate to regulate succession to agricultural land in the Governors' Provinces; and do operate to regulate devolution by survivorship of property to other than agricultural lands.
>
> This decision, in view of the changed position in law, no longer holds good. The federal Court decision was based upon the law of legislative competency as it then stood, by the Government of India Act, 1935. In Schedule 7, Government of India Act, 1935, this subject appears in the Concurrent Legislative List (List 3) as item no. 7. Item 7 was in the following terms:
>
> "wills, Intestacy and Succession, save as regards agricultural lands."
>
> Now under the present Constitution of India, the same subject has been dealt with in the Concurrent List (List 3) in Sch.7 as item No. 5. Item No.5 runs as follows:
>
> "Marriage and divorce, infants and minors, Adoption, Wills, Intestacy and Succession, Joint Family and Partition, all matters in respect of which parties in judicial proceedings were, immediately before the commencement of this Constitution, subject to their personal law."
>
> It is clear that the Parliament had omitted the phrase "save as regards agricultural land" from item No. 5 of the Concurrent List in order to have a uniform personal law for Hindus throughout India, and accordingly, it necessitated the enlargement of Entry No. 5. We have no doubt, therefore, that in view of the change in law, the Act will apply to agricultural lands also, and the decision in AIR 1941 PC 72 (K) would no longer hold good."
>
> [Emphasis supplied]

33. A Full Bench of High Court of Madhya Pradesh in *Nahar Hirasingh* (supra) observed that where a tenancy or a land tenure legislation makes a special provision for devolution of the land, that provision would prevail in view of sub-section (2) of Section 4 of the Succession Act otherwise, elsewhere provisions of the Succession Act would prevail.

34. One finds that in *Tukaram Genba Jadhav* (supra), the learned Single Judge, after considering divergent views taken by various courts of the land and considering most of the aforesaid decisions, held that in fact there was no real conflict in view of the fact that decisions came to be rendered either on the basis of position as it existed prior to the enforcement of the Constitution or in view of the saving clause provided under Section 4(2) of the Succession Act.

35. In fact, view taken by the High Court of Bombay in the said decision is not contrary to the one so taken by the Full Bench of Punjab & Haryana High Court in *Amar Singh* (supra). Mere reading of the report reveals that insofar as subject matter of wills, intestacy and succession is concerned, it squarely falls within the exclusive competence of the Central Legislature. Definitely not the State Legislature. The alleged encroachment of entry No. 18 in the State List, if any, is incidental. By applying the doctrine of "Pith and Substance", if the subject legislated upon falls directly and substantially within the scope and ambit of entry in the Concurrent List, question of alleged encroachment in the State List would not arise.

36. The expression "property" of an intestate in Chapter II of the Succession Act, save and except the saving clause in Section 4(2), which also now stands repealed by virtue of the amendment carried out in the year 2005, necessarily has to include "immoveable property" be agricultural land or otherwise. Any tangible property is what is required to be seen.

37. We are in respectful agreement with the view of the matter taken by the learned Single Judge that the expression "property" would cover all kinds of properties, including agricultural land, which view finds support from the decision rendered by the Apex Court in *Vaijanath* (supra). Now, significantly the Apex Court was dealing with the provisions of the Hindu

Women's Rights to Property Act, 1937 which did not define the word 'property' which in fact, is similar to the position with the statute with which we are dealing. Noticeably, laws relating to women came to be enacted not only to mitigate hardship but also to confer certain rights upon women and widows. These are all beneficial legislations and hence have to be interpreted as such.

38. In *Vaijanath* (supra) the Court held that:

> "8. There is no exclusion of agricultural lands from Entry 5 which covers wills, intestacy and succession as also joint family and partition. Although Entry 6 of the Concurrent List refers to transfer of property other than agricultural land, agriculture as well as land including transfer and alienation of agricultural land are placed under Entries 14 and 18 of the State List. Therefore, it is quite apparent that the Legislature of the State of Hyderabad was competent to enact a Legislation which dealt with intestacy and succession relating to Joint Family Property including agricultural land. The language of the Hindu Women's Right to Property Act, 1937 as enacted in the State of Hyderabad is as general as the Original Act. The words 'property' as well as interest in Joint Family Property' are wide enough to cover agricultural lands also. Therefore, on an interpretation of the Hindu Women's Right to Property Act, 1937 as enacted by the State of Hyderabad, the Act covers agricultural lands. As the Federal Court has noted in the above judgment, the Hindu Women's Right to Property Act is a remedial Act seeking to mitigate hardships of a widow regarding inheritance under the Hindu Law prior to the enactment of the 1937 Act; and it ought to receive a beneficial interpretation. The beneficial interpretation in the present contest would clearly cover agricultural lands under the word 'property'. This Act also received the assent of the President under Article 254 (2) and, therefore, it will prevail.
>
> 9. The appellants, however, rely upon a subsequent Act passed by the State of Hyderabad, namely, Hyderabad Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1954. Section 2 of the said Act provides that "term property' in the Hindu Women's Rights to Property Act as in force in the State of Hyderabad shall include agricultural land." This act received the assent of the President on 15th October, 1954 and was published in the State Gazette dated 22nd of October, 1954. It was submitted that prior to the enactment of the Hyderabad Hindu Women's Right to Property (Extension to Agricultural Lands) Act, 1954, the Hindu Women's Right to Property Act as enacted in 1952 would not apply to agricultural land. The High Court has rightly negatived this contention. A subsequent Act cannot be used to interpret the provisions of an earlier enactment in this fashion. The language of the earlier Act is wide enough to cover agricultural land also. In the entire Hindu Women's Right to Property Act, 1937, there is nothing which would indicate that the Act does not apply to agricultural land. The word 'property' is a general term which covers all kinds of property, including agricultural land. A restricted interpretation was given to the original Hindu Women's Right to Property Act, 1937 enacted by the then Central Legislature, entirely because of the legislative entries in the Government of India Act, 1935, which excluded the legislative competence of the Central Legislature over agricultural lands. Such is not the case in respect of the Hindu Women's Right to Property Act, 1937, as enacted by the State Legislature of the State of Hyderabad. The ratio of the Federal Court judgment, therefore, would not apply. There is, therefore, no substance in the contention that the subsequent Act of 1954 restricted the application of the Hindu Women's Right to Property Act, 1937 brought into force by the earlier Hyderabad Act of 1952. As is pointed out by the High Court, the Act of 1954 was enacted by way of abundant caution, to make sure that the agricultural lands were not considered as excluded from the scope of the Hindu Women's Right to Property Act as enacted in 1952. The second Act is, therefore, clarificatory."

39. The term "succession" is defined as meaning the act of succeeding, or the state of being successive; a following of things consecutively; and, as applied to persons, a series of persons following one another. It is defined more specifically as the act or right of legal or official investment with a predecessor's office, dignity, possessions, or functions; also, the legal or actual order of so succeeding, or that which is or is to be vested or taken. The word "succession" is also applied to lineage or order of descendants, and may be employed to indicate the passing of property, and in a technical sense it denotes the devolution of title to property under the laws of descent and distribution. [Corpus Juris Secundum – Volume 83 (LXIII), Page 769]

40. Ordinary meaning of "succession" is transmission by law or will of man, to one or more persons of the property and the transmissible rights and obligations of the deceased person. That is the sense in which the word "succession" is used in the Lists in Schedule VII which is indicated by the collection of the words "wills, intestacy and succession" in Entry No. 5 of List III.

41. Going back to the issue of legislative intent of the Succession Act, it be only observed that under the Hindu Law only few females could claim inheritance and that too with a limited right. In the modern age of social emancipation and equality, more so to remove gender bias, based upon the principles enshrined in the fundamental Articles of the Constitution, there has been movement for amelioration of hardships faced by the females. It is in this backdrop that the Succession Act came to be codified. On this issue, observations made by the Apex Court in *Munnalal vs. Rajkumar,* AIR 1962 SC 1493, reproduced below are apt:-

> "The Act is a codifying enactment, and has made far-reaching changes in the structure of the Hindu Law of inheritance, and succession. The Act confers upon Hindu females full rights of inheritance, and sweeps away the traditional limitations on her powers of dispositions which were regarded under the Hindu law as inherent in her estate. She is under the Act regarded as a fresh stock of descent in respect of property possessed by her at the time of her death..... Manifestly, the Legislature intended to supersede the rules of Hindu law on all matters in respect of which there was an express provision made in the Act."

42. Although Hindu Law claims to have divine origin and further claims to be divinely ordained and divinely dictated body of rules and although theoretical claims are made that Hindu Law is eternal and immutable, yet in practice during the centuries preceding the promulgation of the Succession Act, Hindu Law and particularly the law relating to succession had ceased to be uniform and schemes of inheritance with radical differences came into existence in different parts of the country. Not only there were two differing systems of inheritance known as 'Mitakshara' and 'Dayabhaga' with different rules and orders of succession but under the 'Mitakshara' system of law, various schools with some differences in law had come into existence. Varying interpretation of texts in the smrities, dissimilar families and local customs and conflicting pronouncements contributed to the absence of uniformity and consistency. There was scant regard for the females in matter of inheritance and succession. Under Hindu Law, few females could claim inheritance and even if they inherited, such acquisition came only with limited rights. Whatever justification may have been for this position in the ancient and medieval conditions, the position could not be tolerated in the modern age of social emancipation and equality. Thus there has been a social struggle for changing the ancient Hindu Law for a more equitable, consistent and coherent system of jurisprudence.

43. In fact, on this issue we find the High Court of Rajasthan to have traced the customary and legislative law in *Bhuri Bai vs. Champi Bai & another*, AIR 1968 Rajasthan 139 (Paras 8 and 9).

44. Tracing the legislative history of succession to agricultural land, as already noticed supra, one would find that succession with regard to the agricultural land was always meant to be a provincial subject. It is in this backdrop, Federal Court, while interpreting the provisions of the Hindu Women's Rights to Property Act, 1937 in Re: *Hindu Women's Right to*

Property Act (supra), came to the conclusion that the Act did not extend to succession of agricultural land. Significantly, the provinces themselves took up the matter and carried out necessary amendments, extending the provisions of the said Act, also to agricultural lands in their respective provinces. For example Bombay Act 17 of 1942, the Bihar Act, 6 of 1942, and the United Provinces Act 11 of 1944 and the Madras Act 26 of 1947. But then the position changed later on.

45. As is evident from entry No. 5 of List–III, the words "save as regards agricultural land", as it stood in Entry No. 7 of the Government of India Act, 1935, stands deleted. Thus under the Constitution, Parliament intended to exercise full power in respect of matters of succession even with regard to the agricultural land, the only exception being so provided under the Act. On this issue, with profit, one may quote the views of famous author Mulla as expressed in Principles of Hindu Law (Vol. II, Page 299) as under:

> "It is sometimes said that the Act does not apply to agricultural lands but that would not be a correct proposition. Sub-section (2) relates only to certain specified matters and subject to that, the provisions of the Act must govern succession to agricultural lands too. Considerable legislation by various States, aimed at prevention of fragmentation of agricultural holdings and securing their consolidation and for the purpose of fixing ceilings and devolution of holdings, has found place on the statute-book in recent years and this section is not intended to override or disturb such legislation. Land policy in different States, though founded on the concept of a socialist welfare state, cannot be expected to be uniform and sub–Section (2), therefore, leaves such legislation relating to agricultural land undisturbed……. It may be said that this provision detracts from the fundamental objective of uniformity of legislation. However, the explanation is that what is aimed at is a uniform law for all Hindus and not necessary a uniform law for all forms of property."

46. The development of law did not stop with the codification of Hindu Law. Even in the year 2005, Act stands amended and the provisions of Section 4(2) of the Succession Act deleted. The whole object, purpose and intent being to offer right, absolute in nature, regardless of the nature of the property of a female.

47. Significantly, Item No. 18 of List –II does not use the expression "property". The expression used is "land". The field for exercising legislative competence by the State appears to be with regard to and in relation to the land – not property – of tenure and tenancy. Noticeably when it comes to agricultural land, the power is with reference to transfer and alienation. Significantly "transfer of property other than agricultural land" is specified as a subject in Entry No. 6 of concurrent list. Hence when it comes to transfer and alienation of agricultural land, Parliament is clear that competence would be only that of the State. However, when it comes to succession or so as to say inheritance, intestacy or testamentary, there is no restriction with regard to the legislative competence about the nature of the property, moveable or immovable, be it "land" or "agricultural land" as stipulated under Entry No. 18 of List II. "Land" necessarily would not mean and take in its sweep any other immoveable property.

48. Noticeably, learned Single Judge of this Court in *Dalip Chand & another vs. Chuhru Ram,* AIR 1989 Himachal Pradesh 44, while dealing with a case where the son, claiming absolute succession of the entire occupancy tenancy land under the provisions of the Punjab Tenancy Act, laid challenge to the gift so made by his mother in favour of a third party by virtue of her having succeeded to the estate of her husband alongwith her son, observed that:-

> "9. In case the rights acquired by Smt. Minhon are to be governed by sub-Section (1) of S. 14, she would be deemed to have been full owner of the aforesaid area of land and, thus competent to make a gift thereof. In that event the view taken by the courts below would have to be held to be erroneous and the suit of the plaintiff liable to dismissal. In the circumstances of the present case it is obvious that as a widow, Smt. Minhon had a right of maintenance which was a

charge on the property of her husband, Munshi Ram. In other words, her right to maintenance was a pre-existing right on the date of enforcement of the Hindu Succession Act. Such a right would bring the case within the ambit of sub-Section (1) of S. 14 of the Hindu Succession Act, 1956. Law in this respect is more than settled. If reference is needed to precedents, it may be made to Vaddeboyina Tulasamma vs. Sesha Reddi, AIR 1977 SC 1944; Bai Vajia vs. Thakorbhai Chelabhai, AIR 1979 SC 993; Nand Ram vs. Vidya, ILR (1985) Him Pra 852 (DB); Jagannathan Pillai vs. Kunnjithapadam Pillai, AIR 1987 SC 1492 and Smt. Gulwant Kaur vs. Mohinder Singh, AIR 1987 SC 2251."

49. To similar effect is the view expressed by another learned Single Judge of this Court in *Hari Singh & others vs. Milap Chand,* 2000 (1) Shim. L.C. 403.

50. The Apex Court in *Madhu Kishwar & others vs. State of Bihar & others,* (1996) 5 SCC 125 has observed that:-

"37. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46, and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores undergo change with march of time. Justice to the individual is one of the highest interest of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

38. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps into iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands." ...

...

"52. Sub-Section (2) of Section 4 of the Hindu Succession Act, to remove any doubts, has declared that the Act shall not be deemed to affect the provisions of any law in force providing for (i) prevention of fragmentation of agricultural holdings; (ii) for the fixation of ceiling; and (iii) for the devolution of tenancy rights in respect of such holdings."

51. The Apex Court in *Union of India vs. Harbhajan Singh Dhillon,* 1971 (2) SCC 779, while dealing with the Constitutional validity of the amendment carried in the Wealth Tax Act, 1957, including capital value of agricultural land for computing net wealth, held the Act not to be ultra vires of the Constitution, on the ground of lack of legislative competence. Repeatedly, the discussion by the Constitution Bench (Seven Judges) is referred to by the Apex Court. Hence, we deem it necessary to reproduce the following passages from the said report:-

"164. It will be noted that the Imperial Parliament was alive to the fact that there might be subject-matters of legislation not covered by any of the three Lists

of the Seventh Schedule but the same were not committed to the care of the Federal Legislature or even attempted to be divided between the Federal Legislature and the State Legislatures. It was the function of the governor-General to empower either the Federal Legislature or a Provincial Legislature by public notification to enact a law with respect to any law not enumerated in the Seventh Schedule including a tax not mentioned in any such list and in the discharge of this function, the governor-General was to act in his discretion. The Explanation for this is to be found in the speech of Sir Samuel Hoare recorded in the Parliamentary debates to the effect that :

> "Indian opinion was very definitely divided between the Hindus who wanted to keep the predominant powers in the Centre and the Moslems who wished to keep the predominant power in the Provinces. The extent of that feeling made each of these communities look with greatest suspicion at the residuary field the Hindu demanding it with the Centre and the Moslems demanding with the Provinces. "

165. It would appear from the same speech that all attempts to bridge the difference only resulted in making the Federal List, the Provincial List and the Concurrent List each as exhaustive as possible to leave little or nothing for the residuary field. The said speaker hoped that "all that was likely to go into the residuary field were perhaps some quite unknown spheres of activity" which could not be contemplated at the moment.

166. The matter had engaged the attention of the Constituent Assembly. The Second Report of the Union Powers Committee, dated 5/07/1947, to the President of the Constituent Assembly contains the following statement:

> "We think that residuary powers should remain with the Centre. In view however, of the exhaustive nature of the three lists drawn up by us the residuary subjects could only relate to matters which, while they may claim recognition in the future, are not at present identifiable and cannot therefore be included now in the Lists."

Moving the aforesaid report Shri Gopalaswami Aiyangar in his speech on 20th August, 1947 said inter alia as follows :-

> "We should make the Centre in this country as strong as possible consistent with leaving a fairly wide range of subjects to the Provinces in which they would have the utmost freedom to order things as they liked, In accordance with this view, a decision was taken that we should make three exhaustive Lists, one of the Federal subjects, another of the Provincial subjects and the third of the concurrent subjects and that, if there was any residue left at all, if in the future any subject cropped up which could not be accommodated in one of these three Lists then that subject should be deemed to remain with the Centre so far as the Provinces are concerned." (see the Constituent Assembly Debates Vol. V. p.38)

… …

"169. Scanning the lists and specially the entries mentioned above, there can be little doubt that the Constitution-makers took care to insert subject-matters of legislation regarding land and particularly agricultural land in the exclusive jurisdiction of State Legislature. Although Parliament is competent to legislate on transfers of property and contracts generally, the legislative power in this regard is not to be exercised over agricultural land but when evacuee property includes agricultural land Parliament is competent to legislate with respect to custody, management and disposal of the same under Entry 41 of List III. Similarly, when a question of acquisition or requisitioning of property including agricultural land

is concerned, both Parliament and the State Legislature are competent to exercise legislative powers."

52. As we have already observed, by virtue of the Amendment Act 39 of 2005, w.e.f. 9.9.2005 sub-Section (2) of Section 4 of the Succession Act stood deleted. Resultantly no local law pertaining to the prevention of fragmentation of agriculture holding for fixation of ceilings for devolution of tenancy rights, in respect to such holdings, with respect to succession is saved.

53. On similar issue, the Delhi High Court in *Nirmala & others vs. Government of NCT of Delhi & others,* 170 (2010) DLT 577 (DB), observed that "female have the right to succeed to the disputed agricultural land". It further observed that "For the aforesaid reasons, we hold that the provisions of the HAS would, after the amendment of 2005, have over-riding effect over the provisions of Section 50 of the DLR Act and the latter provisions would have to yield to the provisions of the HAS, in case of any inconsistency. The rule of succession provided in the HSA would apply as opposed to the rule prescribed under the DLR Act. The petitioners are, therefore, entitled to succeed to the disputed agricultural land in terms of the HSA. The respondents No. 1 and 2 are directed to mutate the disputed agricultural land, to the extent of late Shri Inder Singh's share, in favour of the petitioners and respondent Nos. 3, 4 and 5 as per the HSA."

54. To somewhat similar effect is another decision of the very same Court in W.P.(C) No. 8967/2014, titled as *Deepak Yadav vs. Government of NCT of Delhi,* decided on 25th February, 2015 and more recent one of Bombay High Court in *Shri Eknath Daval Thete vs. Ganpal Dagdu Thete (Decd.),* Second Appeal No. 450 of 1993, decided on 6.1.2016, where it is observed that "Section 22 of the Hindu Secession Act, 1956 clearly confers additional right of pre-emption in case of interest in any immovable property devolving upon two or more heirs specified in ppn 30 sa -450.93 (j).doc clause I of the Schedule and in case any one of such heirs proposing to transfer his or her own interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. The plaintiff being a brother of the defendant No. 1 and was having joint interest in the suit property and rightly applied for pre-emption in the share of the share of the defendant No. 1 in the suit property by exercising right under Section 22 of the Hindu Succession Act, 1956, the learned trial Judge as well as the Lower Appellate Court have considered the said provision of Section 22 of the Hindu Succession Act, 1956 and have rendered a concurrent finding of fact that the plaintiff was entitled to apply for pre-emption and purchase the share of the defendant No. 1 in the suit property before the same was sold to the defendant No. 2. Learned counsel appearing for the defendant No. 2 is unable to demonstrate before this Court as to how the said concurrent finding of the fact rendered by both the Courts below is perverse and contrary to Section 22 of the Hindu Succession Act, 1956…".

55. In *Accountant and Secretarial Services Pvt. Ltd. another vs. Union of India & others,* (1988) 4 SCC 324, where eviction of a tenant was resisted with challenge being laid with regard to the legislative competence of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, so enacted by the Parliament, the Apex Court interpreted the word "land" in entry No. 18 of List –II to read as under:-

> "27. In our opinion, the true import of the word 'land' can be gathered if we try to ascertain the proper interpretation and ambit of these three phrases, particularly, the first two among them, in the context of other entries in the Union List. Doing so, is it possible to interpret this entry as encompassing within its terms legislation on the relationship of landlord and tenant in regard to houses and buildings? That is the question. After careful consideration, we have reached the conclusion that the answer to this question has to be in the negative…"
>
> …
>
> "(5). While, on the one hand, the words in entry 18 have to be given the widest meaning possible, it has to be borne in mnd that the entries in the various lists have to be read together and construed in such a manner as to give a meaning and content to all of them. We need hardly say that the Constitution should be so

> interpreted as to reconcile all concerned and relevant entries (See: Hoechst Pharmaceuticals v. State, (1983) 4 SCC 45: (AIR 1983 SC 1019) and the Dhillon case (Union of India vs. H. S. Dhillon, (1971) 2 SCC 33: AIR 1972 SC 1061). If we give the word "land" a meaning so as to include buildings and also give the words "rights in or over land" a wide interpretation - as we have to, in view of the discussion and ratio in Megh Raj v. Allah Rakhia, AIR 1947 PC 72 - this entry will be seen to cover almost all kinds of not only transfer but also alienation and devolution of, or even succession to, lands and buildings. The interpretation thus placed will affect not merely leases and, therefore, a small part of the contents of the item regarding 'transfer of property'; it will apply equally to sales, mortgages, charges and all other forms of transfer of all kinds of interests in land and buildings and thus make such a substantial inroad into the scope of entry 6 in the concurrent list as to denude it of all application except to property other than land and buildings. The word "property" used in entry 6 will thus lose even its normal meaning not to speak of its being given the widest meaning possible appropriate to a legislative entry. It will mean that though transfer of property - other than agricultural land - is in the Concurrent List, the State will have exclusive power to legislate in respect of transfer of all property in the nature of land and buildings; in other words, for the words "transfer of property other than agricultural land", we will be substituting "transfer of property other than lands and buildings". It will mean that though wills, intestacy and succession are in item 5 of the Concurrent List, the State can legislate exclusively in respect of devolution of land and buildings of all description. It will render entry 35 of List II a surplusage in so far as it refers to "lands and buildings". We do not think that such an interpretation should be favoured. The more harmonious interpretation would be that any subject-matter that involves the element of transfer or alienation of any property (other than agricultural land) or of devolution (on testamentary or intestate succession) of any property or contract (other than one in relation to agricultural land) will fall in the Concurrent List and not in the State List even though it may relate to land or buildings."
>
> [Emphasis supplied]

56. Thus, "succession" falls within the scope of entry No. 5 of List –III and in case a narrow and pedantic or myopic view of interpretation is adopted by accepting succession to an agricultural land, bringing it within the scope of "rights in and over land", impliedly no meaning would be attached to entry No. 5 as each and every word of the list must be given effect to. If there is no local law on the subject, then the special law will prevail which in the instant case is the Succession Act. The scope, object and purpose of codifying Hindu Law is different. It is to achieve the Constitutional mandate. There is no provincial law dealing with the subject. As such, the Central Act must prevail.

57. We are in respectful agreement with the findings returned by the learned Single Judge in its judgment dated 14.10.2015 that the words 'property' as well as 'interest in Joint Family Property' are wide enough to cover agricultural land.

58. For all the aforesaid reasons we hold that the Provisions of the Hindu Succession Act would apply to Agricultural Lands.

Per Justice Dharam Chand Chaudhary, J

59. While, I wholly agree with the view of the matter taken by my esteemed brother Karol, the Acting Chief Justice, I prefer to support the same further by assigning additional reasons.

60. The Hindu Succession Act is a beneficial piece of social legislation enacted with sole object to provide a mechanism governing the law relating to succession among Hindus. The Act, being a codifying statute is a complete code and a comprehensive legislation in respect of the

matters dealt with thereunder. Regard must, therefore, be given to the clear language contained under the Act in the matter of interpretation of various provisions contained therein. Following observations of the Supreme Court in ***Velamuri Venkata Sivaprasad (dead) by LRs vs. Kothuri Venkateshwarlu (dead) by LRs, AIR 2000 SC 434,*** the relevant to the context, are reproduced herein below:

> "Undisputably, the Hindu Succession Act, 1956 in particular Section 14 has introduced far reaching changes having due regard to the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective. It is now a well-settled principle of law that legislations having socio-economic perspective ought to be interpreted with widest possible connotation as otherwise, the intent of the legislature would stand frustrated. Recognition of Rights and protection thereof thus ought to be given its full play for which the particular legislation has been introduced in the Statute Book. ..... The endeavour of the law court should thus be to give due weightage to the requirement of the Constitution in the matter of interpretation of statutes..... The legislation of 1956 therefore, ought to receive an interpretation which would be in consonance with the wishes and desires of framers of our Constitution. We ourselves have given this Constitution to us and as such it is a bounden duty and an obligation to honour the mandate of the Constitution in every sphere and interpretation which would go in consonance therewith ought to be had without any departure therefrom."

61. The provisions contained under Section 22 of the Act have, therefore, to be construed and understood in the light of the above legal principles settled by the Supreme Court. Nothing is there in Section 22 of the Hindu Succession Act, 1956 to prohibit its applicability to "agricultural land" and for that matter even to any other kinds of land including "Banjar Kadim" and "Gair Mumkin", (the subject matter of dispute in the present lis). As a matter of fact, words "immovable property" in Section 22 of the Act covers all kinds of land including "agricultural land". It is worth mentioning that in the report of Joint Committee of both Houses of Parliament on the Bill called as "The Hindu Succession Bill" (13 of 1954), presented to the Rajya Sabha to amend and codify the law relating to intestate succession among Hindus, clause 24 was incorporated with a view to make additional provision to the effect that as and when an heir wish to dispose of his share in the immovable property or business, the intestate left behind, the other heirs shall have not only the right of preemption but also to enjoy such right by buying off his/her share and also that of a married daughter and thereby to dislodge the fears especially being entertained by the business community that a son-in-law and his family members getting hold of daughter's share may disturb their business.

62. Clause 24 of the Bill was enacted with a view to extend preferential right in favour of a co-sharer to buy off the share of another co-sharer in an immovable property or in any business carried on by an intestate in case the latter intends to sell his/her share therein. The Bill adopted by the Select Committee after taking into consideration various suggestions made from time to time was given short title called as "The Hindu Succession Act, 1956". The Act has intended to amend and codify the law relating to succession among Hindus. Section 22 of the Act is *para materia* to Clause 24 of the Bill.

63. The intention behind to give preferential right to a heir(s) as envisaged under Section 22 of the Act, to acquire property of other heirs in certain cases, therefore, is with the sole object to prevent the fragmentation of the estate and introduction of strangers in the family business and estate. After the commencement of the Hindu Succession Act, 1956, if the interest in any immovable property or business carried by an intestate devolves upon two or more heirs specified in class I of the Schedule and if anyone of such heirs proposes to transfer his/ her interest in the property or the business, the other heirs shall have a preferential right to acquire such interest proposed to be transferred. The consideration for acquisition of that interest either may be mutually agreed upon between those two heirs and in the absence of any such

agreement, the matter has to be decided by the Court on an application to be filed under Section 22 of the Act. If the applicability of Section 22 of the Act is excluded in the case of "agricultural land", the very purpose of such benevolent provisions therein shall be frustrated.

64. As noticed by brother Justice Karol in para supra, there are two divergent views qua the applicability of Section 22 of the Act to "agricultural land". Section 22(1) of the Act refers to the immovable properties and business alone. In our considered opinion, the expression "immovable property" is quite wide to include agricultural land(s) and for that matter any other land including *"Banjar Kadim"* and *"Gair Mumkin",* the subject matter of dispute in the present lis.

65. True it is that normally transfer and alienation of agricultural land falls squarely within the ambit of item 18 of the State List (List II) of Schedule VII of the Constitution of India. The transfer of immovable property contemplated under Section 22 of the Hindu Succession Act, 1956, however, has to be taken an exception to the general rule of transfer of agricultural land as envisaged under item No. 18 State List (List II) of Schedule VII of the Constitution of India. Such a transfer, to my mind, is covered under item No. 5 of Concurrent List (List III) of Schedule VII of the Constitution of India, as in a case of "intestacy" and "succession", the Parliament can also enact laws. As rightly pointed out by my esteemed brother Karol, the Acting Chief Justice, in the absence of any State enactment to extend preferential right to a co-sharer to buy off the share of another co-sharer, in the immovable property or business left behind by an intestate, Section 22 of the Act is applicable to such a transfer.

66. As already noticed, the object behind it is very noble i.e. to prevent the fragmentation of holdings, the entry of a stranger to the immovable property and business left behind by an intestate and on the top of it to give some solace to the intestate at his heavenly abode that after his/her death the successors do not allow any third person or stranger to enter upon the estate/business, he/she left behind. It is a hard fact that agriculturists are emotionally attached with the holdings came in their hands from their forefathers. No one wants to part therewith by way of its transfer to a stranger. In a case of inheritance by more than one heir, sometime a scrupulous and cunning heir sells off his share in the joint property to a stranger either to torture the other heirs or take revenge from them or teach a lesson to them for variety of reasons, including jealousy or inimical relations with them. Therefore, Section 22 of the Act not only protects the rights of other heirs in the estate left behind by an intestate but also save them from mental torture, harassment and also put fetters on such scrupulous heir from transferring his share in the joint property he inherited to a third person/stranger.

67. Such being the position, we feel that the provisions contained under Section 22 of the Act should also be made applicable to the property inherited by way of testamentary succession and also by survivorship and in addition to the immovable property or business left behind by an intestate. Anyhow, we leave it open to the Union of India to consider the desirability of incorporating the provisions in this regard either in the Hindu Succession Act or in any other legislation holding the field.

68. Therefore, for all the reasons recorded hereinabove and there being nothing in the Hindu Succession Act, 1956 which defines words "immovable property" used in Section 22 thereof, it is held that the provisions of the Section ibid are applicable to all kinds of lands, including "agricultural land" in the matter of sale of his/her share therein by one of the heirs in favour of other heir(s), of course for consideration, viz. either mutually agreed upon or settled by a Court of law in an application filed for the purpose by such co-sharer willing to exercise his/her preferential right, to buy the same. The point referred to us by learned Single Judge is accordingly answered. The appeal be now placed before a Bench having roster of board to hear and decide the same in accordance with law.

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

Harish Kumar .....Appellant.
Versus
The State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 304 of 2014
Reserved on: 10.01.2018
Decided on: 06.03.2018

Code of Criminal Procedure, 1973- Section 389- Appeal against Conviction- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 42 and 50- Independent Witnesses- One of the independent witnesses fully supporting the prosecution case and his version supported by official witnesses- conviction sustained- Further Held- That Section 42 of the N.D.P.S. Act not attracted, if there was no prior information with the police- Section 50 of the N.D.P.S. Act also held to be not applicable, in case of a chance recovery- Conviction upheld- Appeal dismissed.

(Para- 17 to 23)

Cases referred:
Hem Raj and others vs. State of Haryana, AIR 2005 SC 2110
Vijaysinh Chandubha Jadeja vs. State of Gujarat, (2011) 1 SCC 609
Gyan Singh & others vs. State of U.P., 1995 Supp(4) SCC 658
State Represented by Inspector of Police vs. Saravanan & another, (2008) 17 SCC 587
State of Rajasthan vs. Om Prakash, (2007) 12 SCC 381

For the appellant: Mr. Suresh Kumar Thakur, Advocate.
For respondent: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG and Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 02.08.2014, passed by learned Special Judge (II), (Additional Sessions Judge-II), Shimla, District Shimla, H.P., in Sessions Trial No. 16-S/7 of 2014, whereby the accused was convicted for the commission of the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "ND&PS Act").

2. The background facts, as projected by the prosecution, can tersely be summarized as under:

On 25.10.2013, at about 07:30 p.m., police party was on routine patrol and traffic checking duty at Totu Chowk. The accused was coming from Power House Road towards Totu Chowk and on seeing police he started running. The accused was nabbed and he disclosed his name as Harish. His bag was checked by the police in presence of witnesses and during search inside the bag another black bag was found and the same contained a steel container. The said steel container was opened and some substance, which was black in colour and was in stick shapes, was recovered. The recovered substance on smelling and on the basis of experience was found to be *charas*. The recovered substance was weighed in the shop of one Shri Santosh Kumar on the electronic scale and was found to be 290 grams. The contraband alongwith container was also weighed and found to be 520 grams. Thereafter the police completed the sealing process and the contraband alongwith bags and container was taken into possession vide seizure memo. NCB forms were also filled in. The signatures of the accused and witnesses were

obtained on the seizure memo and sample seal. Seal impression, after its use, was handed over to Shri Kamal Verma. Police party sent *rukka* to Police Station Boileauganj, whereupon FIR was registered. All the incriminating articles were taken into possession vide seizure memo, seal impression was taken into separate piece of cloth and NCB form, in triplicate, was prepared. The case property was resealed with seal impression 'M' and facsimile seal was taken separately on a piece of cloth. The personal articles of the accused were also taken into possession vide separate seizure memo and sealed with seal impression 'J'. The case property was initially deposited in the *malkhana* and subsequently sent to chemical analysis. Police prepared the site plan of the place of occurrence. Special Report was sent to ASP Shimla, through HHC Gulat Ram, which was entered in diary register of Reader to ASP, Shimla. CIPA (common integrated police application certificate) was also prepared. Statements of the witnesses were recorded. Report from the Forensic Science Laboratory revealed that the sample contained presence of cannabinoids, including the presence of tetrahydrocannabinol in the presence of tetrahydracannabinol. The microscopic examination revealed the presence of characteristic cytolitihic haris in the sample. *Charas* is a resinous mass, the quantity of purified resin, as found in the sample as *charas* is 31.10% w/w. Thus the sample is extract of cannabis and sample of *charas.* After completion of all the formalities, final report was prepared and the *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. The accused did not lead any evidence in his defence.

4. The learned Trial Court, vide impugned judgment dated 02.08.2014, convicted the accused to undergo rigorous imprisonment for four years and to pay fine of Rs.20,000/- and in default of payment of fine he was further ordered to undergo simple imprisonment for one year under Section 20 of the ND&PS Act, hence the accused (convict) preferred the present appeal.

5. The learned Counsel for the appellant (accused) has argued that the learned Trial Court has not appreciated the evidence in its right perspective and the judgment passed by the learned Trial Court is based on surmises and conjectures. He has further argued that the learned Trial Court has ignored the fact that the police did not comply with the mandatory provisions ingrained in the ND&PS Act. The statements of the official as well as independent witnesses are not confidence inspiring and the same have not been correctly appreciated. Conversely, learned Additional Advocate General has argued that the learned Trial Court has appreciated the evidence correctly and the accused has been rightly convicted. He has argued that the judgment rendered by the learned Trial Court is the result of proper appreciation of evidence and law. Lastly, he has prayed that the appeal is without merits and the same may be dismissed.

6. In rebuttal, the learned counsel for the appellant has argued that the appellant be acquitted and the judgment of conviction rendered by the learned Trial Court be set aside.

7. In order to appreciate the rival contentions of the parties I have gone through the record carefully.

8. PW-1, HC Manoj, deposed that on 25.10.2013, at about 07:30 p.m. he alongwith other police personnel was patrolling at Totu Chowk. They saw the accused coming towards Totu Chowk and he was carrying a bag on his back. As per this witness, after seeing the police party, the accused started running and was nabbed. Police inquired about his whereabouts and name. At that time Shri Anil Kumar and Shri Kamal Verma (PW-2) were also present there. Police searched the bag of the accused in front of the shop of one Shri Santosh Kumar (PW-9) in the light kept outside the shop. The bag contained one more bag, which was inscribed with word 'Royal' and the same contained a steel box whereon sticker having words 'Super cup tea' was found pasted. This steel box contained a black stick shaped material, which on smelling was found to be *charas.* The recovered contraband was weighed on the electronic scale kept inside the shop of Shri Santosh Kumar (PW-9) and it was found to be 290 grams. The *charas* was again kept inside the steel box and the box was weighed, which was found to be 520 grams. All the

articles were sealed with seal impression 'S' and facsimile seal was taken on a separate piece of cloth and on NCB form. The case property was taken into possession vide seizure memo, Ex. PW-1/A, which was signed by him, Shri Kamal Verma (PW-2) and Shri Anil Kumar. As per this witness, personal search of the accused was conducted and a mobile, electronic/digital scale, one belt, two lockets with black strings and currency notes of Rs. 15330/-, denomination whereof was Rs. 1000/-, Rs. 500/-, Rs. 100/- Rs. 20/- and Rs. 10/-, were found. All the personal articles were also taken into possession vide recovery memo, Ex. PW-1/C, and the same was signed by him and Shri Kamal Verma (PW-2) and Shri Anil. The seal 'S' was handed over to Anil and seal 'J' was kept by the I.O. This witness, in his cross-examination, has deposed that an entry was carried out in the *rapat roznamcha* qua the time of their arrival or departure. He has deposed that they had arrived on the spot at 07:30 p.m. and the accused was spotted by SI Harish. As per this witness, there had been visibility of approximately 100-150 meters from the spot to all the sides. The owner of the shop was present in the shop and police remained there till 11:00 p.m. The accused was apprehended by chance and the search was conducted by SI Harish Kumar (PW-11). He has further deposed that they prepared the parcels on the spot by stitching with needle and thread. Parcels, P-1 and P-7 were available in the I.O. kit, which were stitched with swing machine. Some polythene packets were taken from the shop.

9. PW-2, Shri Kamal Verma (independent witness), has deposed that he is taxi owner and used to park his taxi at Totu Taxi Union. On 23.10.2013, around 07:30 p.m., he alongwith Anil was standing at Totu Chowk. As per this witness, police had nabbed the accused and he was carrying a bag on his back. The accused disclosed his name as Harish, resident of Chamba. The accused was taken to City Café and he, Anil Kumar accompanied them. The bag of the accused was checked, which contained one more bag and that bag had a steel box. The steel box was opened and *charas,* which was black in colour, was found. The *charas* was sealed and personal search of the accused was conducted. During the personal search one mobile, currency notes in between Rs. 10,000/- to Rs. 15,000/- and other articles were found. All the articles were sealed and taken into possession, vide separate seizure memos, Ex. PW-1/A and Ex. PW-1/C. He signed the memos alongwith seal impression, Ex. PW-1/B and Ex. PW-1/D. He has deposed that he is 10+2 and after going through the contents of the memos he signed the same. This witness, in his cross-examination, has deposed that no one called him to the spot and the accused was caught in front of them, as they were standing nearby. As per this witness, he also stood as witness in another case of NDPS at Ghoond. He has good relations with the police. He has deposed that on the day of occurrence he went to Tara Devi and returned around 8-8:15 pm. He stayed on the spot for 5-10 minutes. The *charas* was weighed in the shop of Shri Santosh Kumar (PW-9) and the memos were prepared there to some extent and he signed the memos after returning from Tara Devi. He has deposed that sealing of the packets were not conducted before him.

10. PW-3, HHC Gulat Ram, deposed that he carried the *rukka* to Police Station, Boileauganj. He also also given a sealed parcel having seven seal impressions of 'S' alongwith NCB form, in triplicate, and sample seal. He handed over all the articles to Shri Gopal Verma, SHO, Boileauganj. After registration of the case, case file was handed over to him and he gave the same to S.I. Harish. SI Harish, Incharge, P.P. Jutogh handed over special report, in a sealed envelop, to S.O./ASP, Shimla, in his residence, as it was Sunday. This witness, in his cross-examination, has deposed that *rukka* was prepared about 07:30 p.m, outside the Cafe, Totu Chowk, by SI Harish Kumar. PW-4, HC Varun Singh, deposed that on 28.10.2013, a sealed parcel, containing 290 grams *charas* in a steel box, which was sealed with seal impression 'S' seven times and resealed with seal impression 'N' five times, NCB form, in triplicate, alongwith sample seals 'S' and 'M' alongwith the docket was handed over to him, vide RC No. 123/13, for being deposited in FSL, Junga. He after deposit of the same handed over the receipt to MHC Nikka Ram. As per this witness, all the articles remained intact under his custody. This witness, in his cross-examination, has deposed that he did not remember the time by when the case property was given to him.

11. PW-5, MHC Nika Ram, deposed that on 25.10.2013, SHO Gopal Verma (PW-10)

deposited with him a sealed parcel, which stated to have contained a steel box having 290 grams *charas,* sealed with seven seals of impression 'S' and resealed with five seals of impression 'M' alongwith sample seal, NCB form (in triplicate) and a black bag. He entered the case property at Sr. No. 954/103/13, dated 25.03.2013, which is Ex. PW-5/A. He has further deposed that he had also entered the articles recovered from the personal search of the accused. On 28.10.2013, he handed over the sealed parcel, containing *charas,* alongwith NCB form (in triplicate) and seal impression 'S' and 'M', vide RC No. 123/13 to constable Varun Kumar and he handed over the receipt to him on 28.10.2013. As per this witness, the case property remained intact under his custody. This witness, in his cross-examination, has deposed that he did not remember the time when the case property was entrusted under his custody by SHO Gopal Verma (PW-10). PW-6, HC Bhupender, deposed that he was working as Reader to ASP, Shimla, and on 27.10.2013, at about 03:30 p.m., HHC Gulat Ram, brought a special report under Section 57 of the ND&PS Act to ASP, Shimla, at her residence, as it was holiday. ASP, Shimla, made an endorsement over the report and handed over to him the same for make apt entries. Copy of special report is Ex. PW-6/A and the sane was entered in diary register at Sr. No. 24489. True copy of special report is Ex. PW-6/B.

12. PW-7, Constable Praveen Dutt, deposed that on 25.10.2013 he carried out entry, Ex. PW-7/A, in *rapat roznamcha* register and entered *rapat* No. 9, roznamcha dated 25.10.2013, about the departure report. PW-8, SI Jasvir Singh, deposed that on 25.10.2013, he alongwith SI Harish, HC Manoj Kumar, HC Susheel and HHC Gaulat were on routine patrol duty at Totu Chowk. They, at about 07:30 p.m., spotted the accused carrying a gunny bag on his shoulder and the accused, on seeing the police, started running. The accused was nabbed and he disclosed his name as Harish Kumar resident of Chamba. This witness has further deposed that search of the accused was conducted under the tube light of the shop of Shri Santosh Kumar (PW-9) and the accused was having a black bag, which was kept inside the gunny bag, which was brown and purple in colour. As per this witness, a steel container was recovered from the bag and the same contained stick shaped black substance, which was found to be *charas* sticks. While carrying out the search of the accused Anil Kumar and Kamal Verma were also present on the spot. The *charas* was weighed, in presence of the witnesses, on the electronic scale of Shri Santosh Kumar (PW-9) and was found to be 290 grams. The *charas* was also weighed alongwith the container and was found to be 520 grams. He has further deposed that the *charas* alongwith the steel container was put in a packet and sealed with seal having impression 'S' and facsimile seal was taken on a separate piece of cloth. NCB form, in triplicate, was prepared and the bags were taken into possession. Seizure memo, Ex. PW-1/A, was prepared qua the recovery of all the articles and Shri Anil Kumar, Shri Kamal Verma and HC Manoj stood as marginal witnesses to the seizure memo and accused also put his signatures on the memo. The personal search of the accused was conducted and he was found in possession of Rs. 15,330/-, a belt, two lockets and a pocket electronic machine. All the articles recovered during the personal search of the accused were taken into possession vide seizure memo Ex. PW-1/C and the same were sealed with seal impression 'J'. Memo, Ex. PW-1/C, was signed by Shri Anil Kumar, Shri Kamal Verma and HC Manoj and the accused also signed the same. Facsimile seal was also taken on a separate piece of cloth and the seal was handed over to Shri Anil Kumar. This witness, in his cross-examination, has deposed that the police did not check any vehicle or people during the patrol duty. He has further deposed that 20-25 people gathered on the spot. The *rukka* was prepared while sitting in the shop of Shri Santosh Kumar (PW-9). As per this witness, firstly the bag of the accused was searched and subsequently his personal search was conducted. His statement was recorded on the spot.

13. Shri Santosh Kumar (PW-9) has deposed that he has City Sweet and Café at Totu Chowk and nothing has happened before him, as he was out of the shop at that time. This witness has resiled from his statement given to the police, so he was cross-examined by the learned Public Prosecutor. In his cross-examination he has deposed that he used to sit in the cafe and it is incorrect that the shop remains open till 11:00 p.m. As per this witness it is incorrect that on 25.10.2013 the police came to his shop and weighed the *charas* and steel

container.

14. Shri Gopal Singh Verma, SHO, Police Station Boileauganj (PW-10) has deposed that on 25.10.2013, HHC Gulat Ram came with *rukka,* whereupon FIR, Ex. PW-10/A, was registered and endorsement, qua the *rukka,* was written on the back side of the *rukka,* which is Ex. PW-10/B, which bears his signatures encircled in 'A'. Subsequently, HHC Gulat Ram produced before him a sealed parcel having seal impressions 'S', a steel container having 290 grams of *charas,* which was packed in a poly pack alongwith sample seal 'A' and NCB forms, in triplicate. He resealed the sealed parcel with seal having impression 'M' and the sample seal was taken on a separate piece of cloth. All the articles alongwith the sample seals 'S', 'M' and NCB form were deposited with MHC Nikka Ram. He prepared certificate, Ex. PW-10/C, which was signed by him and MHC. He also filled the columns pertaining to him, as SHO. He, after completion of the investigation, prepared the *challan*, which bears his signatures. This witness, in his cross-examination, has deposed that columns No. 9 and 11 of the NCB form are blank. He has further deposed that he did not associate any independent witness during the resealing process.

15. PW-11, SI Harish Kumar, is the Investigating Officer in the case in hand. He has deposed that on 25.10.2013 he alongwith AsI Jasvir Singh, HC Manoj, HC Susheel and HHC Gulat Ram was on routine patrol duty. At about 07:30 p.m., when they were at Totu Chowk, a person carrying a bag came from Power House side towards Totu Chowk and on seeing the police he started running. On suspicion that he might be having some stolen articles, he was apprehended. The accused disclosed his name as Harish from Chamba. As per this witness, Shri Anil Kumar and Shri Kamal Verma were associated as independent witnesses and bag, which was being carried by the accused, was searched in their presence. The bag, which was brown and purple in colour had one more bag, which was black in colour. Inside the bag there was a steel container, whereon there was sticker having words *'super cup tea'* written. The said container had stick shaped substance and on smelling it was found to be *charas*. He has further deposed that the recovered *charas* was weighed on electronic scale, which was kept inside the shop of Shri Santosh Kumar (PW-9) and was found to be 290 grams. The shop was adjoining to the main road. As per this witness, the *charas* was again put inside the steel container and weighed with it, which was found to be 520 grams. He has deposed that the steel container and *charas* were packed and sealed with seal having impression 'S' and the seal impression was taken on a separate piece of cloth. All the articles were taken into possession vide seizure memo, Ex. PW-1/A, in presence of Shri Anil, Shri Kamal and HC Manoj. As per this witness signatures of the accused and witnesses were also obtained on the seizure memo and the sample seal was handed over to witness Kamal Verma. NCB form was filled in and *rukka*, Ex. PW-11/A, was sent to Police Station, Boileauganj, alongwith the case property. He has further deposed that personal search of the accused was also carried out and cash of Rs. 15,330/- and pocket electronic scale alongwith personal articles were recovered. The articles recovered from the accused were taken into possession vide seizure memo, Ex. PW-1/C, in presence of Shri Anil, Shri Kamal and HC Manoj. The accused also signed the said seizure memo. He prepared the site plan, Ex. PW-11/B and recorded the statement of Shri Santosh Kumar, which is Ex. PW-11/C. The accused was arrested. As per this witness, report from Forensic Science Laboratory, Junga, Ex. PW-11/D, was received and after completion of investigation he handed over the case file to Inspector Gopal Verma for preparing the *challan.* This witness, in his cross-examination, has deposed that on the day when the accused was apprehended the police party came to Totu bazaar and then went to Nalagarh bypass road and subsequently they came on the spot. He has further deposed that Nalagarh bypass road is on the opposite direction from the spot. He saw the accused from the distance of 15-20 meters from Totu Chowk. He has further deposed that there was sufficient light available on the spot, as street light and lights from the shops was lit. He did not know the witnesses prior to the occurrence. The witnesses met him after an interval of two minutes when the accused was apprehended. The shop of Shri Santosh Kumar (PW-9) is on the road side. He admitted that he did not show the street light on the site plan. As per this witness, witness Kamal left the spot during the investigation and his signatures were obtained before he left the

spot.

16. After thoroughly discussing the entire prosecution evidence, it can be safely held that the whole edifice of the prosecution story rests upon the statements of HC Manoj (PW-1), Shri Kamal Verma (PW-2), SI Jasvir Singh (PW-8) and SI Harish Kumar (PW-11). Out of the above mentioned witnesses, Shri Kamal Verma (PW-2) is independent witness and all others are official witnesses. PW-2, Shri Kamal Verma, categorically deposed that on 23.10.2013, around 07:30 p.m., he was standing at Totu Chowk and the police nabbed a person, who was carrying a bag on his back and he disclosed his name as Harish (accused). He has further deposed that the accused was taken to City Cafe and he alongwith Anil accompanied the police team. This witness has fully supported the recovery part of the prosecution story. This witness, in his cross-examination, has deposed that he stood as witness in another case of NDPS at Ghoond, but if an independent witness also sited as a witness in any other case, it does not give any plausible reason for the defence to take benefit of this fact.

17. As it was a chance recovery, there was no occasion for the police to associated independent witnesses, however, in the case in hand the police associated Shri Anil Kumar and Shri Kamal Verma (PW-2), as independent witnesses. One of the independent prosecution witness (Shri Kamal Verma, PW-2) has fully supported the prosecution case and his statement is further fortified by official prosecution witnesses. Therefore, the statement of PW-2 has to be read in conjunction with the statements of HC Manoj (PW-1), SI Jasvir Singh (PW-8) and SI Harish Kumar (PW-11). This Court is delving whether the conviction passed by the learned Trial Court is as per the law and based on the confidence inspiring statements of official prosecution witnesses or not.

18. After carefully scrutinizing the statements of PW-1, HC Manoj, PW-2, Shri Kamal Verma, PW-8, SI Jasvir Singh and PW-11, SI Harish Kumar, it is found that their statements are confidence inspiring. The statements of all these witnesses are convincing and there was no occasion for the official prosecution witnesses to have involved the accused falsely. In fact, the statements of these witnesses have been corroborated by the recovery of contraband from the possession of the accused, which was effected as per the law. The statements of these witnesses go unshattered and thus believable.

19. In the case in hand, the contraband was recovered from the steel container, Ex P-4, which was kept inside a black bag, Ex. P-3, which was further kept inside another bag, Ex. P-2, carried by the accused on his shoulder and this fact stands fully proved by the prosecution. As far as the prior information is concerned, there was no prior information available with the police and there is no material available on record which points towards the fact that the any prior information, qua the accused having the *charas,* was available with the police, thus the provisions of Section 42 of the ND&PS Act are not attracted at all.

20. The learned counsel for the appellant has argued that there are contradictions in the statements of the official prosecution witnesses and the benefit of these contradictions go to the accused. So far as the small contradictions qua distance, time etc. are concerned, such type of contradictions are natural, especially when the witnesses have deposed after lapse of long time, thus these minor contradictions are not fatal to the prosecution case and the accused cannot derive any benefit out of these minor contradictions. The overall reading of the statements of the official prosecution witnesses inspires confidence.

21. The statements of PW-1, HC Manoj, PW-2, Kamal Verma, PW-8, SI Jasvir Singh and PW-11, SI Harish Kumar, unflinchingly establish that a police party comprising of PW-11, SI Harish Kumar, PW-8, SI Jasvir Singh, PW-3, HHC Gulat Ram, and HC Susheel was present on the spot. The accused tried to escape, but he was nabbed and was found in exclusive and conscious possession of 290 grams of *charas,* which was kept inside a steel container. The accused was also found in possession of currency notes of Rs. 15,330/- and a pocket digital electronic scale. The defence endeavored hard while cross-examining PW-1, PW-2, PW-3, PW-8 and PW-11, but nothing favorable could be extracted from them. PW-10, SHO Gopal Singh

Verma carried out resealing process and he has fully corroborated the prosecution story to this effect. PW-3, HHC Gulat Ram, carried *rukka* from the spot, PW-4, HC Varun Singh, deposited the sample in Forensic Science Laboratory. The case property remained safe under the custody of MHC Nikka Ram (PW-5). Compliance qua Section 57 of the ND&PS Act, by making a special report, was proved by PW-6, HC Bhupender. Thus, the sequence of events stands fully proved. FSL report, Ex. PW-11/D, clearly establish that the cloth parcel, bearing seven seals of impression 'S' and five seal of impression 'M' were found intact and the same tallied with the specimen of seal impression on NCB form and the seal sample, which was sent alongwith the sealed parcel. The report further shows that the parcel was kept in safe custody of Assistant Chemical Examiner, till the time the report qua the same was signed and dispatched. NCB form, Ex. PW-10/B, road certificate, Ex. PW-5/B, abstract of *malkhana* register, Ex. PW-5/A, special report, Ex. PW-6/A and abstract of diary register, Ex. PW-6/A, further strengthens the prosecution case. PW-1, HC Manoj, PW-2, Shri Kamal Verma, PW-8, SI Jasvir Singh and PW-11, SI Harish Kumar, supported the prosecution case qua the recovery of *charas* from Ex. P-2 (bag), which contained another bag, Ex. P-3, wherein a steel container, Ex. PW-4, containing the *charas* was found. All the above enumerated witnesses were subjected to lengthy cross-examination, but nothing favourable to the accused came out. All the above witnesses have nothing against the accused and by no stretch of imagination they could have roped in the accused falsely, as nothing has come on record that these witnesses had enmity with the accused.

22. The learned counsel for the accused has argued that there are contradictions in the statements of the official witnesses, thus the testimony of only independent prosecution witness, i.e., PW-2, Shri Kamal Verma, cannot be made basis for convicting the accused. He has placed reliance upon a judgment of Hon'ble Supreme Court rendered in ***Hem Raj and others vs. State of Haryana, AIR 2005 SC 2110,*** wherein vide paras 9 and 10 it has been held as under:

> ***"9. The fact that no independent witness though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case. Amongst the independent witnesses, Kapur Singh was one, who was very much in the know of things from the beginning. Kapur singh is alleged to have been in the company of PW-5 at a sweet stall and both of them after hearing the cries joined PW-4 at Channi Chowk. He was one of those who kept the deceased on a cot and took the deceased to hospital. He was there in the hospital by the time the first I.O. PW-9 went to the hospital. The evidence of the first I.O. reveals that the place of occurrence was pointed out to him by Kapur Singh. His statement was also recorded, though not immediately but later. The I.O. admitted that Kapur Singh was the eye-witness to the occurrence. In the FIR, he is referred to as the eye-witness along with PW-5 Kapur Singh was present in the Court on 6-10-1997. The Addl. Public Prosecutor 'gave up' the examination of this witness stating that it was unnecessary. The trial Court commented that he was won over by the accused and, therefore, he was not examined. There is no factual basis for this comment. The approach of the High Court is different. The High Court commented that his examination would only amount to 'proliferation' of direct evidence. But, we are unable to endorse this view of the High Court. To put a seal of approval on the prosecution's omission to examine a material witness who is unrelated to the deceased and who is supposed to know every detail of the incident on the ground of 'proliferation' of direct evidence is not a correct approach. The corroboration of the testimony of the related witnesses PWs-4 and 5 by a known independent eye-witness could have strengthened the prosecution case, especially when the incident took place in a public place.***
>
> ***10. Non-examination of independent witness by itself may not give rise***

to adverse inference against the prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission of examine the independent witness Kapur Singh, would assume significance. This Court pointed out in Takhaji Hiraji v. Thakore Kubersing Chamansing and others ((2001) 6 SCC 145):-

> ***".....if already overwhelming evidence is available and examination of other witnesses would only a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case, the Court ought to scrutinize the worth of the evidence adduced. The Court of facts must ask itself – whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the Court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there ware at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein."***

It has come in the statements of PW-2, Shri Kamal Verma (independent witness) and I.O. PW-11, SI Harish Kumar, that Shri Anil Kumar was also associated as independent witness and Shri Anil Kumar was given up by the prosecution, being won over by the accused. In fact non-examination of Shri Anil Kumar is not fatal to the prosecution case, especially when PW-2, Shri Kamal Verma, fully supports the prosecution case. Therefore, the judgment (supra) is not applicable to the facts of the present case.

23. Learned counsel for the accused has also placed reliance on another judgment of Hon'ble Supreme Court rendered in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat, (2011) 1 SCC 609,*** wherein it has been held as under:

> ***"24. Although the Constitution Bench in State of Punjab v. Baldev Singh, (1999) 6 SCC 172, did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with***

these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

However, in the case in hand the rigors of Section 50 of the ND&PS Act are not applicable, as it was a chance recovery and the contraband was recovered from the accused, who on seeing the police, tried to escape and was apprehended by the police and his bag was searched. Therefore, the judgment (supra) is not applicable to the facts of the present case and the accused cannot draw any help from it.

24. Lastly, the learned counsel for the accused relied upon another judgment of Hon'ble Supreme Court rendered in ***Gyan Singh & others vs. State of U.P., 1995 Supp(4) SCC 658,*** wherein it is held that conviction cannot be based upon uncorroborated testimonies of official witnesses. However, in the case in hand the testimonies of official police witnesses are fully corroborated with each other, thus it cannot be said that the statements of official police witnesses are uncorroborated.

25. The learned Additional Advocate General has also placed reliance on ***State Represented by Inspector of Police vs. Saravanan & another, (2008) 17 SCC 587,*** wherein vide para 18 of the judgment it has been held as under:

"18. The High Court also held that as there were some discrepancies and improvements in the statement of the witnesses, their evidence should not be relied upon. In State of U. P. v. M.K. Anthony, [(1985) 1 SCC 505] this Court has laid down the approach which should be followed by the Court in such cases:

> ***"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. 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 given by the witness 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, hyper- technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives***

evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross- examination is an unequal duel between a rustic and refined lawyer."

Even otherwise, it has been said time and again by this Court that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies."

Indisputably, no person with precision can depose trivial details. An honest and truthfull witness may miss some trivial details, as the power of observation, retention and reproduction is variable individual to individual. In the case in hand only trivial contradictions are there and those contradictions have no force to overturn the conviction of the accused, therefore, the judgment (supra) is fully applicable to the facts of the present case.

26. The learned Additional Advocate General has also relied upon judgment rendered by the Hon'ble Supreme Court in ***State of Rajasthan vs. Om Prakash, (2007) 12 SCC 381,*** wherein vide para 12 it has been held as under:

"12. At this juncture it is to be noted that though learned counsel for the respondent tried to highlight certain improvements in the version of the witness it is not of consequence. Irrelevant details which do not in any way corrode the credibility of a witness cannot be leveled as omissions or contradictions……..

The judgment (supra) is fully applicable to the present case. In the case in hand minor contradictions, as have occurred, do not corrode the prosecution case and the benefit of the same cannot in any way be given to the accused.

27. A combined reading of facts and law only lead to a safest conclusion that the learned Trial Court has rightly appreciated the evidence and applied the law correctly. This Court finds that it will not be correct to reverse the findings of the learned Trial Court, as the same are based on sound reasons and are backed up by reliable evidence.

28. Now, coming to the sentence part, imposed by the learned Trial Court, upon the accused. The learned counsel for the accused has argued that the sentence imposed upon the accused is too harsh. In contrast, the learned Additional Advocate General has argued that four years rigorous imprisonment has only been imposed upon the accused and it could have been ten years. This Court, taking into consideration the quantity of the *charas* recovered, finds that the sentence of four years is not excessive, however, the learned Trial Court has imposed fine of Rs. 20,000/- (rupees twenty thousand) and in default of payment of fine ordered the accused to undergo one year's simple imprisonment. This Court finds that simple imprisonment of one year

in default of payment of fine of Rs. 20,000/- is too harsh and same is modified. Now, in default of payment of fine of Rs. 20,000/- the accused shall under simple imprisonment for six months.

29. The appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

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

Cr. Appeal No. 271 of 2016 a/w
Cr.Appeal No. 320 of 2016
Date of Decision: March 6, 2018

1. Cr.Appeal No. 271 of 2016
Saleem Mohamad ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.
2. Cr.Appeal No.320 of 2016
Kishori Lal ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Code of Criminal Procedure, 1973- Section 374- Appeal Against Conviction- Sections 20 and 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985- Held- that the contraband recovered from the bag concealed under the front seat of the car over which accused was sitting- Same cannot be construed as a recovery from the person of an accused and as such provisions of the Section 50 of the N.D.P.S. Act were not applicable- Further Held- that simply because accused were also searched after the recovery of the contraband, the fact would not vitiate the trial, for no prejudice stands shown by the accused in the search of their in person, in violation of the provisions of Section 50 of the NDPS Act- Section 50 of the Act not attracted- Consequently, appeal dismissed. (Para-8 to 12)

Cases referred:
Dalip and another vs. State of Madhya Pradesh, (2007) 1 SCC 450
Union of India vs. Shah Alam, (2009) 16 SCC 644
State of Rajasthan vs. Parmanand and another, (2014) 5 SCC 345
State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350
State of Rajasthan vs. Ratan Lal, (2009) 11 SCC 464

For the Appellants: Mr. H.S.Rana, Advocate, for the appellant in Cr.Appeal No.271 of 2016.
Mr.Sandeep Dutta, Advocate, for the appellant in Cr.Appeal No.320 of 2016.
For the Respondent: Mr. Ashok Sharma, Advocate General, with Mr.J.K.Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

In these appeals filed under Section 374 Cr.P.C., convicts Saleem Mohamad and Kishori Lal have assailed judgment dated 02.05.2016 / 05.05.2016, passed by Special Judge-(II), Shimla, H.P., in Sessions Trial No.16-S/7 of 2015, titled as *State of Himachal Pradesh Versus*

Saleem Mohamad & another, whereby they stand convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to serve rigorous imprisonment for a period of ten years each and pay fine of Rs.1,00,000/- each and in default thereof, further to undergo simple imprisonment for a period of one year

2. In short, it is the case of prosecution that on 08.02.2015, police party headed by ASI Raj Kumar (PW.13), recovered 1 kg 100 grams of charas from the conscious possession of accused Saleem Mohamad and Kishori Lal. The charas was recovered from a vehicle bearing registration No.CH-03D-7692, driven by accused Saleem Mohamad and the bag was kept under the front seat of the car over which accused Kishori Lal was sitting. The recovery was effected in the presence of independent witness Kuldeep Sharma (PW.1) and police officials H.C.Pyare Lal (PW.2) and HHC Babu Lal (PW.3). FIR No.8 of 2015, dated 08.02.2015 (Ex.PW.10/A) was registered by HC Kartar Singh (PW.10), for commission of offence punishable under the provisions of Section 20 of the NDPS Act at Police Station, Jubbal, District Shimla, H.P. With the completion of proceedings on the spot, including the accused being searched and the NCB form (Ex.PW.13/A) filled up, contraband substance was deposited in the malkhana by Kartar Singh (PW.10). Vinod Kumar (PW.5) carried the recovered stuff for chemical analysis and the report of the Chemical Analyst (Ex.PW.13/H) alongwith the contraband substance was brought by Jawahar Lal (PW.12). Special report (Ex.PW.11/A) so handed over by L.C. Anjana (PW.7) was received by Nanak Chand (PW.11) in the office of SDPO, Rohru. With the completion of proceedings, which *prima facie* revealed complicity of the accused in the alleged crime, SI Liaq Ram (PW.9) presented the challan in the Court for trial.

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

4. In order to establish its case, in all, prosecution examined as many as thirteen witnesses and statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which they took the plea of false implication. No evidence was led in defence.

5. Appreciating the evidence on record, Trial Court found the prosecution to have proven its case, beyond reasonable doubt, and as such, by convicting the accused sentenced them to serve imprisonment and pay fine.

6. Correctness of the findings returned by the Court below are subject matter in the present appeals, so filed by both the convicts.

7. We have heard M/s H.S.Rana and Sandeep Dutta, learned counsel, on behalf of the convicts-appellants as also Mr.Ashok Sharma, learned Advocate General, on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt against the convict.

8. Learned counsel appearing for the convicts have raised following submissions: (a) Prosecution story, being shrouded with suspicion is untrustworthy; (b) Contradictions in the testimonies of the witnesses have rendered the prosecution case to be doubtful; (c) Provisions of Section 50 of the NDPS Act stand impeached, entitling automatic acquittal of the accused (d) Similarly non compliance of provisions of Section 52(3) of the NDPS Act have rendered the

prosecution case to be fatal; (e) Also there is non compliance of Section 57 of the NDPS Act, thus entitling the accused for acquittal.

9. In the instant case, it is not disputed before us that contraband substance stands recovered not from the "person" of the accused, but from the bag concealed under the front seat of the car, over which accused Kishori Lal was sitting when accused Saleem Mohamad was on the wheels. ASI Raj Kumar (PW.13) does state that after recovery of the bag containing the contraband substance, which appeared to be charas, accused were also searched.

10. Allegedly proceedings of recovery and search of the person of the accused took place in the presence of witnesses be it police officials or independent witness Kuldeep Sharma (PW.1). Having minutely perused the testimonies of Kuldeep Sharma (PW.1), Pyare Lal (PW.2) and Babu Lal (PW.3), we find these witnesses to have corroborated the version of ASI Raj Kumar (PW.13), who states that only after the contraband substance was recovered, did he search the accused persons.

11. This Court in Cr.Appeal No.305 of 2014, titled as *Sohan Lal vs. State of Himachal Pradesh,* decided on 02.11.2016, with similar facts had an occasion to deal with the decisions rendered by the Apex Court in *Dalip and another vs. State of Madhya Pradesh,* (2007) 1 SCC 450; *Union of India vs. Shah Alam,* (2009) 16 SCC 644 and *State of Rajasthan vs. Parmanand and another,* (2014) 5 SCC 345, the judgments cited on behalf of the appellants.

12. After minute scrutiny, this Court found itself to be bound by the decisions rendered by the larger/earlier Benches of Apex Court in *State of H.P. vs. Pawan Kumar,* (2005) 4 SCC 350; *State of Rajasthan vs. Ratan Lal,* (2009) 11 SCC 464 and not *Shah Alam* (supra)*; Parmanand* (supra); and *Dalip* (supra). Hence, in our considered view, contention that search is illegal or there has been violation of mandatory provisions of Section 50 of the NDPS Act is untenable in law. Thus trial cannot be said to be vitiated. Simply because the accused were also searched after recovery of the contraband substance, that fact itself would not vitiate the trial, for no prejudice stands shown by the accused in the search of their person, in violation of the provisions of Section 50 of the NDPS Act.

13. From the testimony of ASI Raj Kumar (PW.13), we notice that regularly posted SHO was not on duty on the day of occurrence of the incident and in fact, in his place, it was the said witness, who was officiating as the SHO. Hence, there was no question of entrusting the property to the SHO or the same to be resealed specially when entire proceedings of depositing the case property in the malkhana had already taken place prior to the regular SHO returning to join his duty. Hence, we do not find any infraction of the said provisions of the NDPS Act.

14. In our considered view, also there is no infraction of provisions of Section 57 of the NDPS Act. From the conjoint reading of the testimonies of L.C.Anjana (PW.7) and Nanak Chand (PW.11), it is apparent that special report (Ex.PW.11/A) was immediately sent to the appropriate authorities. Much emphasis is laid on the fact that SI Liaq Ram (PW.9) does not state that special report was sent by him, but then how does it make any difference, for ASI Raj Kumar (PW.13) has testified to such effect. Yes, said witness does admit that there is overwriting and correction in the record with regard to the special report, but then, this in our considered view, does not render the prosecution case to be fatal. The doubt is not such so as to shake the genesis of the prosecution story to be true. In view of the clear testimony of PW.7 that she took the report and handed it over to Dy.S.P., Rohru on 10.02.2015.

15. From the conjoint reading of testimonies of Kuldeep Sharma (PW.1), Pyare Lal (PW.2), Babu Lal (PW.3) and ASI Raj Kumar (PW.13), it cannot be said that prosecution story is either shrouded with suspicion or that contradictions in the testimonies of the witnesses, in any manner, have rendered the creditworthiness of the witnesses to be doubtful.

16. ASI Raj Kumar (PW.13) categorically states that on 08.02.2015, he alongwith police officials Pyare Lal (PW.2) and Babu Lal (PW.3) was travelling towards Kharapathar on

routine patrolling duty. At about 12.15 pm, when they reached at a place known as Salwakara, they stopped a vehicle near the grocery shop of Kuldeep Sharma. At that time they noticed accused travelling in a vehicle bearing registration No.CH-03D-7692. Since the vehicle was from outside the State, on suspicion, the driver was asked to produce the documents. At that time, both the driver and the occupant appeared to be frightened. In the meanwhile, both independent witness Kuldeep Sharma (PW.1) and Hominder Sharma appeared on the spot. Both the papers and the vehicle were checked in their presence.

17. From the bag concealed under the front seat of the vehicle on which accused Kishori Lal was sitting, contraband substance was recovered. The recovered stuff was weighed with the scales brought from the shop of Kuldeep Sharma and found to be 1 kg. 100 grams. The recovered stuff was packed and sealed with five seals of seal having impression 'H' in the presence of the witnesses. The sample seal was handed over to Kuldeep Sharma after samples of the seal were taken on separate pieces of cloth (Ex.PW.1/A). NCB form (Ex.PW.13/A) was filled up in triplicate. Rukka (Ex.PW.3/A) was prepared and sent to the Police Station through Babu Lal (PW.3). Proceedings of recovery were photographed (Ex.PW.4/A1 to Ex.PW.4/A6). Thereafter, both the accused were searched and Fard jamatalashi (Ex.PW.1/C & Ex.PW.1/D) prepared. Accused were arrested and with the completion of proceedings on the spot, contraband substance was deposited with MHC Kartar Singh (PW.10). Special report (Ex.PW.11/A) was sent to SDPO Rohru through L.C. Anjana (PW.7). The witness has explained that driver of the vehicle in which police party was travelling has since expired. He has testified about the recovered stuff (Ex.P-5), carry bag (Ex.P-3), plastic bag (Ex.P-4). FSL report (Ex.PW.13/H) also stands exhibited by him.

18. Witness was cross-examined at length by both the accused, who were represented by the same learned counsel. We notice that presence of the accused on the spot, travelling in the vehicle in question, remains undisputed. Much emphasis is laid on false preparation of the documents, indicating false implication of the accused and the alleged recovery not having taken place in the presence of the independent witnesses.

19. Significantly, it has not come on record that anyone of the police officials were harbouring animosity against the accused, but then we may not be misunderstood to mean that accused has to prove his innocence, for it is a settled principle of law that prosecution has to stand on its own legs and in a case of such like nature, onus to prove is stricter and heavily, which undisputedly lies upon the prosecution. Statutory presumption would arise only with the prosecution establishing occurrence of crime.

20. When we peruse the cross-examination part of the testimonies of the witnesses, we notice that the credit of the witnesses remains un-impeached. Version of the witnesses with regard to: (a) presence of the police officials on the spot; (b) presence of the accused on the spot; (c) presence of the independent witnesses on the spot; and (d) recovery of the contraband substance from the conscious possession of the accused, stands duly corroborated by independent witness Kuldeep Sharma (PW.1), Pyare Lal (PW.2) and Babu Lal (PW.3) police officials, who in one voice have independently testified with regard to the events which took place on the spot, which we have discussed supra.

21. Contradictions as pointed out, in our considered view are absolutely minor. They are not material rendering the genesis of the prosecution case to be doubtful, much less false. Whether shop of Kuldeep Sharma (PW.1) was at a distance of 100 meters as pointed out by Babu Lal (PW.3) or 200-300 meters as pointed out by Pyare Lal (PW.2) or 60-70 meters as pointed out by Kuldeep Sharma pales into insignificance, for what stands conclusively established is the factum of Kuldeep Sharma having his shop in close proximity to the place of occurrence of the incident.

22. It is also argued that there are contradictions rendering the presence of another independent witness Hominder Sharma to be present on the spot. Whether he came of his own or he was called by the police officials, in our considered view, is not a contradiction material

enough, rendering the genesis of the prosecution case to be doubtful, for after all there is time gap between the date of occurrence of the incident and the recording of their statements in Court.

23. We also notice that the Trial Court has sufficiently dealt with the contradictions in paragraphs 32 and 33 of the judgment.

24. From the testimonies of spot witnesses, official witnesses as also independent witnesses, to our mind, it stands conclusively established that the prosecution has been able to establish its case, beyond reasonable doubt, that the contraband substance was in effect was recovered from the conscious possession of the accused. It is in this backdrop, statutory presumption would lie against the accused.

25. We also otherwise find the prosecution case to have been corroborated by other independent witnesses. Contraband substance came to be deposited with MHC Kartar Singh (PW.10), who has testified that till and so long the property remained with him, the same was not tampered with. It was sealed and the seals were kept intact. He handed over the same to C.Vinod Kumar (PW.5) for being deposited with the Forensic Science Laboratory, Junga. Such version also stands fortified by the latter**.**

26. Not only that, report of the expert of the Forensic Science Laboratory (Ex.PW.13/H) establishes that the case property was received in a proper and sealed manner and that the contraband substance analyzed was found to be charas. The case property was brought back from the Laboratory alongwith the certificate by C.Jawahar Lal (PW.12), who has also testified about the same.

27. We may also observe that accused do not dispute the factum of the vehicle with the registration of another State taken into possession by the police. Now these persons have not explained their presence on the spot.

28. The ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

29. From the material placed on record, it stands clearly established by the prosecution witnesses, beyond reasonable doubt, that the convicts are guilty of having committed the offences charged for. There is sufficient, clear, convincing, cogent and reliable piece of evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the convicts stands proved beyond reasonable doubt to the hilt. It cannot be said that convicts are innocent or not guilty or that they have been falsely implicated or that their defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

30. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that convicts were found in conscious and exclusive possession of 1 kg 100 grams of charas.

31. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeals are dismissed.

Records of the Court below be immediately sent back.

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

Irshad ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

CrMMO No. 56 of 2018
Decided on: March 7, 2018

Code of Criminal Procedure, 1973- Section 311- Re-summoning and re-examination of witnesses- Held- To recall and re-examine witnesses and that too for the limited extent of identifying the case property cannot be termed to be an exercise for filling up a lacuna- It would in any case though depend upon the circumstances of each case- It has been further reiterated that a witness can be recalled and re-examined, if it is necessary for the proper adjudication of the case. (Para-10 and 11)

Code of Criminal Procedure, 1973- Section 311- Re-summoning and re-examination of witnesses- Further Held- That the plausible explanation in the application moved under Section 311 Cr.P.C that the contraband was required to be identified by the prosecution witnesses and the re-examination was confined to that limited purpose, held to be justified- Further Held- that a lacuna in prosecution is not be equated with the fallout of an oversight committed by the prosecutor or Investigating Agency. (Para-12 and 13)

Cases referred:

Sardar Singh vs. State of Himachal Pradesh, I L R 2017 (IV) HP
Rajendra Prasad vs Narcotic Cell, (1999) 6 SCC 110

For the petitioner: Mr. Nimish Gupta, Advocate.
For the respondent: Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 17.1.2018 passed by learned Special Judge, Chamba, District Chamba, Himachal Pradesh, in Cr.MA No. 97/18 in Sessions Trial No. 8/17, whereby application having been filed by the respondent-State under Section 311 CrPC for re-summoning and re-examination of PW-1 Sanjay Kumar and PW-2 Hoshiar Singh came to be allowed, petitioner-accused (hereinafter referred to as 'petitioner') has approached this Court by way of instant petition praying therein for quashing of impugned order referred to herein above.

2. For having a bird's eye view of the matter, necessary facts as emerge from the record are that an application bearing Cr.MA No. 97/18 came to be filed under Section 311 CrPC on behalf of the State seeking therein permission of the court to re-summon and re-examine PW-1 and PW-2, names whereof have been referred herein above. Averments contained in the application i.e. annexure P-1 reveal that at the time of investigation, Investigating Officer had initiated process for pre-trial disposal of case property in terms of provisions contained under Section 52A of the Narcotic Drugs & Psychotropic Substances Act (hereinafter, 'Act'), but before said process could be completed, charge sheet came to be filed against the accused within stipulated period. Since process initiated for pre-trial disposal of case property was pending, necessary disposal certificate could not be issued by competent authority and case property was also not destroyed.

3. On 27.5.2017, PW-1 Sanjay Kumar and PW-2 Hoshiar Singh were examined but on account of pending process of pre-trial disposal and also on account of bona fide belief that proceedings under Section 52A of the Act had been completed and further on account of non-availability of case property on that day, same could not be put to witnesses named above for identification. Factum with regard to aforesaid omission on the part of the prosecution came to the fore at the time of recording of examination of PW-6, whereafter, application for re-examination of PW-1 and PW-2 for limited purpose of identification of case property came to be instituted on behalf of the State.

4. Petitioner, while opposing aforesaid application disputed the averments contained in the same and stated before the Court that application has been moved solely with a view to fill up lacuna/omission on the part of prosecution in getting the case property identified from PW-1 and PW-2, who happened to be members of patrolling party, which had allegedly seized contraband from the conscious possession of the petitioner.

5. Learned trial Court taking note of aforesaid pleadings proceeded to allow the application filed under Section 311 CrPC vide order dated 17.1.2018 and allowed the re-examination of witnesses namely PW-1 Constable Sanjay Kumar and PW-2 Constable Hoshiar Singh. In the aforesaid background, petitioner has approached this Court, laying therein challenge to order dated 17.1.2018.

6. Mr. Nimish Gupta, learned counsel representing the petitioner, while inviting attention of this Court to the provisions contained in Section 311 CrPC, made a serious attempt to persuade this Court to agree with his contention that impugned order passed by learned Court below is not sustainable as the same is not in conformity with the provisions of law. While fairly conceding that in terms of Section 311 CrPC, court enjoys vast power to summon, re-examine or recall a witness at any stage of proceedings, learned counsel representing the petitioner contended that such power can not be exercised by a court to permit applicant to fill up lacuna in the prosecution case. Mr. Gupta further contended that the explanation rendered in the application for re-examination of PW-1 and PW-2 is not plausible because factum with regard to existence of case property was very much in the knowledge of prosecution and as such failure on its part to get the case property identified from PW-1 and PW-2 during their examination has definitely weakened the case of prosecution to the benefit of petitioner and as such, aforesaid omission which is/was not bona fide could not be allowed to be corrected/rectified by the learned Court below by ordering re-examination of aforesaid prosecution witnesses.

7. Mr. Vikrant Chandel, learned Deputy Advocate General, while refuting aforesaid contentions put forth by the learned counsel representing the petitioner, contended that provisions contained in Section 311 CrPC empower a Court to summon/recall a witness at any stage of proceedings, provided same is necessary for the proper adjudication of the case. While terming impugned order to be legal and in accordance with law, learned Deputy Advocate General contended that re-examination of PW-1 and PW-2, in whose presence, contraband was allegedly recovered from the conscious possession of the petitioner would facilitate proper adjudication of the case and no prejudice would be caused to the petitioner/accused, who will definitely be provided proper/adequate opportunity of cross-examination. Lastly, Mr. Vikrant Chandel, learned Deputy Advocate General contended that while exercising powers under Section 311 CrPC, paramount consideration of court is to do justice to the case and court can examine a witness at any stage, even if same results in filling up lacuna or loopholes. In that situation, it is a subsidiary factor. In this regard, he placed reliance upon judgment rendered by this Court in CrMMO No. 209 of 2017, **Sardar Singh** vs. **State of Himachal Pradesh** decided on 1.8.2017.

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

9. Before adverting to the factual matrix of the case as well as arguments advanced by the learned counsel representing the parties, this Court deems it proper to refer to the judgment passed by this Court in CrMMO No. 209 of 2017, wherein scope and power of the Court while exercising power under Section 311 CrPC has been elaborately dealt with. Relevant paragraphs of the aforesaid judgment are reproduced herein below:

> "10. Before ascertaining the merits of the submissions having been made by learned counsel representing the respective parties vis-à-vis impugned order passed by the learned trial Court, it would be profitable to take note of Section 311 Cr.P.C., which reads as under:-
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> > "311. Power to summon material witness, or examine person present:-. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case"
>
> Bare perusal of aforesaid provision suggests that the Court may, at any time, summon any person as a witness, or recall and re-examine any witness provided that same is essentially required for just decision of the case, and judgments passed by Hon'ble Apex Court in Mannan SK and others vs. State of West Bengal and another AIR 2014 SC 2950, wherein the Hon'ble Court has held as under:-
>
> > "10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or reexamination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."
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> 11. Hon'ble Apex Court in Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461, has held that powers under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage provided the same is required for just decision of the case. It may be profitable to take note of the following paras of the judgment:-

"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Cr.P.C. where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Cr.P.C.

15.1 In the decision reported in Jamatraj Kewalji Govani vs. State of Maharashtra - AIR 1968 SC 178, this Court held as under in paragraph 14:-

> "14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction." (Emphasis added)

15.2 In the decision reported in Mohanlal Shamji Soni vs. Union of India and another - 1991 Suppl.(1) SCC 271, this Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under in paragraph 10:-

> "10....In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re- examine any person in attendance though not summoned as a witness or recall and reexamine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

15.3 In the decision in Raj Deo Sharma (II) vs. State of Bihar - 1999 (7) SCC 604, the proposition has been reiterated as under in paragraph 9:-

> "9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person." (Emphasis added)

15.4 In U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan - 2006 (7) SCC 529, the decision has been further elucidated as under in paragraph 15:-

> "15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice." (Emphasis supplied)

15.5 In Iddar & Ors. vs. Aabida & Anr. - AIR 2007 SC 3029, the object underlying under Section 311 Cr.P.C., has been stated as under in paragraph 9:-

> "9...27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports

the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind." (Emphasis added)

15.6 In P. Sanjeeva Rao vs. State of A.P.- AIR 2012 SC 2242, the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 20 and 23, which are as under:-

"20. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:

> "6. ...In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself." (Emphasis in original)

15.7 In a recent decision of this Court in Sheikh Jumman vs. State of Maharashtra - (2012) 9 SCALE 18, the above referred to decisions were followed.

16. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State) – Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 15 and 16:

> "15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such

power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.

The power conferred under Section 311 Cr.P.C. must, therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)"

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and reexamine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

12. Hon'ble Apex Court in **Zahira Habibullah Sheikh** (5) **and another** vs. **State of Gujarat and others** (2006)3 SCC 374 has held as under:-

“27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

28. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross- examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross- examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jamat Raj Kewalji Govani v. State of Maharashtra, (AIR 1968 SC 178).

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a

> criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.
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> 13. In the judgments referred above, the Hon'ble Apex Court has specifically observed that the words "essential to the just decision of the case" are key words and in this regard, the court must form an opinion that for the just decision of the case, whether it is necessary to recall or examine the witness or not."

10. It is quite apparent from the aforesaid exposition of law rendered by this Court, which is squarely based upon the judgment passed by Hon'ble Apex Court, that court enjoys vast power of summoning or recalling any witness at any stage of proceedings, if his/her evidence appears to be essential for just decision of the case. No doubt, it has been cautioned by Hon'ble Apex Court repeatedly that the Courts below should be more careful and cautious while exercising power under Section 311 CrPC but it can always summon, recall or reexamine any witness at any stage, provided his/her statement is necessary for proper adjudication of the case. It is well settled that wider the power, greater the responsibility upon the Court which exercises such power and exercise of such power can not be untrammeled and arbitrary rather, same must be guided by the object of arriving at a just decision of case.

11. In the case at hand, stand has been taken by the learned counsel representing the petitioner that re-examination of PW-1 and PW-2 would amount to filling up of lacuna, but this Court, after having carefully perused averments contained in the application, which have not been seriously disputed by the accused, is not inclined to agree with the aforesaid contention of the learned counsel representing the petitioner. Hon'ble Apex Court in the judgment relied upon by this Court in the judgment of this court (supra), has categorically held that whether recall of a witness is for filling up a lacuna or for its just decision, depends upon the given circumstances of each case. Undisputedly, in the case at hand, factum with regard to existence of case property came to the notice of the prosecution during examination of PW-6 ASI Surinder Kumar, immediately whereafter, application under Section 311 CrPC came to be moved at the behest of prosecution. Prosecution sought re-examination of PW-1 Constable Sanjay Kumar and PW-2 Constable Hoshiar Singh for the limited purpose of getting the case property identified since both the above named witnesses were members of patrolling party, in whose presence, alleged contraband was recovered from the exclusive and conscious possession of the petitioner.

12. There appears to be plausible explanation rendered in the application by the prosecution qua the failure on its part to get the contraband identified at the time of examination of aforesaid witnesses. Explanation rendered on record by the prosecution, as has been taken note above, has been further corroborated with the version put forth by PW-10 ASI Ajit Singh. True it is that the case property was not shown to PW-1 and PW-2 during their examination before the Court, but taking note of the fact that the case property allegedly was recovered from the conscious possession of the petitioner in the presence of aforesaid witnesses, prayer for re-examination of these witnesses that too for limited purpose of identifying the case property, appears to be justified.

13. Hon'ble Apex Court in **Rajendra Prasad** vs **Narcotic Cell**, (1999) 6 SCC 110, which has also been taken note by learned Court below, has categorically held that a lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. Corollary of such lapses or mistakes during conducting the case can not be understood to be lacuna, which a court can not fill up. In the judgment referred herein above, it has been further held by Hon'ble Apex Court that lacuna in prosecution

must be understood as 'inherent weakness' or 'latent wedge' in the matrix of the prosecution. It has been further categorically held that if proper evidence was not adduced or relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

14. In the case at hand, as has been rightly taken note of by learned Court below, names of witnesses were already known to both the parties and they were fully aware of the fact that evidence could not led to prove that case property was recovered from exclusive and conscious possession of petitioner in their presence as such, prayer made by prosecution for re-examination of PW-1 and PW-2 can not be said to be unreasonable.

15. Leaving everything aside, bare perusal of Section 311 CrPC suggests that Section 311 CrPC has two parts; first part reserves a right to the parties to move an appropriate application for recalling and re-examination of the witnesses at any stage but, definitely the second part is mandatory that casts a duty upon the Court to summon, re-examine or recall a witness at any stage, if his/her evidence appears to be essential for just decision of the case, because underlying object of Section 311 CrPC is to ensure that there is no failure of justice on account of mistake of either of the parties in bringing valuable piece of evidence on record or leaving ambiguity in the statements of witnesses examined from either of the sides.

16. Another argument advanced by the learned counsel representing the petitioner with regard to delay in moving the application also deserves outright rejection because application at hand came to be filed immediately after factum with regard to non-disposal of case property came to the notice of prosecution during examination of ASI Surinder Kumar, PW-6. Otherwise also, aforesaid argument can not be accepted in the teeth of wide powers conferred upon the courts under Section 311 CrPC, to summon a witness at any stage of inquiry, trial or other proceedings under CrPC. Moreover, in the case at hand, evidence of prosecution is not yet closed as emerges from the impugned order, rather, remaining witnesses have been ordered to be examined by the learned Court below alongwith PW-1 and PW-2, on the date fixed by it.

17. In the aforesaid background, this Court finds no reason to interfere with the well reasoned order recorded by the learned Court below, which otherwise appears to be in conformity with the provisions contained under Section 311 CrPC as well as law laid down by the Hon'ble Apex Court followed by this Hon'ble Court from time to time, and as such, same deserves to be upheld.

18. Consequently, in view of the detailed discussion above, present petition is dismissed. Impugned order passed by learned Court below is upheld. Pending applications, if any, are disposed of.

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

Smt. Santosh Kumari .....Petitioner.

Vs.

State of H.P. and others .....Respondents.

CWP(T) No.: 4903 of 2008
Date of Decision: 08.03.2018

Constitution of India, 1950- Article 226- Service Matter- Appointment- Appointment denied to the petitioner despite having secured highest marks on the ground that she was disqualified to be appointed as an Anganwadi worker, since, her husband was in Government service- **Held-** that if such a disqualification is not provided under the guidelines, a mere policy decision taken by the Government in this behalf, expressly not contained in the guidelines, will not be sufficient to oust the petitioner from appointment as an Anganwadi worker- The appointment of the respondent set aside- petition allowed. (Para-5 and 6)

For the petitioner: Mr. Pawan Gautam, Advocate.

For the respondents: Mr. Desh Raj Thakur, Additional Advocate General, with Mr. Kamal Kant Chandel, Deputy Advocate General, for respondents No. 1 and 2.
None for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral) :*

By way of this writ petition, the petitioner has challenged the appointment of respondent No. 3 as Anganwadi Worker at Anganwadi Centre, Churru, which appointment took place in the year 1997, on the ground that the candidature of the petitioner was wrongly rejected by the respondent-State, despite the fact that she was found to be more meritorious.

2. Though respondent No. 3 stands duly served and is duly represented by the learned counsel, whose name is duly reflected in the cause list, however, none has appeared for the said respondent, therefore, she is proceeded against *ex parte.* Reply filed by the said respondent is on record and the same has been perused by the Court alongwith the reply filed by the respondent-State as well as the supplementary affidavit subsequently filed by the State.

3. It is not in dispute that in the selection process which was undertaken by the respondent-State for appointing an Anganwadi Wroker for Anganwadi Centre at Churru, the present petitioner was found to be the more meritorious out of the candidates, who appeared in the interview. Details of the interview stand appended alongwith the reply filed by respondents No. 1 and 2, which are quoted hereinbelow:

"Details of interview for the post of Anganwadi Worker under ICDS Project, Amb

Gram Panchayat Churru Anganwadi Centre Churru

Sr. No.	Name of the candidate	D.O.B.	Edu Ql.	Whether any member of Family is in Govt./Semi Govt. service	Edu.	Exp.	GK	Total	Remarks
1.	2,	3.	4.	5.	6.	7.	8.	9	10
1.	Santosh Kumari, w/o Sh. Gian Singh VPO	12.2.71	10th	373/700 Yes	5.3	8	7	20.3	Experience for working in Shivalik Sewa Mandal Churru but the husband is working as Patwari.
2.	Shobha Devi w/o Dharam Pal VPO Churru	13.06.60	10th	447/900 No	4.9	-	5	9.9	IRDP, No family member in govt. service. Member of ward panch. If selected she will resign as per undertaking.

3. Saroj Devi D/o Nanak
Chand VPO Churru 11.4.78 10th356/700 No 5.0 - 4 9.0 Underage.

4. Rekha DhimanD/o
Jagdish Lal VPO Churru 26.8.77 10+2 Absent

5. Sona Devi D/o Paras
Ram V.P.O. Churru 23.4.72 10th Absent

Sd/- Sd/- Sd/-
C.D.P.O Amb T.W.O. Amb S.D.O. (c) Amb"

4. This document so filed by the State is self speaking that the total marks which were obtained by the present petitioner in the interview were 20.3, whereas the selected candidate only got 9.9. marks in the process. Despite this, respondent-State did not offer appointment to the petitioner on the ground that the petitioner was disqualified as her husband was in Government service. This is also evident from the reply so filed on the affidavit of Director, Social & Women's Welfare, H.P. dated 27th April, 1998.

5. Respondent-State had framed guidelines which governs the appointment/engagement of Anganwari Workers/Helpers. The Policy which was invogue at the time when the interviews took place and appointment was made, is on record. A perusal of the said guidelines demonstrates that there was no embargo in the same, which rendered a candidate ineligible to be considered for being appointed as Anganwadi Worker, if her husband was in Government service. Though in subsequent guidelines issued by the Government, a rider stood incorporated with regard to annual income of the applying candidate, but in the said guidelines in issue, there was no such embargo also. The contention of learned Additional Advocate General that though admittedly there was no such embargo in the guidelines which was invogue at the relevant time, but earlier in the year 1989 such a Policy decision stood taken by the Government, in my considered view does not help the cause of the State, because until and unless such a condition was expressly contained in the guidelines, it could not have been read into the guidelines so as to oust the candidate.

6. In view of above discussion, this writ petition is allowed. The act of respondent-authority of rejecting the candidature of the petitioner for being appointed as Anganwadi Worker at Anganwadi Centre, Churru, on the ground that her husband was a Government servant, is quashed and set aside. It goes without saying that in view of the findings so returned by this Court, the appointment offered by the respondent-State to the private respondent is also rendered bad in law. Accordingly, State is ordered to offer appointment to the petitioner forthwith. She shall be entitled for seniority as from the date, the respondent No. 3 was engaged as Anganwadi Worker, however, as far as back wages are concerned, in my considered view, interest of justice will be served in case the petitioner is monetarily compensated by the State by paying a lump sum amount of Rs.25000/-. Though this Court has held that the appointment offered to the private respondent is bad in law, in view of the decision so given by this Court, however, in case the respondent-State intends to protect the appointment offered to the private respondent, it can do so.

Petition stands disposed of in above terms, so also miscellaneous application(s), if any. No order as to costs.

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

Chinta Devi ...Petitioner.

Versus

The Director of Estates (Regions) and another ...Respondents.

CWP No. 10992 of 2011
Decided on: 09.03.2018

Constitution of India, 1950- Article 226- Deceased employee died in an accident while serving as accountant in the office of the respondent- Petitioner, wife applied for appointment on compassionate ground- the application was rejected- **Held** – that the order of rejecting application is non-speaking and uninformed order- It does not reveal that the scheme contained in the office memorandum dated 9th October, 1998 for determination and availability of vacancies for such decision was adhered to or not- non-speaking and uninformed decision smacks mala fide and arbitrariness- petition was allowed and the communication rejecting the claim of the petitioner quashed- respondents were directed to reconsider the claim of the petitioner in the light of the aforementioned office memorandum. (Para-8, 14 and 15)

For the petitioner: Mr. Kulbhushan Khajuria, Advocate, vice Mr. Jitender P. Ranote, Advocate.

For the respondents: Mr. Shashi Shirshoo, Central Government Standing Counsel.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

It is undisputed that petitioner is wife of a deceased employee of respondents, who expired on 2nd July, 2006 in an accident while serving as Accountant in the office of respondent No. 2. After his death, petitioner, who is a matriculate, had applied for compassionate appointment with the respondents vide application, dated 14th August, 2006 (Annexure P-6) with request to consider her case for appointment at her native place, i.e. Shimla, being a single lady. Her request was rejected by the respondents and vide communication, dated 26th December, 2006 (Annexure P-8), it was conveyed that her application for appointment as Lower Division Clerk on compassionate grounds was considered but could not be acceded to. She had re-submitted request for compassionate appointment vide application, dated 11th December, 2008 (Annexure P-7).

2. A legal notice was also issued to the respondents through an Advocate requesting for compassionate appointment and also for assigning reasons for denying the appointment to the petitioner on compassionate grounds. Respondents never responded to the said notice whereupon the present petition stands filed.

3. It is evident from perusal of communication, dated 27th January, 2009 (Annexure P-9) sent by Assistant Estate Manager, Nagpur to Assistant Director of Estates (Regions), New Delhi, in continuation to representation of petitioner, dated 11th December, 2008, that it was recommended that petitioner could be accommodated against the post of LDC lying vacant in that office with effect from 21st April, 2008 and question of obtaining approval from Screening Committee did not arise if she was recommended against the above vacancy as per DoPT O.M. No. 14014/6/94-Estt (D), dated 9th October, 1998.

4. Petitioner has also placed on record office memorandum, dated 9th October, 1998 (Annexure P-11) issued by Ministry of Personnel, Public Grievances and Pension (Department of Personnel and Training), whereby revised 'Scheme' for compassionate appointment under the Central Government has been circulated. The object of this scheme is to grant appointment on compassionate grounds, to a dependent family member of a Government servant dying in harness

or retiring on medical grounds, thereby leaving his family in penury and without any means of livelihood, to relieve the family of the Government servant concerned from financial destitution and to help it get over the emergency.

5. As per clause 2 of the Scheme, spouse also falls in category of dependent family member of a Government servant who dies while in service. 'Determination/ Availability of Vacancies' for compassionate appointment has been provided under a separate Head, relevant portion of which reads as under:

> ***"(a) Appointment on compassionate grounds should be made only on regular basis and that too only if regular vacancies meant for that purpose are available.***
>
> ***xxx xxx xxx***
>
> ***(e) Employment under the scheme is not confined to the Ministry/Department/Office in which deceased/medically retired Government servant had been working. Such an appointment can be given anywhere under the Government of India depending on availability of a suitable vacancy meant for the pui .....ate appointment.***
>
> ***(f) If sufficient vacancies are not available in any particular office accommodate the persons in the waiting list for compassionate appointment, it is open to the administrative Ministry/Department/Office to take up the matter with other Ministries/Departments/ offices of the Government of India to provide at an early date appointment on compassionate grounds to those in the waiting list."***
>
> *(Emphasis added)*

6. In reply to the petition, it has been averred that to assign the vacancy for compassionate appointment in small departments, like the respondent-department, direct vacancies in group C and D posts, arising each year for three or more preceding years, are to be taken into consideration and 5% of vacancies with reference to the grand total of vacancies of such years is to be allocated for compassionate appointment and it would be subject to condition that no compassionate appointment was/has been made by the department for three years or the number of years taken over and above three years for locating vacancy under 5% quota for compassionate appointment.

7. According to respondents, husband of petitioner had died on 2nd July, 2006 and though, the vacancy in the department had arisen on 21st April, 2008, but locating the same for compassionate appointment of the petitioner would have amounted to allocation of 100% vacancies to the compassionate appointment and, therefore claim of petitioner for compassionate appointment was not acceded to.

8. Office memorandum, dated 9th October, 2006, (Annexure - I) issued in continuation to circular, dated 9th October, 1998 has also been placed on record by respondents, which provides as under:

> ***"The undersigned is directed to invite attention to this Department's O.M. No. 14014//6/94-Estt. (D) dated the 9th October, 1998, as amended from time to time containing the Scheme for Compassionate Appointment. Para 7 (b) of this O.M. provides that compassionate appointment can be made upto a maximum of 5% of vacancies under Direct Recruitment quota in any Group 'C' or 'D' post.***
>
> ***2. Pursuant to a demand raised by the Staff Side in the Standing Committee of the National Council (JCM) for review of the compassionate appointment policy, instructions have been issued vide O.M. No.***

14014/3/2005-Estt. (D) dated the 14th June, 2006 prescribing a certain method of calculation of vacancies under 5% quota for compassionate appointment. The provisions of the O.M. dated 14th June, 2006 have sought to enable the Ministries to locate vacancies under 5% quota, in order to absorb the most deserving cases.

3.The Scheme has been further examined, keeping in view the problem of non-availability of vacancies within the prescribed limit of 5% of Direct Recruitment vacancies within the prescribed limit of 5% of Direct Recruitment vacancies in Group 'C' and 'D' posts (excluding technical posts), persisting in the small Ministries/ Departments, even after issue of this Department's O.M. dated 14th June, 2006. It may happen that small Ministries/Departments may not be able to make a single compassionate appointment for a number of yeas due to non-availability of adequate direct recruitment vacancies in Group 'C' and 'D' posts arising in a year. Thus, this Department's O.M. dated 14th June, 2006 providing for a relaxed method for determination of vacancies under 5% quota, may not actually provide any relief to such small Ministries/Departments.

4. Accordingly, it has been decided that the small Ministries/Departments may apply a more liberalized method of calculation of vacancies under 5% quota for compassionate appointment. The small Ministries/Departments, for the purpose of these instructions, are defined as organization where no vacancy for compassionate appointment could be located under 5% quota for the last three years. Such small Ministries/ Departments may add up to the total of DR vacancies in Group 'C' and 'D' posts (excluding technical posts) arising in each year for 3 or more preceding years and calculate 5% of vacancies with reference to the grand total of vacancies of such years, for locating <u>one vacancy</u> for compassionate appointment. This is subject to the condition that no compassionate appointment was/has been made by the Ministries/ Departments during 3 years or number of years taken over and above 3 years for locating one vacancy under 5% quota.

5. The instructions contained in the O.M. No. 14014/6/94-Estt. (D) dated 9th October, 1998, as amended from time to time, stand modified to the extent mentioned above.

6. The above decision may be brought to the notice of all concerned for information, guidance and necessary action.

7. Hindi version will follow."

9. As clarified in memorandum, dated 9th October, 2006, this clarificatory office memorandum has been issued enabling the Ministries/Departments to extend the benefit of compassionate appointment in order to absorb the most deserving cases. It has been clarified in the said office memorandum that keeping in view the problem of non-availability of vacancies within the prescribed limit of 5% of Direct Recruitment vacancies in Group 'C' and 'D' posts persisting in small Ministries/ Departments, it may happen that such Ministries/ Departments may not be able to make a single compassionate appointment for number of years due to non-availability of adequate direct recruitment vacancies in Group 'C' and 'D' posts arising in a year and, therefore, method for determining vacancies under 5% quota, which was already relaxed vide office memorandum, dated 14th June, 2006, has further been liberalized by providing a method of calculation of vacancies under 5% quota for compassionate appointment by stating that the small Ministries/Departments, for the purpose of these instructions, are defined as organizations where no vacancy for compassionate appointment could be located under 5% quota for the last three years and such small Ministries/ Departments may add up the total of DR vacancies in Group 'C' and 'D' posts (excluding technical posts) arising each year for three or

more preceding years for calculating 5% of vacancies with reference to the grand total of vacancies of such years for locating one vacancy for compassionate appointment.

10. The aforesaid clarification is also to be read with clause (e) of Determination/Availability of Vacancies contained in the Scheme for Compassionate Appointment (Annnexure P-11), which provides that employment under the scheme is not confined to the Ministry/Department/office in which deceased servant had been working, but, such an appointment can be given anywhere under the Government of India depending on availability of suitable vacancy meant for the purpose of compassionate appointment. Further clause (f) under the same Head of the Scheme provides that if the sufficient vacancies are not available in any particular office, then, to accommodate the persons in the waiting list for compassionate appointment, it is open to the administrative Ministry/Department/Office to take up the matter with other Ministries/Departments/ Offices of Government of India to provide, at any early date, appointment on compassionate grounds to those in the waiting list.

11. In instant case, communication, dated 26th December, 2006 (Annexure P-8), conveying the rejection of request of the petitioner, is subsequent to clarification/Office Memorandum, dated 9th October, 2006 (Annexure -I). The said communication is non-speaking and uninformed. It does not disclose as to whether provisions of the scheme providing for determination/availability of vacancies notified vide Office Memorandum, dated 9th October, 1998 (Annexure P-11) were adhered to or not and as to whether the liberalized method for calculating the vacancies circulated vide Office Memorandum, dated 9th October, 2006 (Annexure - I), was ever applied in case of the petitioner or not. Further, there was no response to the legal notice, dated 27th August, 2011.

12. So far as plea of the respondents taken in reply to the petition is concerned, it does not disclose that there was no vacancy available at the time of rejection of request of the petitioner in the entire Ministry/Department. There is nothing stated about taking up matter with other departments/Ministries, if ever taken up. The reply is also silent about the fate of the recommendations made by the Assistant Estate Manager on 27th January, 2009 (Annexure P-9) on arising of the vacancies in the office with effect from 21st April, 2008.

13. There is no record to reflect that case of the petitioner was ever considered in light of the provisions of Determination/Availability of Vacancies contained in Scheme for Compassionate Appointment.

14. Petitioner has a basic human and legal right to know the grounds and reasons for rejection of her claim. Non-speaking and uninformed decision smacks mala fide and arbitrariness. Arbitrariness, being anti thesis of 'Rule of Law', amounts to violation of Article 14 of the Constitution of India. Thus, impugned rejection of claim of petitioner warrants interference.

15. In view of above discussion, present petition is allowed, communication, dated 26th December, 2006 (Annexure P-8), conveying rejection of claim of the petitioner, is quashed and set aside with a direction to the respondents to consider the case of the petitioner afresh in light of Office Memorandum, dated 9th October, 1998 (Annexure P-11) and all clarificatory office memoranda issued subsequent thereto, including Office Memorandum, dated 9th October, 2006 (Annexure – I) and to decide the same, in accordance with law, within four months from today and offer her appointment in case she is found entitled to the same.

16. Needless to say that in case petitioner is not considered to be entitled for compassionate appointment, a speaking and reasoned order shall be passed in that regard, under intimation to the petitioner, after providing personal hearing to her, and obviously, petitioner shall have liberty to assail any decision adversely affecting her legal rights before competent Court/forum, in accordance with law, if so advised.

17. The writ petition is disposed of in aforesaid terms alongwith all pending applications, if any.

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

Cr.MMO No. 7 of 2018 with Cr.MMO No. 76 of 2018.
Date of decision: March 09, 2018.

1. Cr.MMO No. 7 of 2018

Rajesh Kumar Chauhan & ors. .....Petitioner.

Versus

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

2. Cr.MMO No. 76 of 2018

Chaman Lal .....Petitioner.

Versus

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

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- Sections 341, 323, 307, 504, 506 read with Section 34 of I.P.C- Cross FIR registered by both the parties- Investigation complete, though, challan had not been filed in the Court- parties sought quashing of the FIR- **Held-** that since the parties have decided not to prosecute the cases and since the evidence is yet to be led in the Court- there are minimal chances of the witnesses coming forward in support of the prosecution case in view of compromise arrived at between the parties- chances of conviction of the accused in both the case are bleak – Cases are at the initial stage and even report under Section 173 Cr.P.C has yet not been filed to allow the criminal proceedings to continue would be an abuse of the process of law- Consequently, FIR ordered to be quashed. (Para-7)

Cases referred:

Gian Singh Vs. State of Punjab and another, (2012) 10 Supreme Court Cases 30
Kulwinder Singh and others Vs. State of Punjab, 2007(3)RCR (Criminal) 1052
Narinder Singh and others vs. State of Punjab and another, (2014) 6 Supreme Court Cases 466

1. Cr.MMO No. 7 of 2018

For the petitioners Mr. Ashish Verma, Advocate.

For the respondents Mr. S.C. Sharma, Addl. AG with Mr. Kunal Thakur, Dy. AG, for respondent No. 1.
Mr. Mehar Chand, Advocate, for respondent No. 2.

2. Cr.MMO No. 76 of 2018

For the petitioner Mr. Mehar Chand, Advocate.

For the respondents Mr. S.C. Sharma, Addl. AG with Mr. Kunal Thakur, Dy. AG, for respondent No. 1.
Mr. Ashish Verma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

This judgment shall dispose of both petitions filed with a prayer to quash the two FIRs registered in Police Station, Baijnath, District Kangra at the instance of the accused-petitioners and respondent No. 2 (complainant) against each other. The FIR bearing No. 0100 of 2017 against the accused-petitioners in petition No. 7 of 2018 though initially was registered under Sections 341, 323, 504, 506 read with Section 34 of the Indian penal Code, however, during the course of investigation the case converted into under Section 307 read with Section 34 IPC. One of the accused-petitioner in petition No. 7 of 2018, namely, Rajesh Kumar Chauhan has also registered a cross case against Chaman Lal-respondent No. 2 pertaining to the same occurrence in Police Station, Baijnath on the same day vide FIR No. 0101 of 2017 under Sections 341, 323, 504, 506 read with Section 34 IPC.

2. Learned Additional Advocate General has placed on record the status report. The perusal whereof reveals that the investigation is complete and the challan though has been prepared, however, not yet filed in the Court. Therefore, both cases are at its initial stage.

3. The parties on both sides in their statements recorded separately have stated that the occurrence was the result of misunderstanding. Accordingly, the cases against each other also came be to registered by them on account of such misunderstanding. They have now realized the same and decided not to prosecute the criminal cases, they registered against each other.

4. It is seen that an offence punishable under Section 307 read with Section 34 IPC is not compoundable under Section 320 of the Code of Criminal Procedure. The apex Court in ***Gian Singh*** Vs. ***State of Punjab and another, (2012) 10 Supreme Court Cases 30*** has however, held that the High Court in exercise of inherent powers vested in it under Section 482 of the Code of Criminal Procedure may quash FIR/criminal proceedings in a case where the offence allegedly committed by an accused though is not compoundable, however, in case the victim and accused have settled the differences amicably the inherent powers of the High Court can be pressed in service for quashing the proceedings. Such powers however can be exercised sparingly and only in appropriate cases, having arisen out of civil, mercantile, commercial, financial, partnership or such other transactions of like nature including matrimonial or the case relating to dowry etc. in which the wrong basically is done to the victim. This judgment further reveals that the compounding of offence in a case of serious nature like rape, dacoity and corruption etc. having serious impact in the society is not permissible.

5. The Punjab and Haryana High Court in ***Karamvir Singh*** vs. ***State of Punjab and another,*** *Crl. Misc. No. M-1586 of 2013 (O&M)* decided on 13.9.2013 after placing reliance on Full Bench judgment of the same High Court in ***Kulwinder Singh and others*** Vs. ***State of Punjab, 2007(3)RCR (Criminal) 1052*** and also that of Apex Court in Gian Singh's case *supra* has allowed the compounding of offence in a case punishable under Sections 279, 337 and 338 of the Indian Penal Code in the similar circumstances with the observation that since the parties have arrived at a compromise and decided to live in peace, no useful purpose would be served by allowing the proceedings to continue.

6. The Apex Court in ***Narinder Singh and others*** vs. ***State of Punjab and another, (2014) 6 Supreme Court Cases 466*** has even quashed the FIR in a case under Section 307 of the Indian Penal Code with the following observations:

> "*We have gone through the FIR as well which was recorded on the basis of statement of the complainant/victim. It gives an indication that the complainant was attacked allegedly by the accused persons because of some previous dispute between the parties, though nature of dispute etc. is not stated in detail. However, a very pertinent statement appears on record viz., "respectable persons have been trying for a compromise up till now, which could not be finalized". This becomes an important aspect. It appears that there have been some disputes which led to the aforesaid purported attack by the accused on the complainant. In this context when we find that the elders of the village, including Sarpanch, intervened in the matter and the parties have not only buried their hatchet but have decided to live peacefully in future, this becomes an important consideration. The evidence is yet to be led in the Court. It has not even started. In view of compromise between parties, there is a minimal chance of the witnesses coming forward in support of the prosecution case. Even though nature of injuries can still be established by producing the doctor as witness who conducted medical examination, it may become difficult to prove as to who caused these injuries. The chances of conviction, therefore, appear to be remote. It would, therefore, be unnecessary to drag these proceedings. We, taking all these factors into consideration cumulatively, are of the opinion that the compromise between the parties be accepted and the criminal proceedings arising out of FIR No.121 dated 14.7.2010*

registered with Police Station LOPOKE, District Amritsar Rural be quashed. We order accordingly."

7. Such being the legal position coupled with the factum of both parties have now decided not to prosecute the cases, they registered against each other as per their statements recorded separately, no useful purpose is likely to be served in case the FIRs are not quashed for the reasons that in view of the compromise now arrived at between the parties they are not likely to depose against each other. Therefore, chances of conviction of the accused in both cases are bleak. The cases registered at the instance of both parties against each other are yet at its initial stage because report under Section 173 Cr.P.C. is also not filed. Allowing the criminal proceedings to continue in these cases would, therefore, be nothing but merely an abuse of process of law.

8. In view of what has said hereinabove, both petitions are allowed. Consequently, both FIRs i.e. 0100 and 0101 of 2017 registered in Police Station, Baijnath, District Kangra are hereby quashed. The petitions stand disposed of.

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

Union of India .....Petitioner.
Versus
Krishan Lal & others .....Respondents.

CWP No.4737 of 2015.
Judgment reserved on: 06.03.2018.
Date of decision: 9th March,2018.

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Section 28-A of the Land Acquisition Act, 1894- Held- The application for the re-determination of compensation does not necessarily mean from the "first award" made by the Court and, as such, the limitation to file the said application will run from the date of the award on the basis of which re-determination of compensation is sought. (Para-7 to 11)

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Section 28-A of the Land Acquisition Act, 1894- Further Held- It is permissible for the collector to keep the application for re-determination in abeyance if the award in question is in an appeal before the higher Court- The Collector can keep the application under Section 28-A of the Land Acquisition Act pending till the matter is finally decided by the High Court or Supreme Court, as the case may be. (Para-12)

Cases referred:

Union of India and another versus Pradeep Kumari and others (1995) 2 SCC 736
Jose Antonio Cruz Dos R. Rodriguese and another versus Land Acquisition Collector and another AIR 1997 SC 1915
State of Tripura and another versus Roopchand Das and others (2003)1 SCC 421
State of Orissa and others versus Chitrasen Bhoi (2009) 17 SCC 74
Kendriya Karamchari Sehkari Grah Nirman Samiti Limited, Noida versus State of Uttar Pradesh and another (2009) 1 SCC 754

For the Petitioner : Mr.Shashi Shirshoo, Central Government Counsel.

For the Respondents: Mr.Susheel Gautam, Advocate, for respondents No.1 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This writ petition takes exception to the award passed by the Collector in exercise of his powers under Section 28-A of the Land Acquisition Act (for short 'Act').

2. The land of the respondents comprised in Khatauni No.1551/1762, Khasra No. 5984/5297, measuring 2 bighas, Khasra No. 6136/5985/5297, measuring 1 bigha and the land comprised in Khasra No.5950/5351, measuring 6-3 bighas, situated in Mauza Fatti Nirmand, District Kullu, H.P. was acquired by the petitioner for setting up an Army base for defence purposes at village Averi, Tehsil Nirmand, District Kullu, H.P. On 19.03.1998, the Collector announced the award in case No.1/98. Certain land owners whose land was covered under the same notification filed reference petition for enhancement of the award which eventually came to be decided by the learned District Judge, Kinnaur, on 21.02.2004 and the award was enhanced to Rs.60,000/- per bigha. Whereas, the respondents had been paid compensation of Rs.31,500/- per bigha for 'Bakhal Charand' and Rs.51,000/- per bigha for 'Bakhal Som'. Since the land of the respondents was acquired under the same notification and they had not sought reference, they filed applications under Section 28-A of the Act before the Land Acquisition Collector, Anni, on 19.04.2004, however, the Collector kept these applications in abeyance because the petitioner had preferred an appeal against the order of the learned District Judge.

3. Upon notice to the petitioners, they filed reply wherein they raised the question of limitation. The Land Acquisition Collector vide his award dated 16.03.2012 allowed the application filed by the respondents. It is this award that has been assailed by the petitioner mainly on the ground that the applications preferred by the respondents under Section 28-A were time barred and could not have been entertained, more especially when the reference pertaining to the same notification was decided by the learned District Judge on 22.02.2003 in Reference No.40-R/4 of 1999.

4. Respondents No.1 and 3 have filed their joint reply wherein they have supported the impugned award by claiming that the same is strictly in accordance with law and, therefore, needs to be upheld.

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

5. The only question that falls for consideration is whether an application under Section 28-A of the Act ought to have been dismissed on the ground that it was not filed within three months from the date of reference Court first award dated 22.02.2003. To answer this question, it would be apposite to refer to Section 28-A(1) of the Act which is extracted hereinbelow:-

> *"[**28A. Redetermination 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 11, 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:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded."

6. A perusal of above extracted portion reveals that an application under this Section has to be filed within three months from the date of the award of the reference Court.

7. The object underlying the enactment of this Section is to remove inequality in the payment of compensation for the same and similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the Civil Court under Section 18 of the Act. This is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redeteremination once any of them has obtained order for payment of higher compensation from the reference Court under Section 18. By construing the expression "wherein an award under this Part" in sub-section (1) of Section 28-A to mean "wherein the *first* award made by the Court under this Part", the word *first* which is not found in sub-section (1) of Section 28-A is being read therein and thereby the amplitude of the said provision would be curtailed so as to restrict the benefit conferred by it. In the matter of construction of a beneficent provision like the present one, it is not permissible by judicial interpretation to read words which are not there and thereby restrict the scope of the said provision. Therefore, the limitation for moving the application to the Collector under Section 28-A of the Act will begin to run only from the date of the award on the basis of which redetermination of compensation is sought and is three months from the date of the award.

8. At this stage, it shall be profitable to refer to the judgment of three Hon'ble Judges Bench of the Hon'ble Supreme Court in ***Union of India and another*** *versus* ***Pradeep Kumari and others (1995) 2 SCC 736*** wherein it was held that the limitation does not necessarily start from the date of the first award. The award "*first*" cannot be read into Section 28-A. The relevant observations of the said decision are extracted hereinbelow:-

10. It is possible to visualise a situation where in the first award that is made by the court after the coming into force of Section 28-A the enhancement b the amount of compensation by the said award is not very significant for the reason that the person who sought the reference was not able to produce adequate evidence in support of his claim and in another reference where the award was made by the court subsequently such evidence is produced before the court and a much higher amount is awarded as compensation in the said award. By restricting the benefit of Section 28-A to the first award that is made by the court after the coming into force of Section 28-A the benefit of higher amount of compensation on the basis of the subsequent award made by the court would be denied "to the persons invoking Section 28-A and the benefit of the said provision would be confined to re-determination of compensation on the basis of lesser amount of compensation awarded under the first award that is made after the coming into force of Section 28-A. There is nothing in the wordings of Section 28- A to indicate that the legislature intended to confer such a limited benefit under Section 28-A. Similarly, there may be a situation, as in the present case, where the notification under Section 4(1) of the Act covers lands falling in different villages and a number of references at the instance of persons having lands in different villages were

pending in the court on the date of coming into force of Section 28-A and awards in those references are made by the court on different dates. A person who is entitled to apply under Section 28-A belonging to a particular village may come to know of the first award that is made by the court after the coming into force of Section 28-A in a reference at the instance of a person belonging to another village, after the expiry of the period of three months from the date of the said award but he may come to know of the subsequent award that is made by the court in the reference at the instance of a person belonging to the same village before the expiry of the period of three months from the date of the said award. This is more likely to happen in the case of inarticulate and poor people who cannot be expected to keep track of all the references that were pending in court on the date of coming into force of Section 28-A and may not be in a position to know, in time, about the first award that is made by the court after the coming into force of Section 28-A. By holding that the award referred to in Section 28-A(l) is the first award made after the coming into force of Section 28-A, such persons would be deprived of the benefit extended by Section 28-A. Such a construction would thus result in perpetuating the inequality in the payment of compensation which the legislature wanted to remove by enacting Section 28-A. The object underlying Section 28-A would be better achieved by giving the expression "an award" in Section 28-A its natural meaning as meaning the award that is made by the court in Part III of the Act after the coming into force of Section 28-A. If the said expression in Section 28-A(l) is thus construed, a person would be able to seek re-determination of the amount of compensation payable to him provided the following conditions are satisfied :-

> *(i) An award has been made by the court under Part III after the coming in to force of Section 28-A;*
>
> *(ii) By the said award the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;*
>
> *(iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;*
>
> *(iv) The person moving the application did not make an application to the Collector under Section 18;*
>
> *(v) The application is moved within three months from the date of the award on the basis of which the re-determination of amount of compensation is sought; and*
>
> *(vi) Only one application can be moved under Section 28-A for re-determination of compensation by an applicant.*

11. Since the cause of action for moving the application for re- determination of compensation under Section 28-A arises from the award on the basis of which re-determination of compensation is sought, the principle that "once the limitation begins to run, it runs in its full course until its running is interdicted by an order of the court" can have no application because the limitation for moving the application under Section 28-A will begin to run only from the date of the award on the basis of which re-determination of compensation is sought.

12.We are, therefore, unable to agree with the view expressed in Babua Ram versus State of U.P. (1995) 2 SCC 689 and Union of India versus Karnail

> *Singh(1995) 2 SCC 728 that application under Section 28-A for re-determination of compensation can only be made on the basis of the first award that is made after the coming into force of Section 28-A. In our opinion, the benefit of re-determination of amount of compensation under Section 28-A can be availed of on the basis of any one of the awards that has been made by the court after the coming into force of Section 28-A provided the applicant seeking such benefit makes the application under Section 28-A within the prescribed period of three months from the making of the award on the basis of which re-determination is sought, The first contention urged by Shri Goswamy in support of the Review Petitions is, therefore, rejected."*

9. The ratio of the aforesaid decision was reiterated by the Hon'ble Supreme Court in ***Jose Antonio Cruz Dos R. Rodriguese and another*** *versus* ***Land Acquisition Collector and another AIR 1997 SC 1915*** by holding that the period of limitation has to be computed from the date of reference Court's award on the basis of which redetermination is sought.

10. Similar, reiteration of law can be found in the decision of the Hon'ble Supreme Court reported in ***State of Tripura and another*** *versus* ***Roopchand Das and others (2003)1 SCC 421*** and thereafter in ***State of Orissa and others*** *versus* ***Chitrasen Bhoi (2009) 17 SCC 74***.

11. In view of the aforesaid exposition of law and further bearing in mind the language employed in Section 28-A and the laudable interpretation put by the Hon'ble Supreme Court in the aforesaid cases, this Court has no hesitation in holding that Section 28-A of the Act provides for making an application within three months from the date of award on the basis of which the redetermination of the market value is sought.

12. In addition to the above, it would be noticed that the reference petition was answered by the learned District Judge on 22.02.2003 and the respondents filed the application under Section 28-A on 19.04.2004 which as observed above was kept in abeyance as the petitioner had preferred appeal against the reference order. Whether such a course was permissible for the Collector is not an issue which can be agitated by the petitioner as the same stands authoritatively decided by the Hon'ble Supreme Court in ***Kendriya Karamchari Sehkari Grah Nirman Samiti Limited, Noida*** *versus* ***State of Uttar Pradesh and another (2009) 1 SCC 754*** wherein it has been categorically held that when the award of the reference Court which is relied upon by the claimant for redetermination of the compensation is a subject matter of appeal before the High Court, the Collector would be well within his power to keep the application under Section 28-A of the Act pending till the matter is finally decided by the High Court or by the Hon'ble Supreme Court, as the case may be. The relevant observations are extracted below:-

> *"40. It is true that once the Reference Court decides the matter and enhances the compensation, a person who is otherwise eligible to similar relief and who has not sought reference, may apply under Section 28-A of the Act. If the conditions for application of the said provision have been complied with, such person would be entitled to the same relief which has been granted to other persons seeking reference and getting enhanced compensation. But, it is equally true that if the Reference Court decides the matter and the State or acquiring body challenges such enhanced amount of compensation and the matter is pending either before the High Court or before this Court (the Supreme Court), the Collector would be within his power or authority to keep the application under Section 28-A of the Act pending till the matter is finally decided by the High Court or the Supreme Court as the case may be. The*

reason being that the decision rendered by the Reference Court enhancing compensation has not attained "finality" and is sub judice before a superior Court. It is, in the light of the said circumstance that the State of U.P. issued two Government Orders on 14-1-1994 and 13-6-2001."

13. In view of the aforesaid discussion and for the reasons stated above, I find no merit in this petition and the same is 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 SURESHWAR THAKUR, J.

National Insurance Company Limited. .....Appellant.

Versus

Onkar Singh & others .....Respondents.

No. 376 of 2017
Reserved on : 5th March, 2018
Decided on : 12th March, 2018

Motor Vehicles Act, 1988- Motor Accident Claims Tribunal- Insurance Company challenging the findings returned by the Learned MACT- the driver of the offending vehicle was not holding a valid driving licence at the time of the accident, on the ground that the Government of Nagaland who had issued the driving licence vide notification dated 1.8.2014 had directed to surrender all the driving licence(s) issued in booklet form after 30th October, 2009, for enabling the digitization of the data and, for the issuance of smart cards in its plea- **Held-** No- It was imperative for the insurer to have placed on record, the aforesaid notification before the learned Tribunal, moreover, when the same had been tendered into evidence as Ex.R-4 the counsel for the insurer had not even contested its validity or authenticity- The conclusions as arrived by the learned tribunal, thus, held to be correct - consequently, appeal dismissed. (Para-4)

For the Appellant: Mr. Anil Tomar, Advocate.
For Respondents No. 1 to 4 : Ms. Ritika Kashav, Advocate vice Mr. H.S. Rana, Advocate.
For Respondents No.5 & 6: Mr. L.S. Mehta, Advocate

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the award pronounced by the Learned Motor Accident Claim Tribunal (II), Solan camp at Nalagarh, whereby, the learned Tribunal adjudged compensation vis-a-vis, the LRs of deceased Laxmi Devi, who met her end, in an accident caused, by the rash negligent driving of the offending vehicle, by one Bhupinder Singh (respondent No.6 herein). The quantum, of, compensation amount adjudged thereunder vis-a-vis the legal heirs of deceased Laxmi Devi, is, constituted in a sum of Rs.14,37,500/- and interest at the rate of 9% per annum, is, levied thereon, commencing, from, the date of petition uptill its deposit. Compensation amount has been apportioned, amongst the claimants in the hereafter extracted manner:-

"Petitioner No.1: Rs.5,37,500/-
Petitioner No.2: Rs.3,00,000/-
Petitioner No.3: Rs.3,00,000/-

Petitioner No.4: Rs.3,00,000/-"

Obviously indemnificatory liability thereof, has been fastened, upon the insurer/appellant herein. The Appellant/insurer is aggrieved therefrom, hence, has instituted the instant appeal before this Court.

2. Note-worthily the only contention raised by the learned counsel for the appellant/insurer, is only, for reversing the findings rendered by the learned Tribunal, vis-a-vis issue No.4, appertaining to the driver of the offending vehicle, holding a valid and effective driving licence, to, at the time contemporaneous to the accident, hence drive it, (I) given theirs rather wanting in force, besides substance nor being supported, by any tangible evidence, of, any creditworthiness, (ii) hence, he further contends, that the findings recorded upon issue No.4, by the learned tribunal, warrant interference by this Court.

3. To support his submission, the learned counsel appearing for the appellant has averred in paragraph No.2 of the grounds of appeal (i) that with the government of Nagaland, wherefrom whose jurisdiction the contentious driving licence, held, by the driver of the offending vehicle, stands issued, having issued a notification No. TC-23/MV/2007[PT-1] of 1.8.2014, (ii) whereby all driving licence(s), issued in booklet form, after 30th October, 2009, warranting holders thereof, to report to the office(s) concerned, wherefrom, they stood issued, for enabling digitization of the data, and, for their issuance in smart card form. (iii) AND with the date for completion of the aforesaid processes, being mandated therein, to be, before 1st December, 2014. (iv) Besides with the driving licence, held, by the driver of the offending vehicle, being issued after 30th October, 2009, hence, enjoined compliance, with the mandate, of, the afore-referred notification, (v) whereas, compliance thereof standing evidently, not meted, by the driver of the offending vehicle, thereupon, no reliance was imputable vis-a-vis Ex.R4.

4. For the aforesaid submission to carry weight and vigour, it was imperative for the counsel, for the insurer, to place on record, the aforesaid notification before the learned Tribunal concerned, (I) conspicuously given, upon its standing adduced, in evidence, therebefore, and, its nullificatory applicability upon Ex. R-4, yet being omitted to be discerned besides adjudicated upon, by the learned Tribunal, (ii) would thereupon, render enabled this Court, to conclude of their occurring palpable discardings, by the learned Tribunal concerned, vis-a-vis the impact of the aforestated notification, upon the validity of Ex. R-4, (iii) hence, the award under challenge before this Court, for apposite discardings of germane material, appertaining to the validity of Ex. R-4, when, hence rendered the latter exhibit to enjoy no force, (iv) thereon any imputation of any validity thereon, by the learned Tribunal rather vested jurisdiction in this Court, to reverse the findings recorded upon apposite issue No.4, by the learned Tribunal. However, a close perusal of the record, as requisitioned from the learned Tribunal concerned, makes disclosures, of the counsel for the respondent No.6 herein, tendering into evidence Ex.R-4, and, at the time of Ex. R-4 being tendered into evidence, the counsel for the insurer, did not contest its validity or authenticity nor he subsequent thereto tendered into evidence, the aforestated notification, (v) for, espousing that given its mandate being visibly infracted, thereupon, Ex. R-4 not enjoying any force, (vi) the aforesaid omission is grave and obviously disables, the insurer/appellant, to urge before this Court through its counsel, that the aforesaid notification, despite, being tendered into evidence its import besides evdentiary worth remained unassessed nor also he is enabled, to urge, that there occurs any perversity or absurdity, in the impugned award, (vii) arising from gross mis-appreciation of evidence, impinging upon the creditworthiness, of, Ex. R-4. (viii) More so, when the validity of Ex. R-4, remained uncontested at the time of its standing tendered besides exhibition marks, being endorsed thereon. Consequently, any reliance herebefore by the Appellant, upon, the aforesaid notification, dehors, its non adduction into evidence before the learned tribunal, for assessing its impact upon the validity of Ex. R-4, is of no worth, rather given the lack of any contest by the counsel, for the insurance company, before, the learned tribunal vis-a-vis Ex. R4, conspicuously at the time of its tendering besides exhibition marks being endorsed thereon, contrarily, renders Ex. R-4 to enjoy legal force, of, the fullest legal vigour.

5. The above discussion unfolds the fact that the conclusions as arrived by the learned tribunal are based upon a proper and mature appreciation of the relevant evidence on record. While rendering the findings, the learned tribunal has not excluded germane and apposite material from consideration.

6. For the foregoing reasons, there is no merit in the instant appeal and it is accordingly dismissed. 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 CHANDER BHUSAN BAROWALIA, J.

R.D. Sharma .....Petitioner
Versus
V.K. Chaudhary and another .....Respondents

Cr.MMO No. 265 of 2017
Reserved on: 08.03.2018
Decided on: 12.03.2018

Code of Criminal Procedure, 1973- Section 482- Sections 23 & 25, read with Section 28 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PC and PNDT Act)- Sections120-B & 201 of **Indian Penal Code, 1860—**Petitioner-Doctor seeking quashing of the complaint filed under the aforesaid provision- **Held-** that from the statement of the victim it was clear that when she was three month pregnant her husband and mother-in-law had forcibly got conducted a sex determination test- Statement of the victim coupled with other evidence on record show that there is prima facie case against the petitioner- it cannot be also said that chances of ultimate conviction of the petitioner are bleak, thus, held that petitioner was prima facie culpable- Accordingly, petition dismissed- parties directed to appear before the learned Trial Court. (Para-9 to 12)

Cases referred:
Bobbili Ramakrishna Raja Yadad and others vs. State of Andhra Pradesh, (2016) 3 SCC 309
Parbatbhai Aahir vs. State of Gujarat, (2017) 9 SCC 641

For the petitioner: Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate.
For the respondents: Mr. Ashwani Sharma, Additional Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure, is maintained by the petitioner for quashing the complaint filed by the complainant, under Sections 23 & 25, read with Section 28 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter to be called as "PC and PNDT Act, 1994) and Sections 120-B & 201 of Indian Penal Code, being complaint No. 34-3 of 2015, as well as order dated 05.05.2017, passed by learned Judicial Magistrate 1st Class, Court No. 2, Ghumarwin, District Bilaspur, H.P., whereby the charge, under Section 23 of the PC and PNDT Act, 1994, has been framed against the petitioner.

2. Briefly stating the facts giving rise to the present petition as per the prosecution

are that on 30.05.2014, the petitioner had conducted Pre-natal Diagnostic Test on one Smt. Priyanka Kapoor (hereinafter to be called as "the victim") in connivance with her husband and mother-in-law and disclosed the sex of foetus to them as girl child. The further allegations against the petitioner are that he has violated Rule 9(4) and Rule 10(1A) of PC and PNDT Rule, 1996.

3. The complaint made by the victim to the Police Station, Barmana on 11.05.2014 is as under:

> ***" Respected Sir, Today I am going to Hospital but first I want to see what happened to me then I want to take action against them. Please its my request take care of my decision. Sir after compromise he didn't talk to me even didn't ask me for food not even my kids. Sir please take action against them if something with happened to me. They were very cruel persons. Please sir it's a request help me out from this problem & neglected that compromise which I have done yesterday. It was just because I had seen my two daughters future and my future too. So once again help me out from this matter. Today 11th May, 2014 at 11:30 p.m. I write now I want to go to hospital. I want legal protection M/s Chet Ram & Co. Sd. Priyanka 11/5/2014."***

On the basis of the complaint made by the victim, F.I.R. No. 70 of 2014, dated 16.05.2014, under Sections 314(2), 498-A, 325 and 34 of IPC was registered against the petitioner and on receipt of intimation from the Superintendent of Police Bilaspur, the then CMO-cum-DAA, Bilaspur, Dr. M.L. Kaushal alongwith Deputy Superintendent of Police, Ghumarwin and Tehsildar Ghumarwin searched the Leelavati Hospital, Indira Market Ghumarwin on 07.07.2014 and sealed the Ultrasound Machine of Make and Model Shimadzu, SDU 350XL in presence of the witnesses and the petitioner with 11 seals of "Himachal Pradesh Kashetrie Perished Jantav Janardan". The record, i.e. register, Form "F" register, ultrasound register, bill/receipt book and Form "F" (in duplicate) four in number were also seized. The seizure memo of ultrasonography machine was duly signed by Dr. M.L. Kaushal, the then CMO-cum-DAA, Bilaspur, Sh. Anjani Jaiswal, Deputy Superintendent of Police, Ghumarwin, Sh. Kuldeep Patial, Tehsildar, Ghumarwin and present petitioner. The separate seal of "Himachal Pradesh Kashetrie Perished Jantav Janardan" was also taken on piece of cloth. On 21.08.2014, the meeting of District Level Advisory Committee constituted under PC and PNDT Act, 1994 was conducted and the Committee resolved to cancel the registration of USG clinic of the petitioner, under the PC and PNDT Act, 1994, for further investigation in the matter. On 04.10.2014, on request of Dr. M.L. Kaushal, the then CMO-cum-DAA Bilaspur, another F.I.R. No. 206/14, under Section 23 of PC and PNDT Act, 1994 was registered against the petitioner. After registration of F.I.R. No. 206 of 2014, the case was investigated by SHO Mukesh, who visited the spot on 11.10.2014 and sealed USG Machine in presence of the witnesses alongwith the record seized by Dr. M.L. Kaushal, the then CMO-cum-DAA, Bilaspur for further investigation, vide separate seizure memo, dated 11.10.2014. The USG Machine of Make and Model Shimadzu, SDU 350XL was kept sealed by the CMO-cum-DAA, Bilaspur w.e.f. 07.07.2014 to 11.10.2014 in the premises of Leelavati Hospital, Ghumarwin, was kept by SHO Ghumarwin in the Police station, Ghumarwin for safe custody, which was later on, vide road certificate No. 195/14, dated 15.10.2014, was sent through Constable Amit No. 470 and Constable Ajit Kumar, No. 194 to State Forensic Science Laboratory, Junga. During the course of investigation statements of the witnesses were recorded and challan was presented before the learned trial Court and learned trial Court, vide order dated 05.05.2017, framed charge against the present petitioner. Hence the present petition.

4. Learned Senior Counsel appearing on behalf of the petitioner has argued that as per the record, the pregnancy of the victim was only three and half months and as per the evidence on record no sex determination test could be carried out before the foetus is 25 weeks old. He has further argued that there is no evidence against the petitioner except the mere statement of the victim. He has argued that the present case is based on the scientific evidence

and there is no scientific evidence against the petitioner. He has further argued that the prosecution has otherwise failed to prove whether the foetus was male or female. Learned Senior Counsel in support of his arguments has placed reliance upon the decision of Hon'ble Supreme Court in ***Bobbili Ramakrishna Raja Yadad and others vs. State of Andhra Pradesh***, (2016) 3 SCC 309. The relevant extracts of the judgment are reproduced hereinbelow:

> ***"11. It is well settled that power under Section 482 Cr.PC should be sparingly exercised in rare cases. As has been laid down by this Court in Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre, that when a prosecution at the initial stage was asked to be quashed, the test to be applied by the Court was as to whether the uncontroverted allegations as made in the complaint prime facie establish the offence. It was also for the Court to take into consideration any special feature which appears in a particular case to consider whether it was expedient and in the interest of justice to permit a prosecution to continue. This was 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 are bleak and therefore, no useful purpose was 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 proceedings even though it may be at a preliminary stage."***

Learned Senior Counsel also placed reliance upon the decision of Hon'ble Supreme Court in ***Parbatbhai Aahir vs. State of Gujarat,*** (2017) 9 SCC 641. The relevant extracts of the judgment are reproduced hereinbelow:

> ***"11. Section 482 is prefaced with an overriding provision. The statute saves the inherent power of the High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court, or (ii) otherwise to secure the ends of justice."***

5. On the other hand, learned Additional Advocate General has argued that legislative intend behind the enactment of the Act is to curb the sex determination in the Country, as numerous cases of sex determination and thereafter abortion of female foetus are coming into existence. He has further argued that the statement of the victim is reliable and trustworthy and made during the course of investigation, further the complainant was not having any enmity with the petitioner. He has argued that as per of the FSL report, the Ultrasound Machine seized/recovered is capable to perform Sex Determination Test. Further the Machine was without storage disk, thus it cannot be said that prior to seize the Machine, how many Ultrasounds were already performed. Learned Additional Advocate General in support of his arguments has placed reliance upon Section 3(a) of PC and PNDT Act, 1994, which provides as under:

> "***3A. Prohibition of sex-selection – No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them."***

Learned Additional Advocate General has further argued that no record regarding conducting of ultrasonography on a pregnant woman was kept by the petitioner in his clinic, as provided, under Section 4(3) of PC and PNDT Act, 1994. Lastly, learned Additional Advocate General has argued that as *prime facie* case is against the petitioner, the present is not a fit case where inherent power, under Section 482 Cr.PC, is required to be exercised in his favour and the present petition deserves to be dismissed.

6. In rebuttal, learned Senior Counsel has argued that the inspection of the clinic of the petitioner was being conducted by the expert every month and further record shows that no

Sex Determination Test was carried out by the petitioner, so the present petition deserves to be allowed and the charge framed against the petitioner may be quashed and set aside.

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

8. At the very outset, it is seen that on 11.05.2014, the victim has made a complainant to the Police, on the basis of which, the case was registered against her husband and mother-in-law, thereafter the complainant made a statement before the learned Magistrate, under Section 164 Cr.PC, wherein she has stated that her marriage was solemnized with Susheel Kumar on 26.11.2004 and when she conceived first girl child, instantaneously thereafter, her mother-in-law started torturing her physically and mentally, even her husband started maltreating her. When second girl child was born to the victim, her husband and mother-in-law started pressurizing her to conceive pregnancy again, so that male child can born and when she was two and half months pregnant, they took her to a *"Daai",* who after giving massage to her disclosed that the foetus is male. Thereafter, when the victim was three months pregnant, her husband and mother-in-law took her to the clinic of Dr. R.D. Sharma/petitioner, who got conducted Sex Determination Test of her foetus and disclosed that the foetus is girl. When her mother-in-law came to know that the child is girl child, she forced her to abort the foetus. As per the victim, on 9th May, 2014, her husband and mother-in-law gave leg blows to her on her stomach, due to which she got unconscious and fell down on the floor. After regaining conscious, when she asked them to take her to the hospital, no person of her family took her to the hospital. Thereafter, she made a telephonic call to Barmana Police, who took her to the Government Hospital, where her ultrasound was conducted and it was opined that the foetus has died. It is further submitted by the victim in her statement that on 10th May, 2014, on assurance of the Police, she has entered into a compromise with her husband and in the morning of 12.05.2014, she went to private Hospital for ultrasound, whereby it was disclosed that the foetus has died due to beatings. Thereafter, her in laws took her to PGI, Chandigarh for abortion, wherefrom she was taken to Panchkula and her abortion was got conducted and after taking all reports with them, they left the victim to her mother's house.

9. From the above statement of the victim, it is clear that when she was three months pregnant, her husband and mother-in-law took her to the clinic of Dr. R.D. Sharma (petitioner) where they forcibly got conducted her Sex Determination Test and the Doctor disclosed them that the foetus is girl. This clear statement of the victim, coupled with the other evidence which has come on record that thereafter husband and mother-in-law of the victim gave beatings to her on the lower portion of the stomach, due to which foetus has died. To this aspect the report of Regional Hospital, Bilaspur is very clear. The above mentioned act shows that the husband and mother-in-law of the victim were not wanted third girl child and for this purpose they gave beatings to the victim, so that the third girl child cannot take birth and all that has happened after the petitioner got conducted the Sex Determination Test of the victim and opined the foetus to be girl child.

10. This Court has also seen the literature enclosed by the petitioner alongwith his petition and gone through the arguments of learned Senior Counsel *"that nothing can be said with 100% precision even after 25 weeks of pregnancy about the sex of foetus,"* but the arguments of the learned Senior Counsel are without any significance when the petitioner after three months disclosed the husband and mother-in-law of the victim that the foetus is girl and that too after conducting sonography test. Figure (E) of the literature, **Annexure P-13**, enclosed with the petition, provides that *"the fetal scrotum and penis are noted at 18 weeks of gestation".* Meaning thereby that after 18 weeks even penis of the foetus can be detected and there is nothing in the literature to show that after 13 weeks sex cannot be determined. So, this Court finds that the petitioner after determining the Sex Determination Test of the victim, informed her husband and mother-in-law about the foetus. Therefore, the petitioner has *prime facie* committed an offence, under Section he is charged with.

11. Now coming to the law as cited by the learned Senior Counsel, this Court finds

that at this moment, there is *prime facie* case against the petitioner and it cannot be said that chances of ultimate conviction of the petitioner are bleak. So, the law laid down by the Hon'ble Supreme Court in ***Bobbili Ramakrishna Raja Yadad and others vs. State of Andhra Pradesh,*** (2016) 3 SCC 309, is not applicable to the facts of the present case. Further the proceedings against the petitioner are in order to secure the ends of justice, as the statement of the victim is unequivocal, therefore, it cannot be said that there is any abuse of the process of the Court. Thus, the law laid down of the Hon'ble Supreme Court in ***Parbatbhai Aahir vs. State of Gugarat***, (2017) 9 SCC 641, cited by the learned Senior Counsel (supra), is also not applicable to the facts of the present case.

12. In view of the aforesaid discussions, this Court finds that prime facie case at this moment is against the petitioner and the charge framed by the learned trial Court is in accordance with law and present case is not a fit case where powers under Section 482 of the Code of Criminal Procedure are required to be exercised in favour of the petitioner.

13. The net result of the above discussion is that the present petition is devoid of any merits, deserves dismissal and is accordingly dismissed. Registry is directed to send the records of the present case henceforth. Parties to appear before the learned trial Court on ***20th March, 2018***.

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

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

United India Insurance Company Limited. .....Appellant.

Versus

Shani & others ....Respondents.

FAO No. 335 of 2015.
Reserved on : 6th March, 2018.
Decided on : 12th March, 2018.

Motor Vehicles Act, 1988- Motor Accident Claims Tribunal- Insurance cover note executed by the company w.e.f. 14.6.2010 at 3:00 P.M. – The ill fated accident occurred on the same day at about 3:50 p.m. – Reiterating the ratio laid down in ***New India Assurance Co. Ltd. Versus Sita Bai (Smt.), (1999) 7 SCC 575***- **Held-** that since the insurance police itself reflected the recital relating to date/time of the commencement of the policy, which admittedly was 14.6.2010 after 3:00 p.m.- Insurance Company was liable to indemnify for the liability, as the accident had took place at 3:00 p.m.- consequently, appeal dismissed and award passed by the learned MACT upheld. (Para-2)

Cases referred:

Oriental Insurance Company ltd. vs. Dharam Chand and others, 2010, ACJ 2659

New India Assurance Co. Ltd. Versus Sita Bai (Smt.), (1999)7 SCC 575

For the Appellant:	Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeewan Kumar, Advocate.
For Respondents No. 1 to 2 :	Mr. Naresh Kumar Sharma, Court Master, as court Guardian.
For Respondents No.3 to 6:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle is aggrieved, by the fastening, of, the apposite indemnificatory liability, upon it, by the learned Motor Accidents Claims Tribunal-III, Una, vis-a-vis the compensation amount, assessed, under impugned award, in favour of the claimants.

2. The ill fated accident, involving, the offending vehicle, occurred on 14.06.2010 at about 3.50 p.m. An insurance cover note executed qua it inter se the owner thereof, and, the insurance company concerned, is comprised in Ex. Rx, wherein, the date of execution thereof is recited, as 14.06.2010 and the time of its issuance is recited as 3.00 p.m. The learned Tribunal concerned relied, upon, a decision rendered by a coram of two Hon'ble Judges, of the Hon'ble Apex Court, reported in ***2010, ACJ 2659, titled as Oriental Insurance Company ltd. vs. Dharam Chand and others***, (i) wherein, it has been held that given the cheque for the premium amount being received by the company, at 4.00 p.m. on 7.5.1998, it rendered valid, the imposition of fastening of liability vis-a-vis the compensation amount, upon, the insurance company, (I) dehors recitals occurring, in column No.3 and 4 of the apt cover note qua the commencement of the policy, being recoknable from 8.5.1998, hence, a day subsequent to the accident. The learned counsel appearing for the insurance company, has contended, on strength of a verdict, rendered by Hon'ble three Judges Bench, of the Hon'ble Apex Court, reported in ***(1999)7 SCC 575, titled as New India Assurance Co. Ltd. Versus Sita Bai (Smt.)*** and others, relevant paragraphs No.4, 5, 6 and 7 whereof are extracted hereinafter:-

> "4. The proposal for insuring the vehicle in question was made by the owner of the vehicle on 16.4.1987 at 2100 hours. The cover note was issued by the appellant in respect of that vehicle, being No.P/703802 on 16.4.1987 at 2100 hours. The Insurance Policy (Exh. P-5) was later on issued in which also the date of commencement of the insurance policy was recorded as 16.4.1987 (2100 hours). The accident, in question, in which Smt. Salta Bai received fatal injuries had admittedly occurred at 10.00 A.M. on 16.4.1987. i.e., much before the commencement of the insurance policy.
>
> 5. The High Court opined that the insurance policy dated 16.4.1987 covered the period of the accident also because the policy would be deemed to have commenced at midnight of 15.4.1987 and 16.4.1987. The High Court in taking this view relied upon the judgment in Ram Dayal's case, (1990)2 SCC 680.
>
> 6. The correctness and applicability of the judgment in Ram Dayal's Case (Supra) came up for consideration before this Court subsequently in a number of cases. In New India Assurance Co. Ltd. v. Bhagwati Devi and Ors., (1998)6 SCC 534, a three-Judge Bench of this Court relied upon the view taken in National Insurance Co. Ltd. v. Jukubhai Nathuji Dabhi, 1997 (1) SCC 66), wherein it had been held that if there is a special contract, mentioning in the policy the time when it was bought, the insurance policy would be operative from that time and not from the previous midnight as was the Case in Ram Dayal's case, where no time from which the insurance policy was to become effective had been mentioned. It was held that should there be no contract to the contrary, an insurance policy become operative from the previous midnight, when bought during the day following, but, in cases where there is a mention of the specific time for the purchase of the policy, then a special contract comes into being and the policy because effective from the time mentioned in the cover note the policy itself. The judgment in Jikubhai's case (supra) has been subse-quently followed in Oriental Insurance Co. Ltd. v. Sunita Rathi & Ors., (1998)1 SCC 365 by a three-Judge Bench of this Court also.
>
> 7. In the fact situation of this case since the commencement of the policy at 2100 hours on 16.4.1987 was after the accident which had occurred at 1000 hours on 16.4.1987, the Tribunal as well as the High Court were wrong in burdening the

> appellant-Insurance Company, with any liability under Section 92-A of the Motor Vehicles Act by applying the law laid down in Ram Dayal's case, which, on facts, had no application to this case. This case is squarely covered by the judgment in Jikhubhai's case and the other judgments following it as noticed above. The impugned order against the appellant cannot thus be sustained. The same is hereby set aside. The appeal consequently succeeds and is allowed in so far as the appellant is concerned. No costs."

(ii) wherein, it stands vividly pronounced, (a) that the date of commencement, of, the insurance policy, elucidated in the cover note issued vis-a-vis the vehicle concerned, rendered the policy concerned, to thereat acquire binding force, or the relevant policy coming into force, only, from the date of its commencement, as, mentioned in the cover note concerned. He further contends, that, with Ex. Rx, exhibit whereof comprises, the cover note in pursuance, whereof the policy of insurance, hence, was issued, elucidating therein, 15.06.2010, to be the date/time, of commencement of the policy, (iv) whereas, with the relevant accident, occurring, a day earlier vis-a-vis, the date of commencement of the cover note, borne in Ex. Rx, hence, the apposite risk(s) contractually agreed to be covered by the Insurance company vis-a-vis the offending vehicle, not, falling within the ambit of Ex. Rx nor the apposite indemnificatory liability being fastenable upon the insurance company. However, the aforesaid submission addressed before this court, by the counsel, for the insurance company is anvilled, upon, his fragmentarily reading, paragraph No.4 and 5, of, Sita Bai's case (supra), (v) and from his remaining unmindful to the exception thereof, being carved in paragraph No.6 and 7 thereof, (vi) exception whereof, is comprised in the factum, of, the aforesaid rule existing in paragraphs No.4 and 5, of Sita Bai's case (supra), rule whereof comprises the tenet qua the reckonable date for concluding qua the timing of coming into force, of the policy of insurance, being the recited date, of, commencement thereof, especially in the cover note. Exception whereto being (a) of an apposite special contract, to the contrary, marked, by a recited date qua its purchase, rather, dehors the date of commencement thereof depicted, in Ex. Rx, being, the relevant date, for gauging the applicability, and, acquisition of force, of the relevant contract of insurance. Nowat with RW2, in his deposition, making, a disclosure, that, the insurance policy was issued, in pursuance, to Ex. Rx, thereupon, it has to be guaged from, Ex. Rx, exhibit whereof, is the apposite cover note qua (a) it embodying recitals vis-a-vis the time, of its purchase, (b) wherefrom, it can further be guaged qua the time, of, its being bought or purchased, thereafter wherefrom, it would erupt qua it containing, the date other than the one, of commencement, of policy concerned also whether date, if any, of purchase of the policy, hence, being a date prior to the occurrence of the ill fated accident, (c) whereupon, it can be concomitantly guaged, that, with the date of its purchase, being evidently prior to the, occurrence of the ill fated accident, hence, immediately on its purchase, it would acquire force, (d) hence occurrence of the relevant accident subsequent thereof, falling within its ambit also rendering valid, the imposition of the indemnificatory liability upon the insurance company. In making the aforesaid effort, with at the end of Ex. Rx, the date of its issuance being 14.10.2010, and, time of its issuance being 3.00 p.m. Consequently, the aforesaid recitals, occurring therein subsume the effects, of prior thereto recitals occurring therein qua date/time of the commencement of the policy, also it comprises a special contract to the contrary vis-a-vis the earlier thereto date/time mentioned in Ex. Rx, hence, renders it to fall within the ambit, of, paragraphs No. 6 and 7 of the Sita Bai's case (supra), (e) whereupon it is reiteratedly construable, to be purchased on 14.6.2010 at 3.00 p.m., whereupon, it acquirea force, from the date of its purchase , and, is also construable to be valid thereat. Consequently, the submission aforesaid, of the learned counsel appearing for the insurer, has no force and it is rejected accordingly.

3. The above discussion unfolds the fact that the conclusions as arrived by the learned tribunal are based upon a proper and mature appreciation of the relevant evidence on record. While rendering the findings, the learned tribunal has not excluded germane and apposite material from consideration.

4. For the foregoing reasons, there is no merit in the instant appeal and it is accordingly dismissed. 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 SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE, AJAY MOHAN GOEL, J.

Anil Chauhan alias Anu ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 338 of 2016
Judgment reserved on: 2.1.2018
Date of Decision : March 13, 2018

Code of Criminal Procedure, 1973- Section 374- Sections 452, 364, 376(2)(f) and 302 of the IPC- The accused convicted and sentenced under the aforesaid provisions- Appeal against the conviction and sentence- Appeal dismissed **holding**- that the Court must adopt a very cautious approach in appreciating the circumstantial evidence and such circumstances must be conclusive in nature, fully connecting the accused with the crime- All the links in the chain of circumstances must be established beyond reasonable doubt and the proved circumstances should be consistent only with the hypothesis of the guilt of the accused- On facts the narration of the independent witnesses held to be trustworthy, true and inspiring confidence, which were duly corroborated by the documentary evidence including the medical evidence- The plea of false implication was also held to be not probable. (Para-6 to 23)

Code of Criminal Procedure, 1973- Section 374- Sections 452, 364, 376(2)(f) and 302 of the IPC- The version of the eye witnesses supporting the prosecution held to be ably corroborated by the circumstantial evidence being the disclosure statement, it even resulting in the recovery of the body of the deceased- the ocular version and the documentary evidence, thus, ably corroborated by the circumstantial evidence clearly establishing the complicity of the accused- consequently, the conviction upheld- Appeal dismissed. (Para-24 to 30)

For the appellant : Mr. V.S. Rathour, Advocate, for the appellant.

For the respondent : Mr. Ashok Sharma, Advocate General with Mr. M.A. Khan, Addl. A.G. and Mr. J. K. Verma, Dy. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

Assailing the judgment dated 31.5.2014, passed by learned Addl. Sessions Judge-I, Shimla, H.P., in Sessions Trial No. 2-R/7 of 2013, titled as *State of H.P. vs. Anil Chauhan alias Anu,* whereby the accused stands convicted of the offences punishable under the provisions of Section 452, 364, 376 (2)(f) and 302 of the Indian Penal Code (hereinafter referred to as the IPC) and sentenced to undergo rigorous imprisonment for a period of 5 years and pay fine of Rs.5,000/- and in default thereof, to further undergo imprisonment for a period of six months for offence under Section 452 of the IPC; rigorous imprisonment for a period of 6 years and pay fine of Rs.10,000/- and in default thereof, to further undergo

imprisonment for a period of one year for offence under Section 364 of the IPC; life imprisonment and pay fine of Rs.10,000/- and in default thereof, to further undergo imprisonment for a period of one year for offence under Section 376(2)(f) of the IPC; and life imprisonment and pay fine of Rs.10,000/- and in default thereof, to further undergo imprisonment for a period of one year for offence under Section 302 of the IPC, he has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. In crux it is the case of the prosecution that on 23.7.2012, accused Anil Chauhan, after committing house trespass with an intent of causing hurt, not only assaulted complainant Rajinder (PW-1) and his wife Anita (PW-2) but forcibly took away their minor daughter, aged two and a half years (name concealed) and after committing sexual assault, murdered her. As such, accused stands charged for having committed offences punishable under the provisions of Sections 452, 364, 376(2)(f) and 302 of the IPC, to which he did not plead guilty and claimed trial.

3. The accused stands convicted on all counts and directed to serve the requisite sentence of imprisonment as also pay fine. Correctness of findings returned by the learned trial Court is subject matter of the present appeal.

4. We have heard Mr. V.S. Rathour, learned counsel, on behalf of the appellant as also Mr. Ashok Sharma, learned Advocate General, on behalf of the respondent-State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt.

5. From the evidence emanating from the record, it is clear that none saw the accused commit rape and kill the deceased. Such fact is sought to be established by the prosecution by way of circumstantial evidence. With regard to the offence of house trespass and kidnapping/abduction of the minor, prosecution seeks to establish the charge both by way of direct and circumstantial evidence.

6. It is a settled principle of law that prosecution has to establish the guilt of the accused beyond reasonable doubt and more so in relation to the charged offence which is sought to be established by way of circumstantial evidence. It is also a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence.

7. The charge of house trespass and abduction is sought to be established by direct evidence, through the testimonies of eye witnesses Rajinder (PW-1), Anita (PW-2), Meera Devi (PW-3) mother of the accused, who has not supported the prosecution and Hukam Singh (PW-4).

8. The charge of murder and rape is sought to be established by way of circumstantial evidence through the testimonies of Rajinder (PW-1), Anita (PW-2), Hukam

Singh (PW-4), Biru (PW-5) and Suchitra Devi (PW-13) and documentary evidence i.e. disclosure statement, memo of recovery and scientific evidence. Significantly all these persons are independent witnesses.

9. By way of medical evidence through the testimonies of Dr. Piyush Kapila (PW-9) and Dr. Dalip Sharma (PW-14) as also Const. Kuldeep Singh (PW-6) and Const. Karun Kishore (PW-18), prosecution has tried to corroborate such ocular evidence.

10. Record reveals that with the recording of 19 prosecution witnesses, statement of the accused under Section 313 Cr.P.C. was also recorded. Significantly not only from the admission made by him in such statement but also from the line of cross examination of the prosecution witnesses and the defence sought to be established through the testimonies of two witnesses, his wife Babli (DW-1) and brother Sushil Kumar (DW-2), factum of the presence of the accused, on the fateful night i.e. 23.7.2012 at 9.30 p.m., in a drunken condition, at the house of the complainant, stands admitted. He has taken a defence that while he was crossing the house of the complainant, he was given beatings with a danda, as a result of which he sustained injuries. Hearing the cries, his mother (PW-3), wife (DW-1) and brother (DW-2) reached the spot and took him away to his house. What happened thereafter is only a concocted story, for in the middle of night (at about 1.30 a.m.), police came and took him to the police station.

11. It is in this backdrop we proceed to examine the evidence led by the prosecution.

12. From the testimony of J. D. Bhardwaj (PW-10) it is evident that complainant Rajinder (PW-1) was employed by him. On 23.7.2012 at about 9.30 p.m., complainant called him on phone informing that the accused was quarrelling. On his asking, Anita made him speak with Babli (DW-1) who was requested to ask the accused not to indulge in such acts. Same night at about 10.15 p.m., he telephonically lodged the complaint at Police Station Rohru vide Rapt No. 42(A) (Ext. PW-19/A), informing that the accused was giving beatings to the complainant and his family members. Later on, complainant also informed that his daughter was missing. Now significantly there is no cross examination of the witness on this aspect. In fact, it would be fruitful to reproduce the exact cross examination part of his testimony which reads as under:

> "Anita informed me that Anil has consumed excessive liquor and due to that reason we are unable to control him. House of accused Anil is quite nearer to my house. Anita also informed me that they are trying to take Anil to her home".

13. Now this version stands corroborated by police officer SI Bhupender Pal (PW-19) who was posted as ASI Police Station, Rohru, who further states that alongwith other police officials, same night, he reached the house of the complainant where they found the accused to have been caught by three – four persons. Complainant (PW-1) got his statement under Section 154 Cr. P.C. (Ext. PW-1/A) recorded which led to the registration of F.I.R No. 73/2012, dated 24.7.2012 (Ext. PW-15/A) under the provisions of Section 364 IPC registered at Police Station Rohru, Distt. Shimla, H.P. Whereabouts of the missing girl were inquired from the accused who was detained under the supervision of HC Puran Chand (PW-16), but since accused did not disclose anything, police party went searching for the child. At about 4.30 a.m., police returned to the house of the complainant. The accused was sent for medical examination for the reason that there were stains of blood on his clothes. While in police custody, the following morning i.e. 24.7.2012, in the presence of independent witnesses Suchitra Devi (PW-13) – a Ward Member and Hukam Singh (PW-4), accused made a disclosure statement (Ext. PW-4/A) to the effect that after picking the deceased from the house of the complainant and after committing assault, threw her in the river at a place, of

which only he had knowledge and could get identified. Resultantly accused took the police and the witnesses to the spot and got recovered dead body of the deceased.

14. What really transpired in the house of the complainant stands narrated by witnesses. We now proceed to examine their testimonies.

15. As already observed, Babli (DW-1) and Sushil Kumar (DW-2), in their testimonies have already admitted not only their presence but also that of accused at the spot. According to these witnesses, accused who was totally drunk, was beaten up by the complainant and his wife and after hearing cries, they reached the spot and took him away. Babli states that after reaching house accused had sex with her and went off to sleep and Sushil slept in another room with his mother. Well we are not inclined to accept the version of these witnesses to be true, believable or probable, for none of the witnesses reported the matter either to police officials who were present on the spot or to the neighbours/public representatives/ authorities concerned. In fact, such defence stands taken for the first time only in Court. It is not that complainant was an influential person. Equally it is not their case that his employer, J. D. Bhardwaj (PW-10), had exercised or exerted any undue influence. In fact, it is not the suggested case of the accused that investigation was misdirected for having been conducted under the influence of any person or out of motivation and malice. One cannot ignore the fact that the complainants are not local persons. They are Nepali nationals and labourers. They had come to serve their master just seven months prior to the occurrence of the incident. Neither the complainant, nor his wife, much less their master, was harboring any animosity with the accused or his family members. The plea of false implication, in our considered view, is not well founded, much less probable.

16. Here we may also observe what the Doctor who conducted the medical examination of the accused had to state about the injuries on the body of the accused. Dr. Dalip Sharma (PW-14) testifies that on medical examination accused was smelling of alcohol. On medical examination, he found certain injuries on the body of the accused and that being, abrasion on the right arm, multiple abrasion on right elbow, abrasion on front of neck, as also injury on the penis which could be caused as a result of sexual intercourse. MLC (Ext. PW-14/B) stands duly proved by him.

17. Now when we notice the testimony of Dr. Piyush Kapila (PW-9) who conducted the post mortem of the dead body of the deceased, we notice him to have testified the deceased to have sustained the following injuries:

> "Face:
>
> 1. Pressure abrasion in an area of 3 X 1 cm on left zygomatic area, Pale yellowish to brown just below Left eye on lateral aspect, post mortem in nature.
>
> 2. Brown yellowish parchmentised pressure abrasion on upper eye lid on medial aspect, transverse, 1 cm X 0.2 cm postmortem in nature.
>
> 3. A linear pressure abrasion, transversely placed on left Lower mandibular margin, measuring 3 X 0.2 cm, Pale, Postmortem in nature.
>
> 4. 0.2 X 0.2 cm brownish yellow abrasion, 1 cm below outer aspect of Lower right eye lid, Postmortem in nature.
>
> 5. 1 X 0.2 cm yellowish abrasion on medial aspect of right eye over nasal area, postmortem in nature.
>
> 6. 1 X 0.2 cm yellowish, brown abrasion on right side of roof of nose just medial to inner right canthus, postmortem in nature.

Note: No injury was found on inner aspect of lips, frenulum or mucosa, however abrasion was present on upper lip (visible outside)."

Also following injuries were found on her private parts:

"Perineal Area: Blood fluid still oozing out of vagina and blood stains present on medial aspects of thighs and perineal area.

Gross abrasion reddish on inner aspect of Labia Minora alongwith reddish contusions as well as in Labia majora and adjoining vaginal opening.

Hymen ruptured at 6 O'Clock position with 2nd degree perineal tear, comprising of rupture of subcutaneous tissue, mucosa and skin of forchette almost reaching to upper margin of anus. Laceration measures 3 cm X 2 cm X muscle deep. Vaginal swab was taken for DNA profiling. 1 cm X 0.2 cm laceration was present skin deep on 6 O'Clock Position on Midline posterior to anal opening. All injuries mention in perineal region are antemortem in nature."

The post mortem report is Ext. PW-9/D. Dr. Kapila has categorically opined {(Ext. PZ) on application (Ext. PW-19/M)} that before her death, deceased was subjected to sexual intercourse.

18. We now examine as to what the complainant has to say about the events which took place on the spot.

19. Complainant (PW-1), who is a labourer, states that on 23.7.2012 at about 9 p.m., accused came to his house and after entering the kitchen, started abusing his wife (PW-2). When she went out, accused slapped her. Immediately she called for the family members of the accused who came and took him away. However on their asking, both he and his wife hid in the orchard. At that time, their daughter was sleeping inside the house. Soon, accused freed himself from his family members and after entering the room of their house picked her and went towards the river side. All this, they watched from the orchard. Soon thereafter he alongwith Biru and Kagu went to trace the girl when they met the accused near the river. At that time, the girl was not with him. Since she was not traceable, he informed his employer, who in turn, informed the police and same day police reached his house, where he got his statement (Ext. PW-1/A) recorded which was thumb marked.

20. The testimony of this witness is inspiring in confidence. We see no reason to disbelieve the version so narrated by him. We do not find his credit to have been impeached in any manner. He is a reliable witness. As already observed he had no reason to falsely implicate the accused or depose as such, in Court. The cross examination part of his testimony is only in the line of what we have discussed earlier. But what further, rather unrebuttedly, stands deposed by this witness in his cross examination, is that the accused was under the influence of liquor and that even his brother had gone to trace the deceased.

21. Even Anita (PW-2), wife of the complainant, has corroborated such version and we do not find her to have deposed falsely. Her credit also cannot be said to have been impeached in any manner. Chili cheese

22. At least, to such extent, the charge of the prosecution, with regard to the accused having entered the house of the complainant; abused his wife; slapped her and taken away the minor child from the house stands established by the ocular version of the witnesses. We have already noticed that such fact stands corroborated by their employer.

23. We may also observe that Meera Devi (PW-3), mother of the accused, stepped into the witness box but did not support the prosecution. She was declared hostile and cross examined by the Public Prosecutor. But however, unrebuttedly even she admits that

"*It is correct that we took with us Anil from the dera of Rejinder but Anil was reluctant to come with us*". ..... "*It is correct that after hearing noise of my son I along with my son and daughter in law reached near that septic tank"* and "*We took Anil with us as he was heavily drunken".* She states that only on the basis of suspicion, police and the complainant falsely implicated her son. In our considered view, this witness, does not shatter the prosecution case, in any manner. Her version that the complainant and his wife were giving beatings to the accused with danda and rod and that the accused fell down near the septic tank and sustained injuries, is not believable. We discount such version, for the matter not having brought to the notice of anyone. It is an afterthought. She has not deposed truthfully. In fact, feigns ignorance about certain facts. Though she states that after taking the accused home, she bolted the room and went off to sleep, but, does not remember as to when the police came. Now this version is totally unbelievable, in fact, stands belied through the testimony of Sushil Kumar (DW-2), according to whom he was sleeping with his mother and when the police came, he opened the door and at that time they took the accused to the spot.

24. Version of such of the eye-witnesses who have supported the prosecution, stands corroborated by circumstantial evidence, that being the disclosure statement (Ext. PW-4/A) recorded by SI Bhupinder Pal (PW-19) in the presence of Hukam Singh (PW-4) and Suchitra Devi (PW-13). Both the independent witnesses are local residents and did not harbour any animosity against the accused. They have testified about the disclosure statement to the effect that after committing sexual assault on the minor, accused killed her and threw her dead body in the river. We can take notice of the fact that river is not adjacent to the house of the complainant. It is at a distance and the child could not have walked to the place where the dead body was recovered. The child did not die as a result of drowning but as a result of shock and hemorrhage. The accused took the police and the witnesses to the place of crime and got recovered the dead body, proceedings in relation thereto, were got prepared and proven as Ext. PW-4/B).

25. Statements of independent witnesses as also police officials with regard to such circumstance are totally believable and inspiring in confidence. Suchitra Devi is categorical that in the police station accused made disclosure statement (Ext. PW-4/A) and thereafter got the body recovered. None knew about the place where the dead body was lying. To similar effect is the statement of Hukam Singh.

26. The Investigating Officer SI Bhupender Pal (PW-19) states that for DNA profiling, opinion of the expert was obtained. As per opinion of the expert (Ext. PX) who conducted the DNA test, samples of blood of the deceased found on clothes (Exhibit-4a & Exhibit-4b), vaginal swab (Exhibit-5), belongings of the deceased (Exhibit-6), matched with the DNA profile of blood found on the clothes (Exhibit-12a, Exhibit-12b, Exhibit-12d) worn by the accused. Testimony of police officials on the issue of collection of incriminating articles and case property and after sealing having kept the same in safe custody and not tampered at all, till the time of deposit at the FSL Junga, stands duly established by the Investigating Officer (PW-19), HC Amrit Singh (PW-8) and Const. Karun Kishore (PW-18). We need not elaborately discuss their testimonies, for such fact is seriously not disputed before us.

27. Thus, the ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

28. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offences he stands charged for.

There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. It cannot be said that the accused is innocent or not guilty or that he stands falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

29. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence that accused Anil Chauhan after committing house trespass with an intent of causing hurt, not only assaulted complainant Rajinder and his wife Anita, but forcibly took away the deceased, a minor aged two and a half years and after committing sexual assault, murdered her.

30. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed.

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

Records of the Court below be immediately sent back.

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

Bhupinder Singh ...Appellant.

Versus

Gola Devi & Ors. ...Respondents.

RSA No.444 of 2005.
Reserved on: 27.2.2018.
Date of Decision : 13.3.2018.

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Order 22 Rule 6- Held- that in case the death took place in between the time, arguments were heard and the judgment was pronounced, the judgment will have the same force and effect, as it had been pronounced before the death took place. (Para-8)

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Order 22 Rule 6- Will- An unregistered Will purported to have been made three days prior to the death of the testator and executed on 17.11.1991, set up against a registered Will executed about 15 years earlier i.e. 16.12.1976 – **Held** - to be shrouded in mystery as the defendants themselves first submitting the registered will and thereupon submitting the unregistered Will dated 17.11.1991- Apparently the second Will was prepared by the defendants after the death of the executants- The recital in the unregistered Will also held to be doubtful as there was no vacant space between writing and signatures of the testator and the witnesses- The entries in the rapat roznamcha Ex.PW-2/A also falsifying the very existence of the unregistered Will- The un-explained late production of the unregistered Will also held be another suspicious circumstance surrounding the genuineness and due execution of the unregistered Will- Consequently, defendants were held to have failed to

prove the subsequent unregistered Will- The findings recorded by the Learned Trial Court and the 1st Appellate Court affirmed and the property was held to have been rightly succeeded intestate by the parties, as directed by both the courts below. (Para-11)

For the appellant — Mr. Sanjeev Kuthiala, Advocate.
For the respondents — Mr. Ajay Sharma, Advocate, for respondent No.1.
Respondent No.2 stands deleted.
Mr. Karan Singh Kanwar, Advocate, for respondents No.3 to 6.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

By way of the present appeal, the appellant has challenged the judgment passed by the Court of learned District Judge, Kullu, in Civil Appeal No.60 of 2004, dated 18.6.2005, vide which, the learned lower Appellate Court, has affirmed the judgment and decree passed by the learned Civil Judge (Senior Division), Lahaul & Spiti at Kullu, in Civil Suit No.20 of 1999, dated 3.6.2004.

2. Material facts necessary for adjudication of this Regular Second Appeal are that plaintiff/respondent (hereinafter referred to as 'plaintiff') maintained a suit for declaration against the defendant/appellant (hereinafter referred to as 'defendant') alleging that plaintiff-Shauni Devi, is owner-in-possession of land comprised in Khata No.671, Khatauni No.1258, Khasra Nos.1468, 1452, 1469, 1507, 1467, 1599 and 5096, kita 7, measuring 20-7-0 bighas and 1/6th share measuring 1-1-7 bighas, out of land comprised in Khata No.672, Khatauni No.1259, Khasra No.1466, measuring 6-10-0 bighas, situated in Phati Nathan, Kothi Naggar, Tehsil and District Kullu, (H.P) (hereinafter referred to as 'suit land') and on the basis of last Will dated 16.12.1976 executed by her husband, Chande Ram, as a result of which, mutation No.4194 and 4174 in favour of the defendants are illegal and void. As per the plaintiff, Shauni Devi, was legally wedded wife of Chande Ram and Gola Devi, was her daughter. At the very outset, the pedigree table of Chande Ram, is as under :

PEDIGREE TABLE

Chande Ram

Nanki Devi (1st wife dead)	Shauni Devi (2nd wife now dead) (plaintiff)	
|	|	Gola Devi
Mine Ram (defendant No.1	Mohar Singh (dead)	Him Dassi (defendant No.2)
	|	

Surinder Singh (defendant No.6)	Karan Singh (defendant No.3)	Virender Singh (defendant No.4)	Devender Singh (defendant No.5)

Defendant No.1-Mine Ram and Mohar Singh husband of defendant No.2 and father of defendants No.3 to 6, were sons of Chande Ram, from his earlier wife, namely, Nanki Devi, who had died long back before the marriage of Shauni Devi-plaintiff with Chande Ram. Gola Devi, was married during the life time of Chande Ram and after her marriage, she is residing in the house of her husband, Moti Ram. Chande Ram, during his life on 16.12.1976 executed Will in favour of Shauni Devi-plaintiff, defendant No.1 and Mohar Singh. Chande Ram, bequeathed all

his cash in favour of defendant No.1 and Mohar Singh, in equal share and rest of the movable and immovable property including the suit land and *abadi* land etc. were bequeathed in favour of the plaintiff, defendant No.1 and Mohar Singh in equal share. After the death of Chande Ram, the suit property was inherited by the plaintiff-Shauni Devi, defendant No.1 and Mohar Singh in equal share, as a result of which, plaintiff became owner-in-possession of the suit land to the extent of 1/3rd share. Plaintiff-Shauni Devi being legally wedded wife of Chande Ram, had pre-existing right of maintenance out of the suit land and by virtue of the alleged Will 1/3rd share was bequeathed by Chande Ram in favour of the plaintiff-Shauni Devi in recognition of her pre-existing right of maintenance. Plaintiff-Shauni Devi was an illiterate, simpleton and rustic village lady and defendant No.1 and his brother Mohar Singh, after the death of Chande Ram, disclosed that mutation, has been attested and sanctioned on the basis of last Will dated 16.12.1976 in their names as well in the name of Shauni Devi. Mohar Singh, died on 26.6.1992 and has been succeeded by defendants No.2 to 6. Defendants No.1 to 6 in the first week of November, 1998 threatened to dispossess the plaintiff from her 1/3rd share in the suit land proclaimed that plaintiff had no right, title or interest in the suit land. On the basis of said proclamation, she made enquiries from Patwari concerned and came to know that mutation has not been entered and attested on the basis of last Will dated 16.12.1976, but the same has been wrongly and illegally attested in favour of defendant No.1 and Mohar Singh to the exclusion of plaintiff-Shauni Devi, on the basis of unregistered Will, dated 17.11.1991, purportedly to have been executed by Chande Ram in favour of defendant No.1 and Mohar Singh. The alleged Will is a forged and fabricated document. The same has been fabricated by defendant No.1 and Mohar Singh, after the death of Chande Ram, in connivance with the scribe and marginal witnesses with an ulterior motive to grab her (plaintiff's) share in the suit land. Mutation No.4194, which has been sanctioned on the basis of alleged Will, is illegal and inoperative.

3. Defendants No.1 to 6 filed their joint written statement by raising preliminary objections qua limitation, estoppel, maintainability and valuation. On merits, plaintiff is admitted, as widow of late Chande Ram. The factum of execution of Will dated 16.12.1976 by Chande Ram, is also admitted. It is pleaded that plaintiff being second wife of Chande Ram and step mother of the defendants was not interested in the defendant to get their share out of estate left by their father Chande Ram. The Will dated 16.12.1976, is the result of undue influence. Chande Ram was not happy with the acts and conduct of plaintiff, as she used to forced him to deprive the defendants of his estate. Chande Ram, deposited Rs.76000/- in State Bank of India, Katrain Branch and an amount of Rs.14,000/- in Post Office Larankelo, in the name of plaintiff in lieu of her maintenance. Defendant No.1 Mine Ram and Mohar Singh, predecessor-in-interest of defendants No.2 to 6 used to serve their father Chande Ram and in lieu of such services rendered by them, Chande Ram, out of his free volition executed his last Will dated 17.11.1991 by revoking earlier Will dated 16.12.1976. Defendant No.1 Mine Ram and Mohar Singh were burdened with maintenance of Rs.200/- to the plaintiff. The mutation was rightly attested in their names, on the basis of last Will dated 17.11.1991 and as such, they are owner-in-possession of the suit land.

4. From the pleadings of parties, the learned trial Court framed following issues :

"1. Whether the Will dated 16.12.1976 executed by deceased Chande Ram in favour of parties is last and valid Will of the deceased ? OPP.

2. Whether the deceased Chande Ram had executed a last and valid Will dated 17.11.1991 in favour of defendant No.1 and Shri Mohar Singh, the predecessor-in-interest of defendants No.2 to 6 ? OPD.

3. Whether the suit is within limitation ? OPP.

4. Whether the plaintiff is estopped by her act and conduct from filing the present suit ? OPD.

5. Whether suit is not maintainable ? OPD.

6. Whether suit is not properly valued for the purpose of Court fee and jurisdiction ? OPD.

7. Relief".

5. The learned trial Court after deciding Issues No.1, 2 in negative, Issue No.3 in affirmative, Issues No.4 & 5 in negative, Issue No.6 not pressed, decreed the suit.

6. Feeling aggrieved thereby the defendants maintained first appeal before the learned District Judge, Kullu, assailing the findings of learned Trial Court below being against the law and without appreciating the evidence and pleading of the parties to its true perspective. The learned lower Appellate Court affirmed the findings of the learned Court below. Now, the appellant has maintained the present Regular Second Appeal, which was admitted for hearing on 27.4.2006 on the following substantial questions of law:

" 1. Whether the suit was barred by time when instituted ?

2. Whether the "suspicious circumstances" noticed by the Courts below are real and, if so, do they make the execution of the Will, Ex.DW4/A, doubtful?"

7. Learned counsel appearing on behalf of the appellant has argued that the judgment and decree passed by the learned Trial Court on 3.6.2004 and defendant No.1-Mine Ram, died on 2.6.2004 and as per the Grounds of Appeal taken in the Regular Second Appeal, the appeal is required to be remanded back to the learned Trial Court to decide this question. On the other hand, learned counsel for the respondent has argued that there is no need to remand the present Regular Second Appeal.

8. I have considered the entire record carefully. The arguments before the learned Trial Court in the present case was heard on 29.5.2004 and thereafter, the judgment was reserved and it was listed for judgment on 1.6.2004, however the judgment could not be pronounced on 1.6.2004 and the same was pronounced on 3.6.2004. As far as the death of the party, during the pendency of case is concerned, the legal representatives are required to be brought on record, but there is a specific exception, provided under Order 22 Rule 6 of the Code of Civil Procedure, which is reproduced as under:

"6. No abatement by reason of death after hearing- Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if had been pronounced before the death took place."

The clear reading of this Rule shows that if the death took place in between the time, arguments were heard and judgment to be pronounced, the same will have the same force and effect, as if it had been pronounced before the death took place. In view of the clear provision, as contained in the Code of Civil Procedure, there is no need to go further, so this Court holds that death of Mine Ram-defendant No.1, on 2.6.2004 has no effect and it will be presumed that the judgment and decree passed by the learned Trial Court before the death of Mine Ram-defendant No.1 took place.

9. Learned counsel appearing on behalf of the appellant has now argued that the learned Trial Court has no occasion to discard the Will, as it was set out by the defendant, as the defendant has proved on record the Will in accordance with law, which was in their favour. He has further argued that the judgment and decree passed by the learned Trial Court and the findings so recorded by the learned lower Appellate Court against the appellant are required to be set aside. On the other hand, learned counsel appearing on behalf of the respondent has vehemently argued that there were two Wills and the earlier Will was a registered Will, which was executed in favour of three persons and the Will of defendants is unregistered Will, which infact

has been prepared after the death of the executant, as it is unregistered Will replacing the registered Will. Therefore, after the death of the executant, it is the defendant, who has placed the registered Will before the Revenue authorities for its mutation. However, the learned Courts below have not relied upon any of the Will and so, the Will, which was earlier registered, has also been set aside, which was in favour of the plaintiff and the plaintiff has not assailed the same before the learned lower Appellate Court.

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

11. At the very outset, the Will on which the defendants are relying is prepared, on a plain paper just few days before the death of executant because as per executant law has changed after the execution of the earlier Will and so, he is executing fresh Will. Now, this Will is required to be analyzed alongwith the facts. As far as the witnesses is concerned, the Will was handed over to the defendant and act of the defendant in not producing the Will, after the death of executant before the Revenue authorities and producing the earlier registered Will, which was in favour of the plaintiff shows that second Will was prepared by the defendants after the death of executant. Thereafter, the defendant producing unregistered Will, which was later in time, the Will in dispute prepared on a plain paper and the same is unregistered Will. Chande Ram was having two wives and the plaintiff-Shauni Devi, is second wife and her daughter and the defendants are offerings his wife Nanki Devi. PW-2-Ved Parkash, proved on record Ex.PW2/A and Ex.PW2/B, copies of rapat No.466, dated 19.7.1992 and rapat No.150, dated 30.12.1991, respectively, which shows that both Will (s) were produced by the defendant before the Revenue authorities, earlier they produced the registered Will and thereafter unregistered Will, which was only in their favour, which creates a serious doubt regarding unregistered Will, which was later in time and so, the same seems to be prepared after the death of executant and the same Will is inexistence earlier, the defendant have produced the Will only before the Revenue authorities and not the registered Will, which was in their favour plaintiff 's also. Defendant No.1-Mine Ram, appeared as DW-7, deposed that Chande Ram was his father. The unregistered Will dated 17.11.1991 was executed by Chande Ram in the presence of marginal witnesses, namely, Bhawani Singh and Jai Chand. Such Will was scribed by Baldev Krishan, on the behest of Chande Ram. After writing the Will, the same was read over to the testator. Chande Ram admitted its contents to be correct and signed the same in the presence of witnesses, who signed the Will in the presence of executant. In his cross-examination, he has admitted that plaintiff-Shauni Devi and Chande Ram, lived together till the death of the latter. He denied that the Will Ex.DW4/A, has been prepared by them after the demise of Chande Ram. He does not know Mohar Singh had lodged a report with the Patwari with respect to the Will. Mine Ram (DW-7) produced the Will before the Patwari one week after the death of Chande Ram. He denied that the Will Ex.DW4/A has been fabricated by them with a view to usurp the share of the plaintiff. Ex.DW4/A, is the original unregistered Will dated 17.11.1991 allegedly executed by Chande Ram in favour of his sons. It was scribed by Baldev Krishan (DW-4) whereas Jai Chand (DW-5) is one of its marginal witnesses. DW-5, Jai Chand, after the Will was written, Chande Ram, handed over to his son Mohar Singh. He admitted that the plaintiff resided with Chande Ram till his end and served him. He admitted that the plaintiff and her daughter were not present at the time of attestation of mutation. The Will was written much earlier to the death of Chande Ram. DW-6, Chuni Singh, deposed that when the mutation on the basis of Will was sanctioned, the plaintiff and her daughter were present. However, they did not raise any objection in his presence. In his cross-examination, he has stated that the learned counsel of both the parties were also present at the time of mutation. There is no denial of the fact that a registered Will was executed way back in the year 1976 by Chande Ram in favour of his wife and sons i.e. defendant No.1 and Mohar Singh. The alleged Will came into existence just three days prior to the death of Chande Ram. There was no reason or occasion for the deceased to cancel a long standing registered earlier Will and execute an unregistered Will to supersede the same. It has come in evidence that Shauni Devi-plaintiff resided with Chande Ram and rendered the services till his end. Therefore, there was no reason for the deceased to ignore the plaintiff particularly when she was living with him

and serving him. DW-4, Baldev Krishan, scribe of the alleged Will stated that Dambu Ram son of Mohar Singh, had come to call him for writing the Will. Further, DW-5-Jai Chand, during his cross-examination stated that after the Will Ex.DW4/A was written, it was handed over by Chande Ram to his son Mohar Singh. Ex.PW2/B, copy of rapat No.150, dated 30.12.1991, discloses that Mohar Singh went to the Halqua Patwari and produced registered Will dated 16.12.1976 before him for entering the mutation. Accordingly, mutation No.4194 was entered. This report was lodged by Mohar Singh after the alleged Will dated 17.11.1991 had seen the light of the day. If Chande Ram, infact executed the Will Ex.DW4/A and delivered it to his son Mohar Singh, then why the latter did not divulge the said fact before the Patwari at the time of lodging the report Ex.PW2/B. The Will Ex.DW4/A has been prepared by the defendants after his (Chande Ram's) death. DW-4 Baldev Krishan, scribe has admitted that spacing between signature of Chande Ram and words "*Basiyat Karta*" is larger, but refuted that the signature of deceased were already there on the paper. He has refuted that the signature of Chande Ram were obtained earlier than the writing of said paper. He has admitted that there is no vacant space between writing and signature of witness. If the Will Ex.DW4/A is perused, it definitely points out unnecessary and unexplained spacing between writing "*Basiyat Karta*" and signature of testator appended thereon, due to which, it could not be ruled out that signatures were obtained on a blank paper. The mutation No.4194, Ex.DA, came to be entered on the basis of Will dated 16.12.1976 and consequent rapat Ex.PW2/B, but the said mutation came to be attested and sanctioned on 10.12.1992 at place Laran Kelo, defendant No.1 produced unregistered Will dated 17.11.1991. The presence of Shauni Devi-plaintiff and her daughter Gola Devi has also been recorded. Chuni Lal, Numberdar, Jai Chand (DW-5) and Bhawani Dutt, have also been present. Mine Ram, produced unregistered Will dated 17.11.1991. Shauni Devi-plaintiff and Gola Devi raised objection and termed unregistered Will Ex.DW4/A, as illegal and forged one. DW-6 Chuni Lal, Numberdar, who was marked present in mutation Ex.DA, while appeared, as a witness has deposed that at the time of attestation of mutation on the basis of Will Shauni Devi and Gola Devi were present there, but they did not raise any objection. The said version of DW-6, is clearly against the recital made in mutation Ex.DA, which is relied upon by none else, but by the defendants and the recital made in the order Ex.DA by the learned Assistant Collector 2nd Grade, Kullu, renders the testimony of DW-6, as untruthful. Even, he has admitted that Chander Mohan Thakur, learned counsel, was present there on behalf of Shauni Devi-plaintiff. Similarly, DW-5 Jai Chand one of the attesting witness, who is also shown to be present at the time of attestation of mutation Ex.DA, in his cross-examination has stated that mutation was attested and sanctioned in his presence. He has admitted that Shauni Devi was also present at the time of attestation and sanction of mutation and also admitted that daughter of Shauni Devi was also present at the time of attestation and sanction of mutation, but they did not raise any objection to the attestation of mutation. In mutation Ex.DA, shows that DW-4 Baldev Krishan, was also present on the spot at the time of attestation of mutation, but when he appeared as DW-4, he has not testified as such. DW-7, in his cross-examination has refuted that Will Ex.DW4/A is forged one. He has stated that Will Ex.DW4/A was handed over by him to Patwari in the year 1991. The said fact is falsified by the entries made in rapat rojnamcha Ex.PW2/A and mutation Ex.DA. Had the said Will been produced by the defendant No.1 before Patwari in the year 1991, definitely rapat in rojnamcha would have been made in the same year, but rapat rojnamcha Ex.PW2/A was made on 19.7.1992 and on the basis of said rapat unregistered Will Ex.DW4/A was produced by defendant No.1 on 19.7.1992. The said facts leading to attestation and sanction of mutation and unexplained late production of Will Ex.DW4/A is one more suspicious circumstances, which shrouds the genuineness and due execution of Will and propounder of the Will i.e. defendants have failed to explain the same. The alleged Will Ex.DW4/A is stated to have been executed on 17.11.1991. Chande Ram, died on 20.11.1991 i.e. after short time from the date of execution of the alleged Will. DW-5, Jai Chand, has stated that Chande Ram was ill. The registered Will was executed on 16.12.1976. There is no evidence on record to show that his relation with Shauni Devi was strained, but to the contrary it has come in evidence that she was also maintaining deceased Chande Ram. The registered Will was not revoked by him for a period of about sixteen years and he never thought in terms of revoking the same till three days prior to his death.

Shauni Devi, original plaintiff was the second wife of deceased Chande Ram and she resided with him. The said reason to debar her is not plausible and reasonable. As per condition of alleged Will Ex.DW4/A, the defendants were required to make payment of Rs.200/- each per month to Shauni Devi. The defendants have produced in evidence money order receipts Mark **A** to Mark **F** and money order form Ex.DW2/A to Ex.DW2/F. All money orders of Rs.600/- each are shown to have been sent on the same date i.e. on 15.6.1993 i.e. after the attestation of mutation Ex.DA and the dispute arose between the parties, which clearly shows malafide on behalf of the defendants that they wanted to pretend that were complying with the terms and conditions, as mentioned in Ex.DW4/A, but it cannot be ruled out in view of the said facts that the alleged Will Ex.DW4/A was manipulated by them after the death of Chande Ram and the said circumstances surrounds the due and proper execution of Will in question. The inheritance cannot be kept in abeyance. Neither due execution of Will Ex.PW3/A nor of Will Ex.DW4/A by Chande Ram has been proved, hence he would be deemed to have died intestate and the learned Trial Court has rightly held that his legal heirs would succeed to his estate in view of the intestate succession. Till the death of Chande Ram, he was owner-in- possession of the suit land and property. He died on 20.11.1991. The suit has been maintained on 6.1.1999. Nothing could be shown on behalf of the defendants, as to how the suit is barred by limitation. As far as the registered Will is concerned, original Will was not brought on record nor there was any secondary evidence led. So, the findings recorded by the learned Trial Court regarding not believing the same cannot be said to be perverse. At the same point of time, the findings recorded by the learned Trial Court regarding the Will Ex.DW4/A, the same cannot be a genuine document and the same is forged one, as per the evidence, which has come on record. Accordingly, substantial question of law No.1, as framed by this Court, is answered holding that the Will was assailed at the earliest, as discussed hereinabove, when the defendants started asserting their exclusive right on the suit land and the plaintiff came to know about the forged act of the defendants immediately she maintained the suit, so the suit is within limitation and the suit cannot be termed as time barred. The suspicious circumstances noticed by the learned Courts below are real one and Will Ex.DW4/A, is a forged and fabricated document prepared after the death of executant and so, substantial question of law No.2, is answered accordingly. Both the learned Courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by both the learned Courts below.

12. In view of the above discussion, the appeal of the appellant is without merit, deserves dismissal and is accordingly dismissed. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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

New India Assurance Company ...Appellant.

Versus

Smt. Seema Devi ...Respondent.

FAO (MVA) No. 46 of 2016
Reserved on: 13.12.2017
Date of Decision : 14.3.2018

Motor Vehicles Act, 1988- Section 173- Motor Accident Claims Tribunal- Appeal filed by the insurer on the ground that deceased was a gratuitous passenger- **Held-** on facts nothing was proved on record as to how the deceased was a gratuitous passenger, he was not found to be the owner of the vehicle as alleged by the Insurance Company, on the contrary the evidence on record

was that the deceased was travelling with his goods in the ill-fated vehicle – on quantum the award was held to be not excessive as deceased was only 16 years of age- Consequently, appeal dismissed. (Para-16 to 18)

For the Appellant: Mr. Praneet Gupta, Advocate.
For the Respondents: Ms Anu Tuli Azta, Advocate for respondents No.1 & 2.
Ms. Tim Saran, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1988, is maintained by the appellant/Insurance Company (hereinafter referred to as 'the appellant'). Subject matter of the present appeal is award, dated 31.10.2015, made by the learned Motor Accident Claims Tribunal, Shimla, (for short 'the learned Tribunal') in M.A.C. case No.111-S/2 of 2013, titled as Smt. Seema Devi & another versus New India Assurance Company Ltd. & others, vide which the compensation to the tune of Rs.6,00,000/- (Rupees six lacs) was awarded with interest @ 7.5% per annum from the date of institution of the claim petition, i.e. 30.10.2013 till its realization and costs assessed at Rs.5,000/- came to be awarded in favour of the claimants.

2. As per the petitioners deceased Vikas Sharma was travelling in vehicle No.HP-51A-1145 and died in the road side accident, which took place on 13.7.2013 at 7.30 P.M at Jajhar Nalah on Dalash-Luhari road.

3. The claimants are the parents of deceased Vikas Sharma and the present appeal has been preferred against the Insurance Company being insurer, owner and legal heirs of the deceased Virender Kumar, driver of the vehicle No.HP-51A-1145.

4. The case of the claimants is that the accident took place due to the rash and negligent act of the driver, who unfortunately has also died in the accident in question.

5. The Insurance Company filed its reply, in which the preliminary objection qua the fact that the claim petition is not maintainable, the vehicle involved in the accident was being driven in violation to the provisions of Motor Vehicles Act, as well as, in contravention to the terms and conditions of the insurance policy have been taken. It has also been pleaded that the deceased was travelling in the vehicle, in question, as gratuitous passenger. It has also been pleaded that the driver was not having a valid and effective driving licence and there was collusion between the claimants and respondents No.2 and 3.

6. The owner of the vehicle was Maneesh Kumar (respondent No.2). He also filed his separate reply, in which, he denied the contents of the claim petition for want of knowledge. However, the factum of accident has been admitted and it has been admitted that the deceased was travelling in the vehicle with apples.

7. The L.Rs. of the deceased driver (Virender Kumar) has not chosen to file reply, as the driver has expired in the accident. So, the legal representatives were made party and they were proceeded against *ex-parte* before the learned Tribunal below.

8. The above mentioned claim petition was resisted by the respondents/claimants before the learned Tribunal and the following issues came to be framed by the learned Tribunal below on 05.8.2014/30.10.2015:

> **"1. Whether Sh. Virender Kumar was driving Bolero Camper bearing registration No.HP-51A-1145 on dated 13.07.2013 at place Jajhar Nala on Dalash-Luhari road in rash and negligent manner resulting in death of Vikas Sharma, as alleged? OPP.**

2. **If issue No.1 is proved in affirmative, whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP.**
3. **Whether vehicle was being driven in violation of terms and conditions of Insurance Policy, provisions of Motor Vehicles Act and Rules as alleged? OPR.**
4. **Whether deceased Vikas Sharma was traveling in the offending vehicle as unauthorized/gratuitous passenger as alleged ? OPR.**
5. **Whether deceased driver Virender Kumar was not holding valid and effective driving licence as alleged? OPR**
6. **Whether petition is not legally maintainable as alleged? OPR**
7. **Whether petition has been filed in collusion with respondents No.2 & 3 as alleged? OPR-1.**
8. **Relief."**

9. The learned Tribunal, after examining the evidence, oral as well as documentary, held that the owner/insured-cum-driver of the offending vehicle had driven the same rashly and negligently at the time of accident and caused accident.

10. After deciding Issue Nos.1 and 2 in affirmative and Issue Nos. 3 to 7 in negative, the learned Tribunal awarded this compensation amount. The Insurance Company assailed the present award on the following grounds:

(1). That the impugned award under Section 166 of the Motor Vehicles Act is against the law and contrary to the facts and documents placed on the record, hence, liable to be quashed and set aside;

(2) That the learned Motor Accident Claims Tribunal has fallen in grave error in awarding exaggerated/ exorbitant amount and passed an award by totally ignoring the well settled legal positions as lay down by the Hon'ble Supreme Court of India and the award is not perverse, fanciful unjustifiable, unfair, arbitrary but also unreasonable. It has been submitted that the application moved under Section 170 of the MVA by the appellant was allowed by the learned Tribunal on 29.10.2014;

(3) That the learned Tribunal below has wrongly fastened the liability on the appellant despite the fact that the appellant has categorically pleaded and proved on record that the vehicle was plied in violation of the terms and conditions of the insurance policy;

(4) That the findings of the learned Tribunal below on Issue No.4 is without any evidence and pleadings. The contemporaneous record produced on record clearly shows that two persons were travelling as gratuitous passengers. The petitioners nowhere pleaded that deceased was travelling as a owner of the goods.

(5) That the learned Tribunal below has acted upon wrong principle of law by awarding extremely high/exorbitant compensation. The learned Tribunal below has drawn inference about the deceased occupation and income without any cogent and reliable oral or documentary evidence on record. It has been submitted that the learned Tribunal below should have not allowed a misfortune to turn into windfall.

(6) That the learned Tribunal below has awarded highly excessive compensation without their being any documentary evidence on record. The claimants have failed to prove on record the earning of the deceased and the figure of earning taken by the learned Tribunal below was without any basis

11. Learned counsel for the appellant has argued that Insurance Company is not liable to pay the amount of compensation and further that amount as awarded is against the law as settled by the Hon'ble Supreme Court of India, in Special Leave Petition (Civil) No.25590 of 2014, decided on 31.10.2017, titled **National Insurance Company Limited** versus **Pranay Sethi and others**, and the amount is thus required to be reduced.

12. On the other hand, learned counsel appearing for the respondents have argued that the Insurance Company has no right to assail the award and the appeal be dismissed.

13. In rebuttal, the learned counsel for the appellant has argued that as per the decision of the Hon'ble Supreme Court in Special Leave Petition(Civil) No.25590 of 2014, titled **National Insurance Company Limited** versus **Pranay Sethi and others,** the award be modified.

14. To appreciate the arguments of the learned counsel appearing on behalf of the parties, I have gone through the record of the appeal carefully.

15. As far as the negligence of the driver of the vehicle is concerned, PW1, Pooja Devi by filing her affidavit Ex.PW-1/A in examination-in-chief shows that the same is based upon the contents of the claim petition. Allegations of rash and negligent driving against the driver have also been levelled. Further, the facts speaks for itself.

16. PW2, H.C. Anil Kumar, Police Station, Anni, District Kullu, proved the copy of the F.I.R. Ext. PW-2/A, registered at Police Station, Anni. He deposed that due to the death of the driver in the accident, in question, the proceedings in the F.I.R. have been dropped. However, the case of the Assurance Company is that in the F.I.R., there is nothing to show that the deceased was travelling as the owner of the vehicle. So far as the death is concerned, PW3, Dr. Manish Thakur, who conducted the postmortem examination of the dead body of the deceased and proved the copy of the postmortem report Ext.PW-3/A. This witness has specifically stated that the injuries found on the body of the deceased could be caused in a motor vehicular accident. Unfortunately the driver, against whom the allegations of rash and negligent driving have been levelled by the claimants, had also died in the accident in question. In this case, there is no eye witnesses to the accident in question as all the occupants as well as the driver died in the accident. Keeping in view the allegations, which have been mentioned in the F.I.R., according to which, the road was wide enough, this Court is of the view that the accident had taken place due to the rash and negligent driving of the driver and the registration of FIR is prima facie proof for rash and negligent driving against the driver of the ill-fated vehicle.

17. Further, from the record, it is clear that it was the driver who was driving the vehicle in such a rash and negligent manner that he could not control the vehicle and resultantly, the accident took place and the deceased died. Further, the facts speaks of itself and so this Court is of the considered view that the accident in question, took place due to the rash and negligent driving of the vehicle in question, in which the deceased received fatal injuries.

18. The age of the deceased was 16 years and he was the only son of his parents and the Court below has awarded Rs.6,000,00/- (Rupees Six lacs) alongwith interest @ 7.5% per annum. So, this Court finds that the Award passed by the learned Tribunal below cannot be said to be excessive, as the deceased was 16 years of age and could have earned a lot in his life and might have served his parents. Therefore, this Court find no infirmity or illegality in the award passed by the learned Tribunal below and thus the award needs no interference. Hence, the appeal is dismissed.

19. Pending application(s), if any, shall also stands disposed of accordingly.

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

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

Cr. Appeal No. 149 of 2017
Reserved on : 19.12.2017
Decided on : 14.3.2018

Code of Criminal Procedure, 1973- Section 374- Appeal against Conviction- Section 302 of I.P.C- Circumstantial Evidence- Appellant convicted under Section 302 of I.P.C to undergo life imprisonment and to pay a fine of Rs.20,000/- - conviction and sentence challenged- While dismissing the appeal **Held**- legal parameters to appreciate the circumstantial evidence reiterated, as were held in criminal Appeal No.242/2016 titled as **Hikmat Bahadur versus State of Himachal Pradesh** decided on 19th September, 2017- The principle laid down by the Supreme Court of India in **Sharad Birdhichand Sarda versus State of Maharashtra, (1984) 4 SCC 116** reiterated that the conclusion of guilt is to be barred or "must or should be", and not merely "may be" fully established- The facts so established should be consistent only with the hypothesis of the guilt of the accused- The circumstances should be of conclusive nature and should exclude every possible hypothesis except the one to be proved and the chain of evidence must be so complete as to leave no reasonable grounds for the conclusion consistent with the innocence of the accused- Based on the aforesaid, on facts the circumstances culled out by the Learned Trial Court held to be consistent with the chain of circumstances so complete, but to establish the hypothesis of the guilt of the accused alone and the chain of evidence was held to be so complete as to leave any reasonable ground to come to the conclusion consistent with the innocence of the accused- Consequently, the appeal dismissed. (Para-17 to 29)

Case referred:
Jagriti Devi versus State of Himachal Pradesh, AIR 2009 SC 2869

For the appellant Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.
For the respondent Mr. S.C. Sharma and Mr. Narinder Guleria, Addl. AGs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellant herein is convict (hereinafter to be referred as 'accused'). He has been tried for the commission of an offence punishable under Sections 364 and 302 of the Indian penal Code, however, convicted and sentenced to undergo life imprisonment and to pay a fine of Rs.20,000/- for the commission of an offence punishable under section 302 IPC alone vide judgment dated 27.1.2017 passed by learned Additional Sessions Judge, Sirmaur District at Nahan in Sessions trial No. 51-N/7 of 2015.

2. Aggrieved by his conviction and sentence the convict-appellant has preferred the present appeal for quashing and setting aside the impugned judgment on the grounds, inter alia, that the same is against the law and facts of the case. He had no intention to kill his son deceased Himanshu. He was not seen by anyone while throwing his son in Kulhal canal. The circumstantial evidence produced against him no where suggest that it is he who has thrown his son Himanshu in the canal. The chain of the evidence led against him is not complete so as to clinch that it is he alone and none else had eliminated deceased Himanshu. The trial Court was

not justified to make basis the statement he made under Section 313 Cr.P.C. while recording his findings of conviction and sentence. His version in the statement does not absolve the prosecution from the onus upon it to prove him guilty beyond all reasonable doubts. The testimony of the prosecution witnesses, none else but closely related hence interested one, has been erroneously relied upon to record the findings of conviction against him. The person like PW15 Parvinder Singh is a liar because his statement that he noticed the accused driving the motor cycle with his child as pillion rider at a time while buying some articles from S.K. General Store and that when returned the child was not on the motor cycle is absolutely false. PW15 according to the accused is a stock witness, hence deposed falsely. Near Yamuna bridge, only dhabas and tea-stalls are situated and not any general store. PW16 Ram Dass admit that there exists path adjoining Kulhal canal being used by the people to have access to village Khara and Baba Bhure Shah Mandir. Therefore, in a broad day light i.e. around 11:30 A.M. or 12.00 noon how a grown up child could have been thrown in the canal. Otherwise also, a person thrown in canal would raise hue and cry, however, no such evidence has been produced. Therefore, PW16 has also made a false statement.

3. Complainant in this case is Reena Devi (PW1). She is wife of accused. They married each other on 7.5.2000. Two sons namely Deepak and Himanshu (deceased) were born to them out of this wedlock. Since the accused was suspecting extra marital relations of the complainant with someone else and was also of the belief that both sons were not born to her from his loins and rather from the loins of the person with whom she was having extra marital relations, he had no liking for both children. He also used to torture the complainant on this pretext. She was given merciless beating by him in the year 2010. She, therefore, left the matrimonial home with her sons and started living in the house of her parents. It is in the year 2013 the accused compromised all disputes with her and assured that he will not torture her any further. On the assurance so given by him she returned to the matrimonial home and they again started living together with children. After some time he again started torturing her at the same pretext. She had been managing her stay in the matrimonial home anyhow or other.

4. On 30th May 2015 the accused asked her to accompany him along with Himanshu to Paonta Sahib for preparing Adhaar cards. They went to Paonta Sahib with accused on motor cycle. There the accused filled-in her form and also form of Himanshu and handed over the same to the complainant. She was asked to stand in queue and deposit the forms in SDM office and himself went to market to purchase computer. Master Himanshu was also taken by him on motor cycle with him. When the accused and deceased Himanshu did not come back for one and half hours, she made a call on his cell phone through the cell phone of Kamla PW2 who was also standing in queue with her. The accused, however, did not pick up the call. When after one and half hours he returned alone she inquired about Himanshu as to where was he. The accused replied that Himanshu had alighted from the motor cycle at Nirmal Sweet shop. He asked the complainant to search Himanshu at the place of her parents. The missing report Ext.PW1/A lodged by the complainant reveals that she and her husband the accused both searched master Himanshu in the market near and around Paonta Sahib but of no avail. It is thereafter she decided to report the matter to the police.

5. The report Ext.PW1/A was lodged in the police station on 30.5.2015 itself. The police swung into action. Efforts were made with the assistance of the complainant and other relatives of Himanshu to search him out but of no avail. On the next day i.e. 31.5.2015 in the evening when statement of the complainant was recorded under Section 161 Cr.P.C. she disclosed about her strained relations with the accused at the pretext of the latter was suspecting her chastity and paternity of both sons. She also expressed her doubt that due to such suspicion it is he alone who either has done away with minor Himanshu or concealed him somewhere. Shri Fateh Singh (Former MLA) father of accused was also associated on that very day in the investigation of the case. He also disclosed about the strained relations of the complainant and the accused on account of the latter doubting the chastity of the former and her extra marital relations with someone else. He has further disclosed to the police that the accused was even of the impression that two sons have not been born to the complainant from his loins and rather

from that of the person with home she was having extra marital relations. Therefore, Fateh Singh aforesaid has also suspected that Master Himanshu was either eliminated by the accused or hided at some place. The statement of PW15 Parvinder Singh recorded by the police under Section 161 Cr.P.C. that while crossing through S.K. General Store near Yamuna bridge a child was sitting on the motor cycle being driven by the accused as pillion rider, however, when returned the child was not with him has also given a clue to the investigating agency that there is hand of the accused in the commission of some non-bailable offence connected with the incident of missing of Master Himanshu.

6. The accused was, therefore, taken in custody on 31.5.2015 itself. When interrogated in custody, the accused allegedly made the disclosure statement Ext.PW16/A in the presence of witnesses that he can show the place where he pushed Himanshu in canal. The statement so made was reduced into writing. Accordingly the police and witnesses had rushed to Kulhal barrier and identified the place where he pushed his son Himanshu into canal. The identification memo of that place Ext.PW16/B was accordingly prepared in the presence of witnesses. During further course of investigation the spot map etc. was also prepared. The motor cycle bearing No. HP-17B-4035 of the accused handed over to the police by his brother Sumer Chand was also taken into possession vide seizure memo Ext.PW11/A.

7. On 12.6.2015 in the morning PW4 Jagbir Singh a JCB Operator noticed the dead body of a child floating in Kulhal canal. He informed the official of CISF Unit deployed there on security duty. The intimation was further passed on by CISF official to Mirjapur police and police of Paonta Sahib. The police in turn had passed on such information to PW17 Surjeet Singh and Sumer Chand, the uncles of Himanshu. They accompanied by the police went to the spot near Khara project and identified the body of their nephew Himanshu. The autopsy was got conducted from the team of Doctors comprising PW10 Dr. Kamal Pasha. Since the dead body was in badly decomposed condition, therefore, referred to IGMC Shimla for conducting autopsy by the expert. In IGMC it is Dr. Sangeet Dhillon PW21 who has conducted the autopsy and the cause of death of deceased was found drowning and throwing him in water.

8. On collecting the post mortem reports and also the report from State Forensic Science Laboratory as well as completion of the investigation the police has found the involvement of the accused in the commission of the offence. Therefore, report under Section 173 Cr.P.C. was filed against him in the trial Court.

9. Learned trial Judge on having gone through the evidence collected by the police and hearing learned counsel and recording its satisfaction qua the existence of a prima-facie case against the accused proceeded to frame charge against him under Sections 364 and 302 of the Indian Penal Code. He, however, pleaded not guilty and claimed trial.

10. The prosecution has examined 21 witnesses in all to prove its case against the accused. As noticed at the outset, the present is a case of circumstantial evidence. Anyhow, the material prosecution witnesses who have been examined by the prosecution to prove the circumstances suggesting the guilty of the accused are PW1 Reena Devi the complainant, PW2 Kamla Devi, PW3 Fateh Singh father of the accused, PW6 Vishal brother of PW1, PW16 Ram Dass father of the complainant, PW17 Surjeet Singh elder brother of accused, PW18 Gurmeet Singh and PW15 Parvinder Singh also. The other witnesses including officials have also been examined to complete the chain of circumstances so relied upon against the accused.

11. The accused was also examined under Section 313 Cr.P.C. and all the incriminating circumstances appearing against him in prosecution evidence put to him during such examination. Interestingly enough, he has not denied his marriage with the complainant and two sons born to her. Though the prosecution evidence that he was suspecting her extra marital relations with someone else and also raising finger on the paternity of two sons were denied, however, admitted that on one occasion the complainant abandoned his company and left the matrimonial home also. She was brought back by him on the assurance that he will not torture her any further in future.

12. The accused also admit that on 30.5.2015 he had taken the complainant and deceased Himanshu to Paonta for preparing their Adhaar cards. He also admits that he went to the market for purchasing a computer and had taken HImanshu also with him. It was also put to him that when he returned Himanshu was not with him which fact he also admit as correct. However, when the disclosure statement Ext.PW16/A was put to him though he admit that he made the statement to the police, however, not to the effect that he pushed Himanshu into canal and explained that Himanshu rather slipped away into canal at his own. In reply to question No. 14 he admit that on being asked by PW1 as to where Himanshu was, he told that Himanshu alighted from the motor cycle at Nirmal Sweet shop. He also admitted that when returned on motor cycle PW15 noticed that Himanshu, a pillion rider was not with him at that time.

13. The accused was given an opportunity to produce evidence in his defence also, however, he opted for not to do so.

14. Learned trial Court on the completion of the record and hearing learned Public Prosecutor as well as defence Counsel and on appreciation of the evidence available on record has held the accused guilty of the commission of an offence punishable under Section 302 IPC. Consequently, he has been convicted to undergo rigorous imprisonment for life and also to pay Rs.20,000/- as fine. No case under Section 364 IPC, however, was found to be made out against him, hence acquitted of the charge so framed against him.

15. Mr. N.K. Thakur, learned Senior Advocate assisted by Mr. Divya Raj Singh, Advocate has argued that there is no iota of evidence to connect the accused with the commission of alleged offence. Again there is no tangible evidence to show that it is the accused who has pushed his own son Himanshu into Kulhal canal and thereby killed him. The circumstantial evidence as pressed in service according to learned defence Counsel is neither plausible nor reasonable. The findings of conviction under Section 302 IPC are stated to be recorded against the accused on the basis of surmises and conjectures.

16. On the other hand, learned Additional Advocate General while repelling the arguments addressed on behalf of the accused has contended that the circumstantial evidence available on record is cogent and reliable. The change of circumstances as appeared in the prosecution evidence against the accused is complete and leave no manner of doubt that it is the accused who has pushed deceased Himanshu into canal and due to which he died. Learned lower Court, therefore, has not committed any illegality or irregularity while convicting the accused for the commission of offence punishable under Section 302 of the Indian Penal Code.

17. On having gone through the entire material on record and also the given facts and circumstances coupled with the factum of the present is a case where no direct evidence is available and rather the prosecution case hinges upon the circumstantial evidence an onerous duty is casted upon this Court to find out the truth by separating grain from the chaff. However, before that it is desirable to take note of the necessary ingredients of an offence punishable under Section 302 IPC.

18. Reliance in this regard can be made to the provisions contained under Section 300 IPC. As a matter of fact, culpable homicide amounts to murder firstly if the accused is found to have acted with an intention to cause death or secondly to cause such bodily injury knowing fully well that the same is likely to cause death. Thirdly, intention of causing bodily injury to any person and such injury intended to be inflicted knowing fully well that the same in ordinary course of nature would be sufficient to cause death.

19. Culpable homicide has been defined under Section 299 IPC. Whoever causes death of someone by way of an act caused intentionally or with the knowledge that such act is likely to cause death can be said to have committed the offence of culpable homicide punishable under Section 302 of the Indian Penal Code. The Apex Court in ***Jagriti Devi*** versus ***State of Himachal Pradesh, AIR 2009 SC 2869*** has held that expression “intent” and “knowledge” postulate the existence of a positive mental attitude of different degree. 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. Whether the circumstantial evidence produced by the prosecution is sufficient to connect the accused with the commission of offence or not is a question to be determined later on, however, before that what are legal parameters to appreciate the circumstantial evidence as we detailed in a recent judgment in *Criminal Appeal No. 242 of 2016*, title ***Hikmat Bahadur*** versus ***State of Himachal Pradesh*** and its connected appeal rendered on September 19, 2017 need to be discussed. The same reads as follows:

> ".....Before the evidence produced by the prosecution in this case is elaborate, the present being a case of circumstantial evidence, the Court seized of the matter has to appreciate such evidence in the manner as legally required. We can draw support in this regard from a judgment of Division Bench of this Court in **Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550**. The relevant extract of this judgment is re-produced here-as-under:-
>
> ***"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., AIR 1952 SC 343, has laid down the following principles:*
>
> *"It is well 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 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."...*
>
> 21. Similar case is the ratio of judgment rendered again by this Bench in **State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213**. 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. L.C. 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.

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 Suppl.(3) S.C.C. 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 by 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. Learned trial Court in para-37 of the impugned judgment has taken into consideration the following circumstances and formed an opinion that the chain is complete:-

1) The accused suspected that complainant had extra marital relations with one person of the neighbourhood and both the children were born from those relations.

2) The accused used to torture the complainant and subject her to severe beatings on this issue and had given an axe blow on the head of the complainant in the year 2010.

3) The accused used to treat the children with cruelty and had no affection for them.

4) In the year 2010, when the complainant was dealt axe blow by the accused, she along with the children left the house and stayed with her father.

5) The accused thereafter, brought the complainant back alongwith children with the promise not to torture them anymore and kept nicely for about 6 months, where after maltreatment again begun.

6) The accused had made an attempt to eliminate the deceased child by putting him in a box as narrated by the complainant and others to the Investigating Officer, SHO Laiq Ram.

7) On the fateful day, the accused intentionally brought the complainant and the deceased child to the office of SDM Paonta Sahib, with a view to get their Adhaar card prepared as he had a design in his mind to eliminate the child.

8) The accused intentionally made the complainant to stand in the queue to wait for the turn and at that very moment impressed upon her that he shall take Himanshu to market so that a computer could be purchased for him; whereas, as a matter of fact presence of Himanshu was also required on the spot as his Adhaar card was also to be prepared. Computer could have been purchased later on.

9) The accused thus, intentionally isolated the child and made his mother bound to stay before the Authorities by making her to stand in the queue so that she would not come in his way.

10) The accused took the child on the motorcycle across the Yamuna river and pushed the child in the canal and on his return made a false excuse by deposing that the child has alighted at Nirmal Sweet shop.

11) The accused thereafter, misguided the complainant and made her to report the police about the missing of the child and took her to the houses of relatives to search the child, whereas he himself knew that he had pushed the child in the water canal.

12) The accused on the next day instead of joining the search campaign of the child started evading his presence and also did not pick up the phone calls and in this manner the complainant and her father expressed that they suspected that the accused had hand in the missing of the child.

13) The accused was seen with the child going across the Yamuna bridge by PW15 Shri Parwinder Singh. He also noticed that the accused had returned all alone.

14) The accused thereafter, made a confessional statement and showed the canal, in which he had thrown the child and subsequently, body was recovered from the same canal. The accused therefore, had a special knowledge as to from where the body of the child could be recovered and this evidence became admissible against him.

15) The accused while asked to explain the circumstances, he admitted the evidence to the effect that he had taken the child across the bridge and by the side of canal. He only tried to explain that child slipped in the water for no fault on his part.

16) Even if the child had slipped in the canal by accident, the conduct of the accused speaks volumes of his intentions and falsify the explanation given by him. The accused concealed all these facts and pretended as if the child had gone missing near the SDM office itself.

17) The medical evidence showed that the death of the child has been caused by drowning and death has taken place 10-15 days back and thus the possibility of murdering the child somewhere else and throwing the body in the canal are fully ruled out.

18) The accused thus, had a motive, had failed in his previous attempt and thus created an opportunity to execute his designs by bringing the child and the mother for preparation of their Adhaar card and by making the mother of the child to stand in the queue before the Authorities and executed his designs with utmost cleverness.

21. We are in full agreement with learned trial Court as the above sated circumstances appeared on record against the accused. The question for our consideration is, however, that the chain of circumstances so appeared on record is complete so as to establish the

guilt of the accused in the commission of the offence. Our answer to this poser in all fairness and in the ends of justice would be in affirmative for the reason that on facts the prosecution and defence by and large is not at variance. As noticed hereinabove the accused admit the complainant to be his legally wedded wife. He also admits strained relations between them. Though he has disputed that the cause thereto was extra marital relations of his wife, the complainant, with someone else, however, has failed to assign any other and further reason thereto. We are convinced that the cause of strained relations between accused and complainant was the suspicion the former entertained against the latter that she had extra marital relations with someone else as had it been not so at least PW3 Fateh Singh his father and brother Surjeet Singh PW17 would have not stated so while in the witness box. They have not been cross-examined qua this aspect of their testimony having come on record in their examination-in-chief. There is thus admission on the part of the accused that he was suspecting her relations with someone else. His wife the complainant PW1, father-in-law Ram Dass PW16 and brother-in-law Vishal PW6 have also stated in own voice that the accused was suspecting the relations of PW1 with someone else. They have also not been cross-examined qua this aspect of the matter. In normal circumstances their testimony could have been suspected on account of interested in the success of prosecution evidence, however, their testimony in examination-in-chief is not discredited at all as they have not been cross-examined qua this aspect of the matter. It is thus safe to place reliance thereon also while arriving at a conclusion that the cause of strained relations between the accused and the complainant was the former suspecting the chastity of latter. The evidence as has come on record by way of the statement of PW3 Fateh Singh and PW17 Surjeet Singh cannot be ignored by any stretch of imagination as they were none else but the father and real brother respectively of the accused. Normally the father and brother will not implicate his own son/brother that too in a case of this nature. Both PWs 3 and 17 had shown the guts and told truth while in the witness box to substantiate the cause of justice. No suggestion was given to them that they deposed so on account of enmity or for some extraneous consideration. Therefore, from the circumstances appeared on record and relied upon against the accused it is proved satisfactorily that the accused had been doubting the chastity of his wife, the complainant and was under the impression that the two sons including deceased were not born to the complainant from his loins and rather from that of the person with whom she allegedly was having extra marital relations.

22. Be it stated that in a case of circumstantial evidence the motive to commit the offence plays a vital role. In the present case the circumstances appeared against the accused on record establish that he had the motive to kill deceased Himanshu since he was belaboring under the belief that Himanshu is not born to complainant from his loins and rather from that of someone else, therefore, he had the cause to eliminate Himanshu. The testimony of the complainant PW1 that of her father-in-law PW3 Fateh Singh, brother-in-law PW17 Surjeet Singh reveal that the accused had no liking for the children. As per the testimony of PWs 1 and 3 the children used to remain in the company of their grandfather PW3 for all the time. According to PW3 deceased Himanshu was even sleeping also with him whereas as per that of PW1 the accused was not allowing the children to sleep with them (accused and complainant). Himanshu, therefore, had become an eyesore for the accused. It is for this reason he has planned to done away with the life of deceased Himanshu.

23. As per own admission of the accused his wife the complainant and Himanshu both accompanied him to Paonta Sahib for preparation of Adhaar cards. He also admits that while the complainant was asked to stand in queue and deposit the forms in the SDM office, he went to the market for buying a computer. He had also taken Himanshu with him. He also admits that he returned alone to SDM office. On query by his wife as to where Himanshu was, his reply was that he alighted from the motor cycle at Nirmal Sweet shop. Surprisingly enough, in his statement recorded under Section 313 Cr.P.C. his reply to question No. 26 was altogether different because when the disclosure statement Ext.PW16/A was put to him he replied that no doubt he had made the statement to the police, however, not that he pushed Himanshu into canal and rather that Himanshu slipped away and fell into canal at his own. Had it been so, why

it was not disclosed to the complainant at the best available opportunity to him when on his return alone she inquired as to where Himanshu was. There was no occasion for him to have disclosed her at that time that Himanshu had alighted from the motor cycle at Nirmal Sweet shop. The different statement the accused made qua this vital part of the prosecution case speaks in plenty that Himanshu was thrown by the accused alone into the canal and he died due to that. The disclosure statement Ext.PW16/A is duly proved from the testimony of Ram Dass PW16, a witness thereto. Even the accused has also admitted the statement having been made by him to the police, however, qualified his version that he has made the statement qua deceased Himanshu having slipped into the canal at his own and not pushed by him into it, which for the reasons already recorded cannot be believed to be true. The testimony of PW15 may not be of much help to the prosecution case because even if it is believed that the said witness was buying articles in S.K. General Store situated near Yamuna bridge was not expected to have take note of the accused driving the motor cycle with a child as pillion rider and also the accused returning alone after one hour. The accused, however, has himself admitted that he returned alone from the market.

24. The remaining prosecution case i.e. the dead body of Himanshu was seen floating in Kulhal canal by PW4 Jagbir Singh in the morning is also satisfactorily proved on record as this part of the prosecution case is not only supported by PW4 Jagbir Singh CISF personnel on duty at canal but also the another official Sh. Sham Singh PW5, PW7 Surjeet Singh the brother of accused as well as PW18 Gurmeet Singh who accompanied Surjeet Singh to Kulhal canal where the dead body was seen. The prosecution case qua taking in possession the dead body and forwarding the same to Civil Hospital, Paonta Sahib for post mortem also stand satisfactorily proved from the testimony of PW10 Dr. Kamal Pasha who on examination of the dead body and its condition alongwith Dr. Rajiv Chauhan concluded that the dead body being in decomposed condition its post mortem was required to be conducted by a forensic expert. The dead body, as such, was referred to IGMC, Shimla where the autopsy was conducted by PW21 Dr. Sangeet Dhillon. In his opinion, the cause of the death was throwing the deceased into water and consequently drowning.

25. The link evidence produced by the prosecution also substantiates the circumstances appearing against the accused in prosecution evidence. As already noticed PW4 Jagbir Singh was working as JCB Operator at the relevant time in A.P.E. company, Khara Hydro Electric Project. It is he who noticed the dead body of Himanshu in Kulhal canal on 12.6.2015 around 8:00 a.m. He informed the CISF official on duty at the project site. Consequently, PW4 Sham Singh who was posted as ASI in CISF Unit, Khara Hydro Electric project at that time informed Mirjapur and Paonta Sahib Police about the dead body lying in the canal. The canal leads to Haryana to Kulhal side is proved from the testimony of PW7 Ram Bhaj Sharma, Patwar, Patwari Circle, Ambari, Tehsil Vikas Nagar, District Dehradun. He has supplied the copy of revenue papers Ext.PW7/A and tatima Ext.PW7/B to the police. PW8 Pankaj Kumar, Lekh Pal, Patwari Circle, Tehsil Behat, District Saharanpur (UP) has supplied the jamabandi Ext.PW8/A and tatima Ext.PW8/B of the place from where the dead body was recovered. PW9 Sukhjit Singh at the relevant time was posted as Executive Engineer at Asan Barrage, Dhalipur (Uttrakhand). On an application Ext.PW9/A made to him by the police he had supplied the certificate Ext.PW9/B to the effect that canal leads to Haryana via Asan barrage, Kulhal, Mutak Majri etc.

26. The remaining witnesses are police officials. PW11 Constable Pradeep Kumar, Police Station, Paonta Sahib has proved the seizure memo Ext.PW11/A whereby the vehicle along with its key was taken in possession by the I.O. PW12 HHC D.R. Thakur has proved the memo Ext.PW12/A whereby the IO has taken in possession one nip of water from canal. PW13 HHC Rajinder Singh, Police Station, Paonta Sahib had taken the case property to the Forensic Science Laboratory vide RC No. 77/15 Ext.PW14/B and deposited the same there in safe custody. PW14 HHC Virender Singh was posted as Moharar Head Constable in police Station, Paonta Sahib at the relevant time. He has received the case property, made its entries Ext.PW14/A in the Malkhanna register and later on forwarded the same to Forensic Science Laboratory for testing through PW13 vide RC No. 77/15 Ext.PW14/B. PW19 at the relevant time was posted

as SHO in Police Station, Paonta Sahib. He has recorded the FIR Ext.PW19/A on the basis of the report Ext.PW1/A lodged by the complainant. He had prepared spot map Ext.PW19/C and also issued hue and cry notice Ext.PW19/D. According to him when PW1 complainant and her father-in-law PW3 Fateh Singh was associated in the investigation of the case on the next day i.e. 31.5.2015 they both stated that the accused was suspecting her extra marital relations with someone else and that it is he who had either killed Master Himanshu or hidden him at some place. PW15 Parvinder Singh was also associated on the same day. In view of their statements recorded under Section 161 Cr.P.C. the accused was arrested by PW19 and handed over the case file to PW20 ASI Mohar Singh for further investigation. It is PW20 who had recorded the disclosure statement Ext.PW16/A made by the accused while in custody and prepared the identification memo Ext.PW16/B of the place from where the dead body was recovered. He had also prepared the spot map Ext.PW20/B and inquest papers Ext.PW20/C and Ext.PW20/D. The application Ext.PW10/A was made to the Medical officer for conducting post mortem of the dead body. The dead body was sent through Constable Ram Kumar vide docket Ext.PW20/E to IGMC Shimla for expert opinion. PW20 had also taken the photographs Ext.PW20/G-1 to Ext.PW20/G-16. He had also collected the revenue record i.e. Ext.PW9/B, PW8/A and PW8/B. The reports from laboratory Ext.PA and PB were also taken on record.

27. The link evidence as has come on record by way of the testimony of the former/official witnesses discussed hereinabove also helps the prosecution to show that the chain of circumstances appearing against the accused in prosecution evidence is complete in all respect.

28. The present in view of the discussion hereinabove is a case where the circumstances pressed into service against the accused stand satisfactorily established on record. The circumstantial evidence produced by the prosecution being conclusive in nature is with the findings of guilt of the accused recorded by learned trial Court. The chain of circumstances is complete and leave no reasonable ground for arriving a conclusion inconsistent with the guilt of the accused and also satisfies the conscience of this Court that it is the accused alone who had thrown his son Himanshu in Kulhal canal and as a result thereof he died.

29. True it is that a criminal trial is not like a fairy tale and the prosecution must built its case on the edifice of evidence legally admissible. However, in this case, legally admissible evidence has been produced by the prosecution to prove the involvement of the accused in the commission of such a gruesome offence, hence he rendered himself liable to be convicted and sentenced for the commission of said offence. Learned trial Judge, therefore, has not committed any illegality or irregularity while recording the findings of conviction against the accused.

30. In view of what has said hereinabove, this appeal fails and the same is accordingly dismissed.

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

Shakuntla Devi. .....Petitioner.

Versus

Lalman & ors. .....Respondents.

Cr. Revision No. 89 of 2009.
Date of decision: March 14, 2018.

Indian Penal Code, 1860- Sections 147, 447, 323 read with Section 149- Petitioner was allegedly assaulted by the respondent - challenged acquittal of the respondents by the 1st

Appellate Court reversing the conviction recorded by the Learned Trial Court by way of revision- It transpired during hearing that revision was not maintainable – petition was filed for conversion of revision petition into an appeal- **Held-** that prayer of conversion is legal but same needs to be filed at the threshold – present application has been filed after nine years of filing of revision – Also, respondents have been suffering for last eighteen years in facing the criminal proceedings- no iota of evidence that they had constituted an unlawful assembly or used force or violence against the complainant- no interference is made out- revision petition as well as Cr.M.P (M)s dismissed. (Para-7 to 9)

For the petitioner	Mr. Dalip K. Sharma, Advocate.
For the respondents	Mr. Neeraj Gupta, Advocate, for respondents No. 1 to 4. Mr. S.C. Sharma and Mr. Narinder Guleria, Addl. AGs with Mr. Kunal Thakur, Dy. AG, for respondent No. 6.

The following judgment of the Court was delivered:

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

Cr.MP(M) No. 1276 of 2017, Cr.MP o. 1215 of 2017
and Cr. Revision No. 89 of 2009

Petitioner herein claims herself to be the victim of occurrence having taken place long back on 10.11.2001 around 1:30 P.M. at village Dhangu, Police Station Balh, Tehsil Sadar (now Tehsil Balh), District Mandi wherein she allegedly was assaulted by respondents No. 1 and 2, the accused persons at a time when was irrigating the field belonging to them along with her son Hitesh Kumar. Both accused accompanied by their co-accused Hem Raj, Jagdish Kumar and Puran Chand (since dead) all of a sudden appeared on the spot and started ploughing the said field with a tractor brought with them. While accused-respondent Lalman caught hold the complainant, his wife accused Radha Devi assaulted her with sickle and thereby she received injuries on her person. It was further alleged that all the accused gathered in the form of an unlawful assembly and conspired with each other to tress pass into the land of the complainant party and also administer beatings to them. The task they planned by conspiring with each other they completed by entering upon the field of complainant party and administered beating to the complainant and her son Hitesh Kumar.

2. The occurrence was reported to the police of Police Station, Balh, District Mandi where a case came to be registered against all the accused under Section 147, 447, 323 read with Section 149 IPC vide FIR No. 376 of 2001. The police on conducting investigation and collecting the evidence against the accused-petitioner prepared the final report under Section 173 Cr.P.C. and presented the same in the Court with a prayer to punish the accused persons. The report so filed came to be registered as Police Challan No. 53-I/2002 (46-II/2002) and tried by the Court of learned Judicial Magistrate Ist Class (II), Mandi, District Mandi. Learned trial Magistrate after holding full trial has convicted all the accused persons for the commission of offence punishable under Sections 323 and 447 read with Sections 149 and 147 of the Indian Penal Code. They were sentenced to undergo simple imprisonment for a period of three months and also to pay Rs.500/- as fine under Section 323 read with Section 149 of the Indian Penal Code and to undergo simple imprisonment for a period of two months and to pay Rs.200/- as fine under Section 447 read with Section 149 IPC and also to undergo three months simple imprisonment as well as to pay Rs.500/- as fine under Section 147 IPC.

3. All the accused have assailed the findings of conviction recorded against each of them by learned trial Court in an appeal registered as Criminal Appeal No. 15 of 2006. Learned Sessions Judge, Mandi on hearing the parties and appreciation of evidence has held that the prosecution has failed to prove its case beyond all reasonable doubt. All the accused, as such, were acquitted of the charge framed against each of them vide judgment under challenge in these proceedings before this Court.

4. It is worth mentioning that the State has not opted for filing an appeal against the judgment of acquittal passed by learned lower Appellate Court. It is the complainant claim herself to be the victim of the occurrence has preferred the revision petition challenging therein the judgment passed by learned lower Appellate Court on several grounds, however, mainly that the findings of the acquittal of the accused recorded by learned lower Appellate Court are not based upon the proper appreciation of the evidence available on record. As per her further grouse the well reasoned judgment passed by learned trial Court has erroneously been set aside.

5. The revision petition when heard for some time, it transpired that the same is not maintainable. Therefore, on the prayer made on behalf of the petitioner, the matter was adjourned enabling thereby the learned Counsel representing her to satisfy this Court as to how a revision petition is maintainable against the judgment of acquittal passed by learned lower Appellate Court. It is pursuant to the order so passed in this petition the applications registered as Cr.MP No. 1215 of 2017 with a prayer to order the conversion of the revision petition into an appeal and Cr.MP No 1276 of 2017 to grant leave to appeal came to be filed.

6. Both applications have been resisted and contested on behalf of the respondents-accused on the grounds, inter-alia, that at this belated stage neither the revision petition can be ordered to be converted into an appeal nor leave to appeal granted.

7. On hearing learned Counsel representing the parties and learned Additional Advocate General, it would not be improper to conclude that in normal circumstances there is nothing illegal in converting a revision petition into an appeal. The present, however, is a case where the application with a prayer to convert the revision petition into an appeal came to be filed after nine years of the institution of the revision petition in this Court. On the other hand against the judgment of acquittal passed by learned lower Appellate Court the remedy available was to file appeal in this Court and not revision petition. As noted at the outset the conversion of a revision petition into an appeal is legally permissible, however, in appropriate cases and that too at the very threshold and not at a belated stage because allowing the revision petition to be converted into an appeal at this stage would amount to take away a right accrued in favour of the accused on expiry of the period prescribed for filing the same. Above all allowing such conversion at this belated stage would amount further harassment of the respondents-accused who have been facing the present case since its registration with the police in the year 2001 i.e. for the last 18 years. The offence allegedly committed by the accused-respondents is also not very serious and heinous in nature as the only allegations against them are that they entered upon the field of the complainant party and caused hurt to the complainant and her son Hitesh Kumar. The offence they allegedly committed is thus punishable under Sections 447 and 323 of the Indian Penal Code because admittedly the so called injuries allegedly inflicted by the accused party on the person of the complainant were simple in nature. In a case punishable under Section 447 IPC the maximum sentence of imprisonment may extend up to three months with fine which may extended to Rs.500/-. Similarly, for the offence punishable under Section 323 IPC the sentence of imprisonment may extend to one month or with fine which may extended to Rs.1000/- or with both. A person held guilty under Section 147 IPC

may also undergo the sentence of imprisonment for a maximum period of two years or with fine or with both.

8. The accused persons who have been facing the present case for the last 18 years in the considered opinion of this Court had suffered a lot. Otherwise also, the record reveals that there is no iota of evidence suggesting that the accused formed an unlawful assembly and conspired with each other to enter upon the field of the complainant party and also administered beatings to them. There is no grain of truth in the prosecution story that the accused assembled in the form of an unlawful assembly, had used force against the complainant party and were violent also so that the commission of an offence punishable under Section 147 IPC could have been said to be committed by them. No doubt, learned trial Judge has convicted and sentenced the accused, however, learned lower Appellate Court on re-appreciation of the evidence while setting aside the findings of conviction recorded by the trial Court has acquitted them of the charge framed against each of them.

9. Therefore, not only the wrong remedy has been chosen by the petitioner-complainant but on merits also no case for interference is made out. The present is also not a case where at this belated stage, the prayer for conversion of the revision petition into an appeal and leave to appeal should be granted.

10. Being so, the applications are dismissed. Consequently, the revision petition also stand dismissed.

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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

Om Parkash ...Respondent.

Cr. Appeal No.166 of 2011
Reserved on: 09.01.2018
Decided on: 14.03.2018

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- Section 20 of the N.D.P.S. Act, 1985- Respondent acquitted by the learned Trial Court- State challenged the acquittal while re-affirming the findings so recorded - **Held-** that the bag containing contraband held not to have been recovered from the conscious possession of the accused/respondent as it was alleged to have been in between the legs of the accused beneath the seat No.14- On facts, based on the testimony of PW-2 Satvir Singh, an independent witness- All four passengers sitting on Seat Nos.12, 13 and 14 had come out off the bus and were questioned by the police regarding ownership of the bag in question- The said fact coupled with the discrepancy in timings- held- did not prove that the contraband was recovered from the conscious possession of the accused – Consequently, acquittal of the accused-respondent upheld. (Para-19 to 33)

Cases referred:

Muddasani Venkata Narsaiah (Dead) through LRs versus Muddasani Sarojana, (2016) 12 SCC 288

Devraj versus State of Chhattisgarh, (2016) 13 SCC 366

Raja and others versus State of Karnataka, (2016) 10 SCC 506

Vinod Kumar versus State of Punjab, (2015) 3 SCC 220

Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321
Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439
Sunil versus State of Himachal Pradesh, reported in Latest HLJ 2010 (HP) 207
State of H.P. versus Mehboob Khan, reported in 2013 (3) Him. L.R. (FB) 1834

For the appellant: Mr.D.S. Nainta & Mr. Virender Verma, Additional Advocate Generals.
For the respondent: Mr.Vipin Rajta, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Instant appeal has been preferred by the State of Himachal Pradesh against acquittal of respondent-Om Parkash vide judgment, dated 14th January, 2011, passed by the learned Presiding Officer, Fast Track Court, Solan, in Case No. 11 FTC/7 of 2010 arising out of case FIR No. 98/2009 registered at Police Station Parwanoo, District Solan, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

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

3. Prosecution case, in brief, is that on 28th November, 2009, after recording G.D. Entry No. 34 (a), Ex. PW-4/A, PW-12 ASI Ram Lal alongwith PW-1 HC Ashok Kumar, PW-7 HC Bhagirath, PW-11 Constable Rajesh Kumar and Constable Gurcharjit Singh (not examined) left the Police Station at about 11.10 p.m. in official vehicle Bolero Camper being driven by Constable Desh Raj (not examined) having search light, investigation kit and weights and scale for checking of vehicles and Nakkabandi in the area of Sector 3, Parwanoo etc. At about 12.35 a.m., police party stopped a HRTC bus plying from Rohru to Delhi near Shivalic Agro Factory, Sector 3, Parwanoo and conducted routine checking of luggage of passengers. During checking, a person sitting on seat No. 14 was found with a bag in his lap and one bag between his legs below the seat. On checking these bags, a mobile charger with lead and a t-shirt were found in the bag which was in his lap and in another bag, a brown pant, a woolen shawl and a polythene packet were found. In the polythene packet, charas in round and stick shape was recovered. Person alongwith bags was brought out of the bus from the front door and driver and conductor of the bus were also called outside the bus, who disclosed their names to be Vinod Kumar and Nagender, respectively. Name of owner of bag was also asked in presence of driver and conductor of the bus, who disclosed his name and identity as respondent.

4. Thereafter, identification slip of recovered contraband Ex. PW-1/A was prepared and on weighing, recovered charas was found to be 4 kg 400 grams. Recovered charas was put in the polythene bag and was again put in bag alongwith shawl and the bag was sealed in a packet of cloth by affixing seal 'A'. Another bag was also sealed in a separate piece of cloth with the same seal 'A'. Sample of seal was taken and it was handed over to PW-7 HC Bhagirath. Memo Ex. PW-1/C was prepared in this regard. Parcels were taken into possession vide property search and seizure form Ex. PW-1/D and Ex. PW-1/E. NCB form in triplicate was filled in. During the search and seizure process, PW-1 HC Ashok Kumar had also taken photographs of the proceedings with digital camera, which were downloaded by PW-10 ASI Chander Shekhar on the computer for taking prints Ex. P-10 to P-12 of the said photographs.

5. After seizure of the contraband, rukka Ex. PW-12/B was sent to Police Station at 2.10 a.m. through PW-11 Constable Rajesh Kumar, who handed over the same to PW-4 MHC Prem Singh, which was fed in the computer by the said MHC and FIR Ex. PW-4/B was registered, which was signed by PW-9 SHO Govind Ram. After registration of FIR, PW-11 Constable Rajesh Kumar brought the case file to the spot. PW-12 ASI Ram Lal completed the proceedings on the spot. During this process, respondent also produced bus tickets from Karsog to Shimla worth ₹ 90/- Ex. P-1 and from Shimla to Samlakha worth ₹ 200/- Ex. P-2, vide memo Ex. PW-1/F. Spot

map Ex PW-12/C was prepared. Statements of witnesses were recorded and respondent was arrested at 5.30 a.m. after giving information of his arrest to him and his father. Memo Ex. PW-12/D was prepared in this regard.

6. As per prosecution case, police party returned to Police Station at 7.40 a.m. and produced the case property before PW-9 SHO Govind Ram, who re-sealed the recovered contraband with seal 'G'. After taking sample of seal 'G' on the piece of cloth, filling up relevant column in NCB form and affixing facsimile of seal 'G' on the said form and recovered contraband, NCB form was handed over to PW-4 MHC Prem Singh for depositing the same in malkhana. Entry in daily station diary Ex. PW-9/F was made in this regard. PW-4 MHC Prem Singh entered the case property in malkhana register against entries No. 430 and 431 as black bag containing clothes of respondent was deposited by PW-12 ASI Ram Lal directly in the malkhana against entry No. 430 and recovered contraband, after re-sealing was deposited by PW-9 SHO Govind Ram against entry No. 431, as depicted in Ex. PW-4/C.

7. On 30th November, 2009, the recovered contraband alongwith forwarding letter Ex. PW-9/G was sent for chemical analysis vide RC Ex. PW-4/D by PW-4 MHC Prem Singh through PW-5 HHC Santosh Singh, who deposited the same in SFSL Junga on the very same day.

8. After receiving the recovered contraband alongwith report of Chemical Examiner, Ex. PW-12/E, challan was prepared and presented in the Court by PW-9 SHO Govind Ram.

9. On finding *prima facie* complicity of the respondent in commission of offence, charge under Section 20 of NDPS Act was framed against him. During trial, prosecution has examined twelve witnesses to prove its case. After recording his statement under Section 313 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), respondent has chosen not to lead any evidence in his defence. On conclusion of trial, the respondent stands acquitted. Hence, the present appeal.

10. PW-1 HC Ashok Kumar, PW-7 HC Bhagirath, PW-11 Constable Rajesh kumar and PW-12 ASI Ram Lal are spot official witnesses. PW-2 Satvir Singh (passenger of the bus) and PW-3 Nagender Singh (conductor of the bus) are independent witnesses examined in support of prosecution case.

11. The spot official witnesses, by and large, have corroborated the prosecution case with respect to departure of police party from Police Station at 11.10 p.m., arrival of the police party on the spot at about 11.25 - 11.30 p.m., checking of certain vehicles prior to intercepting the bus in question and checking of no other vehicle thereafter. These witnesses have also stated in one voice that respondent was travelling on seat No. 14 having one bag in his lap (wherein no charas was recovered) and another bag in between his leg beneath the seat wherein 4 kg 400 grams charas was recovered by the police party.

12. Preparation of memo of identification of recovered contraband Ex. PW-1/A, memo of affixing sample seal on piece of cloth Ex. PW-1/B and handing over the seal to PW-7 HC Bhagirath Ex. PW-1/C, seizure memo Ex. PW-1/D, seizure form Ex. PW-1/E and signing of these memos and piece of cloth having sample seal by four persons, i.e. driver Vinod Kumar (not examined), PW-3 Nagender Singh (conductor), PW-1 HC Ashok Kumar and PW-7 HC Bhagirath has been deposed almost in similar fashion by these official witnesses. Preparation of rukka Ex. PW-12/B by Investigation Officer, PW-12 ASI Ram Lal at 2.10 a.m. and handing over the same to PW-11 Constable Rajesh Kumar for registration of FIR has also been corroborated by these witnesses. Receiving of rukka in Police Station, registration of FIR Ex. PW-4/B by PW-9 SHO Govind Ram after getting it typed in computer through PW-4 MHC Prem Singh and handing over the case file to PW-11 Constable Rajesh Kumar thereafter, have also been duly proved by PW-4 MHC Prem Singh, PW-9 SHO Govind Ram and PW-11 Constable Rajesh Kumar. Snapping of photographs on the spot with the help of official digital camera, by PW-1 HC Ashok Kumar, has also been proved by official witnesses. Downloading and development of these photographs has

been proved by PW-10 ASI Chander Shekhar, Nodal Officer, Police Station Parwanoo, who has also proved photographs Ex. P-10 to P-12.

13. Handing over of tickets Ex. P-1 to P-9 by respondent to the Investigating Officer and taking possession thereof vide memo Ex. PW-1/F has been proved by PW-1 HC Ashok Kumar and PW-7 HC Bhagirath. Issuance of these tickets has been admitted by PW-3 Nagender Singh, conductor of the bus. All these facts have not been disputed during the cross-examination by the defence. Spot map Ex. PW-12/C, prepared by the Investigating Officer, has also not been questioned at any point of time.

14. It is well settled that no cross-examination of witness on a point, stated in examination-in-chief, amounts to admission of version of the said witness on the said count. *(See Muddasani Venkata Narsaiah (Dead) through LRs versus Muddasani Sarojana, (2016) 12 SCC 288)*

15. Independent witness PW-2 Satvir Singh has supported the prosecution case whereas PW-3 Nagender Singh (conductor of the bus) has desisted from lending support to the entire prosecution case, however, he has admitted certain facts during his cross-examination by the learned Public Prosecutor after getting him declared hostile for resiling from his earlier statement recorded by the police.

16. It is settled law that statement of a hostile witness cannot be brushed aside in toto and said to be inadmissible only for the reason that he has been declared hostile, rather, reliable portion of his statement, which finds due corroboration from the other evidence/material on record, can be considered in favour of either of the parties. *(See Devraj versus State of Chhattisgarh, (2016) 13 SCC 366; Raja and others versus State of Karnataka, (2016) 10 SCC 506 and Vinod Kumar versus State of Punjab, (2015) 3 SCC 220)*

17. PW-3 Nagender Singh has admitted that he was conductor in the bus plying from Rohru to Delhi on 28th November, 2009 and Vinod Kumar was driver of the said bus, which was checked by the police party during midnight near Parwanoo. Recovery of one bag from the bus, weighing of recovered charas in his presence and issuance of tickets Ex. P-1 to P-9 by him has also been admitted by him. He has also admitted signing the memos Ex. PW-1/A, Ex. PW-1/B, Ex. PW-1/C, Ex. PW-1/D and Ex. PW-1/E after going through contents of these documents.

18. From the entire evidence on record, interception of the bus, checking of the luggage by the police party and recovery of 4 kg 400 grams charas from the bag kept beneath the three seater bench of seats No. 12 to 14 stands duly proved on record.

19. Now, the moot question to determine the guilt of respondent is as to whether the bag containing charas was recovered from the conscious possession of respondent.

20. It is law of the land that stringent the punishment, stricter the degree of proof required, since higher degree of assurance is required to convict the accused. *(See Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321; and Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439)* In present case, evidence connecting the respondent with the recovered charas is not only weak but dicey.

21. In examination-in-chief, PW-1 HC Ashok Kumar, PW-7 HC Bhagirath, PW-11 Constable Rajesh Kumar and PW-12 ASI Ram Lal have deposed that the bag was kept by respondent beneath his seat between his legs whereas PW-2 Satvir Singh has stated that passengers were sitting on the three seater bench having seats No. 12 to 14 and on inquiry by police about ownership of the bag found under these seats, respondent, sitting on seat No. 14, had claimed it as his bag. PW-2 Satvir Singh has also stated that Om Parkash (respondent) alongwith bag and also driver and conductor were alighted from the bus. He has further stated that he, who was sitting on seat No. 16, and two other persons sitting with Om Parkash (respondent) also came out of the bus. In cross-examination this witness has stated that respondent told the police outside the bus that bag belonged to him. Contrary to the prosecution

case that bag was found in possession of the respondent in between his legs under seat No. 14, this witness has deposed that not only two passengers of the bus seating on seats No. 12 and 13 were enquired, but he (PW-2) was also asked regarding the bag by the police whereupon he had told that his bag was inside the bus.

22. Matter does not end here. PW-2 Satvir Singh has further deposed that police, after taking out the jean pant from the bag, was matching the pants worn by the persons sitting on seats No. 12, 13 & 14 and it took about 15-30 minutes to the respondent to confess that bag belonged to him.

23. What emerges from the evidence of PW-2 Satvir Singh, who is an independent prosecution witness, is that the bag, lying below the three seater bench bearing seats No. 12, 13 and 14 was recovered but it was not sure as to whom that bag belonged and the police was trying to ascertain the actual owner/possessor of the said bag. Not only passengers sitting on seats No. 12 and 13, but PW-2 Satvir Singh, who was travelling on seat No. 16, was also enquired by the police in this regard and for identifying the possessor of the bag, an exercise to match the jean pant found in the bag containing the recovered charas with the pants of persons sitting on seats No. 12, 13 and 14 was also undertaken.

24. According to PW-2 Satvir Singh, four passengers sitting on seats No. 12, 13, 14 and 16 came out of the bus and all of them were questioned by the police regarding ownership of the bag in question. The said fact also finds corroboration in the statement of PW-3 Nagender Singh, who has stated that four persons were interrogated on suspicion.

25. Though, passenger sitting on another two seater bench on seat No. 16 has been cited as a witness and examined as PW-2 by the prosecution, however, the fact that he was ever associated as a witness does not find mention either in any memo prepared during investigation or in rukka sent to Police Station and special report submitted to the Superintendent of Police.

26. There is no plausible reason on record for not having any reference or detail of passengers travelling on the same bench of seat (seats No. 12, 13 and 14) on which respondent was sitting and for not citing or examining those persons/passengers as a witness who would have the best persons to tell about the events of recovery of contraband and exact location of the bag better than the person travelling on seat No. 16.

27. Rukka was prepared at 2.10 a.m. Meaning thereby, search and seizure was complete prior to that. FIR was recorded at 2.30 a.m. and case file was handed over to PW-11 Constable Rajesh Kumar. As per prosecution witnesses, the distance between the spot and the police station was 1½ to 3 kilometers and the police party was having official vehicle with it. All memos except Ex. PW-1/F (seizure of tickets) were prepared prior to leaving of the bus for its destination as these memos bear signatures of driver and conductor of the bus.

28. According to PW-2 Satvir Singh, the bus was detained for about 1½ hour whereas according to PW-1 HC Ashok Kumar, it was detained approximately for about three-four hours. PW-11 Constable Rajesh Kumar stated that he did not remember exact time of detention of the bus on the spot whereas PW-12 ASI Ram Lal stated that bus was detained for about 1½ hour. It is case of the prosecution that bus was intercepted at about 12.30 a.m. If the statement of Investigating Officer, i.e. PW-12 ASI Ram Lal in corroboration with statement of PW-2 Satvir Singh is believed then bus was detained up to 2.00 a.m. Even if the bus is considered to have been detained for three-four hours, then the bus must have left for its destination by 4.00 a.m.

29. PW-1 HC Ashok Kumar and PW-7 HC Bhagirath have categorically stated that police party remained on the spot for 1½ hour after leaving of the bus. In case statement of PW-12 ASI Ram Lal is believed, the police party was supposed to reach Police Station at about 3.00 a.m. and in case statement of PW-1 HC Ashok Kumar is believed, then police party was supposed to reach by 5.00 a.m., whereas as per record, police party had reached in the Police Station at 7.40 a.m.

30. In case of other reliable evidence on record, the discrepancy in timings may have been immaterial, but, in present case, there is material contradiction with regard to identity of possessor of the bag in which contraband was recovered by the police and, therefore, the time gap of at least more than 2½ hours remained unexplained by the prosecution as, as per prosecution case, no other vehicles were checked/intercepted after recovery of contraband in present case and after completing of proceedings on the spot, the police party returned to the Police Station. In case proceedings were completed by 5.00 a.m., what for the police party remained on the spot till 7.30 a.m. at a distance not more than three kilometers from the Police Station despite the fact that the police party was having the official vehicle with it and it might have taken hardly 5-10 minutes to reach the Police Station from the spot.

31. PW-11 Constable Rajesh Kumar and PW-12 ASI Ram Lal have categorically stated that after checking the bus, only respondent was taken out from the bus and no other passenger deboarded the bus, whereas PW-2 Satvir Singh, the independent witness, has deposed contrary to that.

32. It is the case of the prosecution that the entire proceedings were completed with the help of search light and street light. PW-12 ASI Ram Lal further added that besides taking help of search light and street light, help of light of the vehicle was also taken. It is also claimed that all shops/khokhas near by the spot were closed at that time. But, the photographs placed on record as Ex. P-10 to P-12 indicate something else. It is evident from photograph Ex. P-12 that police party is sitting on a bench inside some shop and behind it, door of the said shop/store is open and articles kept in shelf of the said store adjacent to the opened door are also clearly visible in this photograph. Further Ex. P-10 and P-11 clearly indicate that papers of the police are kept on a white table. These photographs appear to have been snapped and developed in such a manner so as to hide the complete visibility of location on the spot and only to reflect the situation suitable to the prosecution case.

33. In view of the aforesaid evidence on record, it cannot be held beyond reasonable doubt that it was only the respondent who was having the possession of the bag from which the contraband was recovered. Therefore, prosecution has failed to prove the recovery of contraband from the conscious possession of the respondent. So, presumption under Sections 35 and 54 of the NDPS Act is also not attracted in present case.

34. As it has been found that prosecution has failed to prove the recovery of charas from the conscious possession of the respondent, chemical examination report Ex. PW-12/E is of no help to the prosecution. However, it is clarified that judgment, dated 11th December, 2009, passed by a Division Bench of this Court in a batch of **Criminal Appeals No. 267 & 311 of 2007 and 45, 314, 363 & 500 of 2008, Sunil versus State of Himachal Pradesh,** reported in **Latest HLJ 2010 (HP) 207,** relied upon by the trial Court to discard chemical analysis report, stands overruled by Full Bench of this Court in case titled as **State of H.P. versus Mehboob Khan,** reported in **2013 (3) Him. L.R. (FB) 1834,** holding that finding in Sunil's case; that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners, the contraband recovered was not proved to be charas; was erroneous and it has further been held that charas is a resinous mass and for presence of resin in the stuff analyzed, without there being any evidence qua the nature of neutral substance, the entire mass has to be taken as charas.

35. Respondent has advantage of being acquitted by the trial Court fortifying the presumption of innocence in his favour which stands unrebutted for want of pointing out any cogent, reliable, convincing and trustworthy evidence regarding recovery of contraband from his possession. Therefore, it cannot be said that acquittal of respondent has resulted into travesty of justice or has caused miscarriage of justice. Thus, no case for interference is made out.

36. Having glance of the above discussion, the appeal is dismissed. Bail bonds furnished by the respondent and his surety are discharged. Record be sent back.

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

Devender Thakur and another ...Petitioners.
Versus
Hardayal Khimta ...Respondent.

CMPMO No. 424 of 2016
Reserved on: 28.02.2018
Decided on: 15.03.2018

Code of Civil procedure, 1908- Order 15 Rule 1 CPC- Section 6 of the Specific Relief Act, 1963- Civil Revision- Suit of the plaintiff-respondent decreed at the stage of framing of issues directing the defendant/petitioner to remove locks from the property rented to the plaintiff-respondent- **Held-** that Section 6 of the Specific Relief Act provides an instant remedy to the possessor of the premises for restoration of the possession in case he is dispossessed by anyone, including the owner of the property- the said proceedings are summary in nature. (Para-4 to 16)

Code of Civil procedure, 1908- Order 15 Rule 1 CPC- Section 6 of the Specific Relief Act, 1963- Civil Revision- Further held that keeping in view the nature and scope of the suit filed under Section 6 of the Specific Relief Act and the conjoint reading of Order 15 rule 1, Order 14 Rule 1, Order 10 Rule 1, 2 and 3, as there was no denial of the assertion and the facts pleaded by the respondent-plaintiff with respect to the possession of the premises in question and the locking of the same by the petitioner-defendant, without taking recourse to law, there was no issue in dispute and as such, the learned Trial Court could have passed the judgment and decree at that stage itself- no material illegality, irregularity, infirmity or error of jurisdiction found to have been exercised by the learned Trial Court- Consequently, revision dismissed. (Para-16 to 25)

Cases referred:

Mohanlal and others versus The State of Punjab and others, 1970 Rent Control Journal 95

M.C. Chockalingam and others versus V. Manickavasagam and others, (1974) 1 Supreme Court Cases 48

Sanjay Kumar Pandey and others versus Gulbahar Sheikh and others, AIR 2004 Supreme Court 3354

Ved Prakash Wadhwa versus Vishwa Mohan, AIR 1982 C 816 = (1981) 3 SCC 667

Sham Lal (dead) by Lrs versus Atma Nand Jain Sabha (Regd.) Dal Bazar, AIR 1987 SC 197 = (1987) 1 SCC 222

Arjun Khiamal Makhijani versus Jamnadas C. Tuliani and others, (1989) 4 SCC 612

Siraj Ahmad Siddiqui versus Shri Prem Nath Kapoor, AIR 1993 SC 2525 = (1993) 4 SCC 406

Advaita Nand versus Judge, Small Cause Court, Meerut and others, (1995) 3 SCC 407

M/s. Mangat Singh Trilochan Singh thr. Mangat Singh (dead) by Lrs. & ors. Versus Satpal, AIR 2003 SC 4300 = (2003) 8 SCC 357

K. Seetharam versus B.U. Papamma & Anr., 2001 (2) Apex Court Journal 682 (SC)

For the petitioners: Mr. Virender Singh Chauhan, Advocate.
For the respondent: Mr. Arvind Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

This petition has been filed assailing judgment and order, dated 21st September, 2016, passed by learned Civil Judge (Junior Division), Chopal (Camp at Jubbal), District Shimla, in Case No. 45/1 of 2016, titled as Hardyal Khimta versus Devender Thakur (for short 'impugned

judgment') whereby suit of plaintiff-respondent has been decreed, at the stage of framing of issues, exercising powers under Order XV Rule 1 of the Code of Civil Procedure (for short 'CPC'), by adjudicating the suit under Section 6 of The Specific Relief Act, 1963 (for short 'the Act'), directing the defendants-petitioners to remove the locks from the property rented out to the plaintiff-respondent.

2. I have heard learned counsel for the parties and have also gone through the record and relevant provisions of law.

3. Section 6 of the Act reads as under:

> ***6. Suit by person dispossessed of immovable property.*** *- (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.*
>
> *(2) No suit under this section shall be brought -*
>
> *(a) after the expiry of six months from the date of dispossession; or*
>
> *(b) against the Government.*
>
> *(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.*
>
> *(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.*

4. As evident from bare perusal of Section 6 of the Act, it provides instant remedy to the possessor of the premises for restoration of possession in case he is dispossessed by anyone, including the owner of the property, without adopting the due process of law. The public policy propagated under Section 6 of the Act is to discourage persons from taking the law in their own hands and entering, by force, upon the property in the possession of other persons.

5. The main object of this provision is to establish the rule of law by directing the person, interested to have the possession of a property in possession of another person, to approach the competent Court of law instead of allowing a person to be his own judge. The proper course for a party, out of possession, is to file a suit for ejectment and recover possession and if, instead of adopting due course of law, he forcibly dispossesses another person in possession, the law requires restoration of status quo ante and the fact that the dis-possessor, the lawful owner, who can successfully maintain an ejectment action, is immaterial for this purpose. As observed by the apex Court in case titled as **Mohanlal and others versus The State of Punjab and others,** reported in **1970 Rent Control Journal 95,** *"under our jurisprudence even an unauthorised occupant can be evicted only in the manner authorised by law. This is the essence of law."*

6. Suit proceedings under Section 6 of the Act are summary in nature and, thus, no appeal has been provided against the decree under Section 6 of the Act. A limited remedy to the unsuccessful party in a suit under Section 6 of the Act is a revision under Section 115 CPC, but, only by way of exception. Owner or the person, entitled for recovery of possession of the property, has an independent remedy to file a suit for recovery on the basis of his title or entitlement for possession, but he has no right to dispossess a person by taking law in his own hands.

7. In case titled as **M.C. Chockalingam and others versus V. Manickavasagam and others,** reported in **(1974) 1 Supreme Court Cases 48,** the apex Court has held as under:

> *"13. ..... All that Section 6 (new) of the Specific Relief Act provides is that a person, even if he is a landlord, cannot take the land into his own hands and forcibly evict a tenant after expiry of the lease. This Section has relevance only to the wrongful act of a person, even if it be by the landlord, in forcibly recovering possession of the property without recourse to law. Section 6 frowns upon forcible dispossession without recourse to law but does not at the same time declare that*

the possession of the evicted person is a lawful possession. The question of lawful possession does not enter the issue at that stage. All that the Court is then required to consider is whether an evicted person has been wrongfully dispossessed and he has come to the Court within six months of the dispossession. The various civil rights between the land-lord and the tenant will have to be adjudicated upon finally in a regular civil suit if filed. ....."

8. Dealing with the scope and nature of proceedings of suit under Section 6 of the Act, the apex Court in **Sanjay Kumar Pandey and others versus Gulbahar Sheikh and others,** reported in **AIR 2004 Supreme Court 3354,** has held as under:

"4. A suit under Section 6 of the Act is often called a summary suit inasmuch as the enquiry in the suit under Section 6 is confined to finding out the possession and dispossession within a period of six months from the date of the institution of the suit ignoring the question of title. Sub-section (3) of Section 6 provides that no appeal shall lie from any order or decree passed in any suit instituted under this Section. No review of any such order or decree is permitted. The remedy of a person unsuccessful in a suit under Section 6 of the Act is to file a regular suit establishing his title to the suit property and in the event of his succeeding he will be entitled to recover possession of the property notwithstanding the adverse decision under Section 6 of the Act. Thus, as against a decision under Section 6 of the Act, the remedy of unsuccessful party is to file a suit based on title. The remedy of filing a revision is available but that is only by way of an exception; for the High Court would not interfere with a decree or order under Section 6 of the Act except on a case for interference being made out within the well settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code."

9. Order VII Rule 1 CPC provides the particulars to be contained in the plaint whereas Order VIII CPC deals with written statement, set-off and counter claim wherein Rule 2 provides that defendant must raise by his pleadings all matters which show the suit not to be maintainable and all such grounds of defence, if not raised, would be likely to take the opposite party by surprise. Rule 3 of Order VIII CPC provides that denial in the written statement must be specific and it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff. Order X CPC empowers the Court examination of parties at the first hearing of the suit to ascertain as to whether allegations in pleadings are admitted or denied.

10. Relevant Rules 1, 2 and 3 of Order X CPC reads as under:

"ORDER X

EXAMINATION OF PARTIES BY THE COURT

1. Ascertainment whether allegations in pleadings are admitted or denied. *- At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by the necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials.*

.....

2. Oral examination of party, or companion of party. *- (1) At the first hearing of the suit, the Court -*

(a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit; and

(b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in Court or his pleader is accompanied.

(2) At any subsequent hearing, the Court may orally examine any party appearing in person or present in Court, or any person, able to answer any material question relating to the suit, by whom such party or his pleader is accompanied.

(3) The Court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party.

3. Substance of examination to be written. *- The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record."*

11. Order XIV CPC deals with settlement of issues and determination of suit on issues of law or on issues agreed upon. Relevant Rule 1 of Order XIV CPC reads as under:

"ORDER XIV

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

1. Framing of issues. *- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.*

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence."

12. Order XV Rule 1 CPC empowers the Court to dispose of the suit at the first hearing by pronouncing judgment, which reads as under:

"ORDER XV

DISPOSAL OF THE SUIT AT THE FIRST HEARING

1. Parties not at issue. *- Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce judgment."*

13. It is not *res integra* that the term 'first hearing of a suit' in provisions of Order I Rule 10 CPC, Order XIV Rule 1 (v) CPC and Order XV Rule 1 CPC means the day fixed for hearing on which Court applies its mind to determine the point in controversy between the parties to the suit, which ordinarily would be at the time when either issues are determined or evidence is taken. *{See Ved Prakash Wadhwa versus Vishwa Mohan, AIR 1982 C 816 = (1981) 3 SCC 667; Sham Lal (dead) by Lrs versus Atma Nand Jain Sabha (Regd.) Dal Bazar, AIR 1987 SC 197 = (1987) 1 SCC 222; Arjun Khiamal Makhijani versus Jamnadas C. Tuliani and others, (1989) 4 SCC 612; Siraj Ahmad Siddiqui versus Shri Prem Nath Kapoor, AIR 1993 SC 2525 = (1993) 4 SCC 406;*

Advaita Nand versus Judge, Small Cause Court, Meerut and others, (1995) 3 SCC 407; and M/s. Mangat Singh Trilochan Singh thr. Mangat Singh (dead) by Lrs. & ors. Versus Satpal, AIR 2003 SC 4300 = (2003) 8 SCC 357}

14. In instant case, respondent-plaintiff had filed a suit under Section 6 of the Act for restoration of his peaceful possession as a tenant alleging his forcible dispossession by the landlord, i.e. petitioners-defendants, without adopting due course of law by locking the premises rented out to the respondent-plaintiff.

15. In the written statement, petitioners-defendants had admitted renting out premises in question to respondent-plaintiff and also putting locks thereupon with an explanation that the said premises was found without lock for two days and, thus, to protect the premises to be further being sublet to others alleging that rented premises had been sublet by respondent-plaintiff to someone else resulting into loss of possession by respondent-plaintiff and also that respondent-plaintiff had no right, title or interest in the premises for arrears of rent amounting to ₹ 42,500/- up to 31st March, 2016, as the respondent-plaintiff had not paid rent since 1st March, 2015 and also for non-payment of electricity bill amounting to ₹ 7,064/- since 9th February, 2012 till 31st August, 2016.

16. Keeping in view the nature and scope of a suit filed under Section 6 of the Act, material proposition of fact, in present case, is that as to whether respondent-plaintiff was in possession of the premises in question as a tenant of petitioners-defendants and he has been dispossessed without adopting the due process of law and material proposition of law is that as to whether the suit under Section 6 of the Act has been preferred within six months of forcible dispossession of the respondent-plaintiff.

17. In the plaint, respondent-plaintiff has specifically pleaded his possession as a tenant and putting locks by the landlord on 14th July, 2016 upon the premises rented to him resulting into his forcible dispossession from the said premises. In the written statement, petitioners-defendants have not disputed renting out of the premises to the respondent-plaintiff and his possession till 14th July, 2016, rather, they have admitted putting locks on the premises in question on 14th July, 2016 with explanation that the said premises was lying unlocked since 13th July, 2016 and, therefore, after informing the police and Gram Panchayat, the said premises was locked in presence of Up Pradhan of the Gram Panchayat and the said act was justified for arrears of rent, non-payment of electricity bill and subletting of one portion of the said premises.

18. It is evident from the material on record that for the purpose of adjudicating a suit under Section 6 of the Act, there was no denial of the assertion and the facts pleaded by respondent-plaintiff with respect to possession of the premises in question rented out by the petitioners-defendants and locking the said premises by the petitioners-defendants without taking recourse under law available to the petitioners-defendants.

19. Date of dispossession, i.e. 14th July, 2016, has also not been disputed by the petitioners-defendants. Suit was preferred within the period of six months prescribed under Section 6 of the Act as the same was filed on 14th October, 2016. Therefore, material proposition of fact or law, as affirmed by the respondent-plaintiff, has not been denied, rather, admitted by the petitioners-defendants in the suit. There was no issue in dispute of material proposition of fact or law and thus, parties were not at issue on any question of law or fact to be adjudicated upon under Section 6 of the Act.

20. So far as question of recovering the possession for arrears of rent or non-payment of electricity bill or subletting the portion of premises by the respondent-plaintiff is concerned, petitioners-defendants have an independent right to take recourse to appropriate proceedings in competent Court of law, which are definitely not to be adjudicated upon in a suit filed by respondent-plaintiff under Section 6 of the Act.

21. It may be noticed that learned Civil Judge has not reduced the substance of examination of party, as provided under Rule 3 of Rule X CPC read with Order XIV Rule 1 (5) CPC

and also from the impugned judgment, it does not appear that he opted for oral examination of party, as provided under Rule 2 of Order X CPC, but the purpose of these provisions is to ascertain as to whether there is any issue in dispute arising between the parties from a material proposition of fact or law affirmed by one party and denied by the other. But omission to carry out such exercise does not have any effect on merits of order as such exercise was necessary only if parties would have been at variance on material propositions of fact or of law and, as discussed hereinabove and hereinafter, there is no such variance in present case.

22. During hearing of the present petition, learned counsel for the petitioners-defendants has re-asserted that it is not disputed that premises in question was rented out to respondent-plaintiff by the petitioners-defendants and the said premises was locked by the petitioners-defendants on 14th July, 2016, as admitted in the written statement, but, has argued that the learned Civil Judge has committed an error by passing the impugned judgment and decree in favour of respondent-plaintiff ignoring the plea of the petitioners-defendant with regard to arrears of rent, non-payment of electricity bill and subletting of a portion of the premises in question.

23. Petitioners-defendants have also relied upon pronouncement of apex Court in case titled as **K. Seetharam versus B.U. Papamma & Anr.,** reported in **2001 (2) Apex Court Journal 682 (SC).** The facts of the said case were entirely different from the present case. As per submissions made on behalf of petitioners-defendants, referred to above, and also evident from the written statement and documents placed on record by petitioners-defendants, material proposition of fact with regard to possession of respondent-plaintiff upon premises in question as a tenant and putting locks thereon by the petitioners-defendants resulting into dispossession of respondent-plaintiff without adopting due process of law stands admitted by petitioners-defendants whereas in the judgment relied upon by the petitioners-defendants, the findings of the Courts below were clearly found to be contrary to the record and it was found that the Courts below had erred in construing that the defendant had admitted the pleadings of the plaintiff as there was a categorical denial of the defendant in the written statement with regard to assertion of the plaintiff made in the plaint. Therefore, this judgment is not applicable in the given facts and circumstances of present case.

24. Keeping in view the settled position of law with regard to nature and scope of suit under Section 6 of the Act, as discussed hereinabove, I am of the opinion that for all these issues related to arrears of rent, non-payment of electricity bills and subletting, petitioners-defendants should have approached the competent Court of law under the relevant provision of law applicable and available for redressal of his grievances.

25. For aforesaid reasons, I am of the considered view that the learned Civil Judge has not committed any error in decreeing the suit of respondent-plaintiff. There is no material illegality, irregularity, infirmity or error of jurisdiction exercising the powers by the learned Civil Judge in terms of the impugned judgment.

26. Viewed thus, there is no merit in the present petition, hence, the same is dismissed. No order as to costs.

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

Maya Kalsi .....Petitioner

Versus

State of H.P. .....Respondent

Cr. Revision No. 143 of 2016
Reserved on: 12.03.2018
Decided on: 15.03.2018

Code of Criminal Procedure, 1973- Section 397 read with Section 401- Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985- The petitioner alongwith one Mr. Mathias apprehended with 165 grams of MDA including Indian and foreign currency while travelling in the Car- Driver Mathias on being signalled to stop was alleged to have thrown waist money bag, black in colour, towards the back seat of the car- the petitioner aggrieved by framing of the charges against her sought quashing of the same on the ground that the contraband was not recovered from her conscious possession nor there was any evidence that she abetted the commission of the crime- **Held-** that the petitioner was accompanying the accused for the last many days and there was prima facie evidence that they had purchased the contraband from Rishikesh, and, as such, it cannot be said that the petitioner did not have knowledge of the narcotic substances being carried by the co-accused for the last so many days- Thus, at this stage, there was sufficient material to proceed against the petitioner- consequently, framing of charge upheld. (Para-7 to 9)

Case referred:
Ismail Khan Aiyub Khan Pathan vs. State of Gujarat, (2000) 10 SCC 257

For the petitioner:	Ms. Shilpi Jain and Mr. Karan Singh Kanwar, Advocates.
For the respondent:	Mr. Ashwani Sharma, Additional Advocate General with Mr. Rajat Chauhan, Law Officer.

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, is maintained by the petitioner, for setting aside the impugned order dated 03.12.2015, whereby learned Special Judge, Kullu, H.P., has framed charge against the petitioner, under Sections 22 & 29 of the Narcotic Drugs and Psychotropic Substances Act (hereafter to be called as "ND & PS Act").

2. The brief facts of the case, as per the prosecution are that on 10.05.2015, Head Constable Bhupender Singh alongwith Head Constable Ram Krishan, No. 62, Constable Chaman Lal, No. 357, Constable Vinay Singh, No. 674 and lady Constable Meena Kumari, No. 282, was on traffic checking duty. At about 6:30 p.m., one car bearing registration No. HP-34A-8000, coming from Kullu Side was signaled to be stopped. The said car was being driven by a foreigner and a foreigner woman was sitting with him on front seat. When documents of the car were demanded from the driver, both the foreigners were got perplexed and the driver thrown the waist money bag, black in colour, on the back seat of the car. At the same time, one car bearing registration No. HP-34D-0780 coming from Patlikuhal side was also signaled to stop by Head Constable Bhupender Singh, which was being driven by a local resident, namely Munna Lal. Thereafter, Head Constable Ram Krishan, No. 62 and Munna Lal were made witnesses and in their presence when names of the persons sitting in the car were asked, they told their names to be Mathias S/o Dietar, Nationality Deutsch and Maya D/o Onkar Nath Chand, Nationality British. When search of the above foreign citizens were made in front of the witnesses, no objectionable article was recovered, however when the waist money bag, which was thrown on the back seat of the car was searched, one transparent polythene tied with rubber band, in which, brown colour substance, stated to be MDA and currency notes, both Indian and foreign were recovered, which on weighment was found 165 gms. The recovered substance was sealed with eight seals of impression "T" and NCB form in triplicate was prepared and seal after use was handed over to the witness Munna Lal. After completing all necessary formalities, the petitioner alongwith co-accused was arrested and challan was presented before the learned trial Court and learned trial Court, vide order dated 03.12.2015, framed charge against the present petitioner. Hence the present petition.

3. Ms. Shilpi Jain, learned counsel appearing on behalf of the petitioner has argued that the petitioner was having no knowledge with respect to the alleged quantity of Narcotics recovered. She has further argued that the present petitioner has accompanied the co-accused from Goa to Manali only for the simple reason that she wanted to save her Flight fare from Goa to Kullu, which was unaffordable. She has argued that as far as abetment is concerned, no ingredients is there to prove the same, as there is nothing in the prosecution case to conclude that whether the petitioner had packed the material, kept the material or in any manner assisted the co-accused. She has further argued that as the petitioner is innocent, she may be discharged. Learned counsel for the petitioner, in support of her arguments placed reliance upon the decision of Hon'ble Supreme Court in ***Ismail Khan Aiyub Khan Pathan vs. State of Gujarat***, (2000) 10 SCC 257 and stated that no presumption can be taken against the person sitting as a passenger in a car.

4. On the other hand, learned Additional Advocate General has argued that the prior to Manali incident, the petitioner remained with the co-accused for many days at different places in Madhya Pradesh, Uttar Pradesh etc., which is evident from their call details collected by the Police. He has further argued that the petitioner is actively involved in the present incident and the prosecution has collected sufficient material and placed the same before the Court, to connect the petitioner with the alleged offence and order of framing charge needs no interference at this stage.

5. In rebuttal, learned counsel for the petitioner has argued that the petitioner is a young lady and cannot be expected to be involved in such offences, so the present petition may be allowed and the charge framed against the petitioner may be quashed.

6. The case of the prosecution is that the petitioner was accompanying the co-accused in the car and, therefore, she was having knowledge with regard to the Psychotropic substance and when their car was stopped for traffic checking, she becomes perplexed. The co-accused has also disclosed to the Police that he purchased the alleged substance from a person at Rishikesh for Rs.60,000/- and he was in Manali to sell the same. Further the petitioner accompanied the co-accused from Rishikesh and prior to that, they were together for many days at different places.

7. In these circumstances, at this stage, *prime facie* case is found to be made against the petitioner and the judgment cited by the learned counsel for the petitioner is of no use, being not applicable to the facts and circumstances of the present case, as in the said case, the Hon'ble Supreme Court has come to the conclusion that there is nothing on record that the accused were dealing with the Narcotic Drugs, nor they had admitted either through a confession or otherwise of any incriminating role, nor was there any evidence that the accused persons, who were found sitting in the room, had a connection with the article in question. However, in the present case, the petitioner was accompanying the accused for the last so many days and *prime facie* it seems that they purchased this material from Rishikesh, thus it cannot be said that the petitioner was not having knowledge with respect to the Narcotic substance, as she also got perplexed on seeing the Police and was with the co-accused from last many days.

8. Therefore, it is not possible to hold at this moment that the petitioner is not at all involved in the present case. There is sufficient material to proceed against the petitioner, so order dated 03.12.2015, whereby charge against the petitioner was framed, cannot said to be without any basis.

9. In view of the aforesaid discussions, this Court finds that *prime facie* case, at this moment, is against the petitioner and the charge framed by the learned trial Court is in accordance with law.

10. The net result of the above discussion is that the present petition is devoid of merits, deserves dismissal and is accordingly dismissed. However, taking into consideration the age of the present petitioner and the fact that trial is pending since, 2015, it is expected that learned trial Court will try to dispose of the matter at the earliest possible. Registry is directed to

send back the records forthwith. Parties through their counsel are directed to appear before the learned trial Court on ***28th March, 2018***.

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

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

M/S Mahindra & Mahindra Financial Services Ltd. .....Petitioner.

Versus

Sh. Kana Singh & anr. .....Respondents.

CMPMO No. 390 of 2015.
Date of decision: March 15, 2018.

Arbitration and Conciliation Act, 1996- Section 36- The enforcement of award through execution can be filed anywhere in the Country where such decree can be executed – there is no requirement for obtaining an order of transfer of the decree or issue of a percept from the Court which would have jurisdiction over the arbitral proceedings. (Para-4)

Case referred:
Swastik Gases Private Limited versus Indian Oil Corporation Limited (2013) 9 Supreme Court cases 32

For the petitioner Mr. Deepak Gupta, Advocate.
For the respondents Nemo for respondent No. 1.
Name of respondent No. 2 stands deleted.

The following judgment of the Court was delivered:

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

Heard.

2. Order dated 21.2.2015 passed by learned District Judge, Shimla in execution proceedings registered as Arbitration Case No. 40-S/X of 2014 is under challenge in this petition. The petitioner herein is the decree holder as learned Arbitrator has made the award in its favour and against the respondents-judgment debtors. Respondent No.1-judgment debtor though is duly served, however, no one has put in appearance on his behalf on the previous date and even before that also. Today also, there is no appearance on his behalf. Respondent No.2, however, has already been ordered to be deleted.

3. The petitioner-decree holder has initiated proceedings in the Court below for execution of the award passed in its favour in terms of Section 36 of the Arbitration and Conciliation Act. In the matter of the execution of the award the same has to be executed in the same manner as the decree passed by the Court. Learned District Judge has placed reliance on the judgment of the Hon'ble Apex Court in ***Swastik Gases Private Limited*** versus ***Indian Oil Corporation Limited (2013) 9 Supreme Court cases 32*** and arrived at a conclusion that for want of jurisdiction, the award cannot be executed. The execution petition, as such, has been ordered to be returned to the petitioner-decree holder for presentation before the competent Court having the territorial jurisdiction to entertain and

try the same. The view of the matter so taken by learned District Judge is not legally sustainable as at this stage it is well settled that the arbitral proceedings stands terminated on the announcement of the award. Although in the matter of execution of the award the same procedure as in the case of the execution of a decree passed by the Court had to be followed yet the award cannot be treated to be a decree within the meaning of Section 38 of the Code of Civil Procedure.

4. Being so, the execution of the award can be sought by initiating the execution proceedings at any place in the country where the same can be executed. Neither the execution proceedings need to be transferred nor any percept obtained as is required in the matter of execution of the decree passed by a civil Court. Support in this regard can be drawn from a recent judgment of the Apex Court in Civil Appeal No 1650 of 2018, titled ***Sundaram Finance Limited*** versus ***Abdul Samad & anr.,*** decided on 15th February, 2018. The relevant portion of this judgment reads as follows:

> "*19. The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.*
>
> *20. It is in the aforesaid context that the view adopted by the Delhi High Court in* ***Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*** *records that Section 42 of the Act would not supra apply to an execution application, which is not an arbitral proceeding and that Section 38 of the Code would apply to a decree passed by the Court, while in the case of an award no court has passed the decree.*
>
> *21. The Madras High Court in* ***Kotak Mahindra Bank Ltd. v. Sivakama Sundari & Ors.*** *referred to Section 46 of the said Code, which spoke of precepts but stopped at that. In the context of the Code, thus, the view adopted is that the decree of a civil court is liable to be executed primarily by the Court, which passes the decree where an execution application has to be filed at the first instance. An award under Section 36 of the said Act, is equated to a decree of the Court for the purposes of execution and only for that purpose.*
>
> *Thus, it was rightly observed that while an award passed by the arbitral tribunal is deemed to be a decree under Section 36 of the said Act, there was no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award was passed should be taken to be the Court, which passed the decree. The said Act actually transcends all territorial barriers.*
>
> ***Conclusion:***
>
> *13 supra.*
>
> *22. We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings."*

5. Such being the position of law, the impugned order being not legally sustainable is quashed and set aside. The present petition is allowed. The Court below is directed to proceed further in the pending execution proceedings in accordance with law.

6. The petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

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

Shri Surinder Mohan. .....Petitioner.

Versus

Shri Raj Kumar Mehra & anr. .....Respondents.

CR No. 17 of 2017.
Date of decision: March 15, 2018.

Code of Civil Procedure, 1908- Order 6 Rule 17- An application under Order 6 Rule 17 CPC filed for the amendment in the reply after the commencement of trial- **Held-** that amendment after the commencement of trial are controlled by the proviso to Order 6 Rule 17 CPC- amendment in the pleading should, however, normally be allowed, even a prayer in this regard is made at some belated stage, in case the same is essential and required for just and effective decision of the pending lis as possibility of the bonafidely omission to raise such plea at the relevant time and realization of such omission at a later stage cannot be ruled out as happened in the instant case, wherein issues were framed on 31.3.2014 and application for amendment was filed on 5.7.2014 before any evidence was recorded- application partly allowed and petition disposed of accordingly. (Para-9, 12 and 19)

Cases referred:

Vidyabai and others versus Padmalatha and another, (2009) 2 Supreme Court Cases 409

Ajendraprasadji N. Pandey versus Swami Keshavprakeshdasji N. & Others, (2006) 12 SCC 1

Surender Kumar Sharma versus Makhan Singh, (2009) 10 Supreme Court Cases 626

State of Madhya Pradesh Versus Union of India and another, (2011) 12 Supreme Court Cases 268

Rameshkumar Agarwal versus Rajmala Exports Private Limited and others, (2012) 5 Supreme Court Cases 337

Abdul Rehman and another versus Mohd. Ruldu and others, (2012) 11 Supreme Court Cases 341

For the petitioner Mr. R.K Bawa, Senior Advocate with Mr. Ajay K. Sharma, Advocate.

For the respondents Mr. Bhupender Gupta, Senior Advocate with Mr. Naresh Sharma, Advocate.

The following judgment of the Court was delivered:

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

Order Annexure P-1 passed by learned Rent Controller, Court No. III, Shimla in an application under Order 6 Rule 17 CPC registered as CMA No. 75-6 of 14 is under

challenge in the present petition. Learned Rent Controller below has dismissed the application and declined the amendment sought to be made by the petitioner (hereinafter referred to as the respondent-tenant) in reply to the rent petition initially filed.

2. The respondents herein are the owners of a shop in building No. 84, the Mall Shimla. The building is non-residential. The shop was rented out to one Trilok Chand, father of respondent-tenant Surinder Mohan for doing tailoring business. The respondent-tenant is presently doing the tailoring business in the shop under the name and style M/S Bhagat sons. The demised premises allegedly is bonafidely required by the petitioners-landlords for expansion of their business. They are running cloth business in this very building under the name and style M/S Nathu Ram and Sons. Adjoining thereto is another shop occupied by Shri Raman Jain. The petitioners-landlords are also running business of readymade garments under the name and style "M/S John Raymond Bright" in a part of the floor situated immediately below Mall Road level. The demised premises and another shop adjoining thereto being situated in the heart of town are stated to be most appropriate and convenient to the petitioners-landlords for expansion of their existing business. The petitioners-landlords allegedly are not occupying any other premises owned by them in the Urban Area of Shimla nor vacated any such premises in the Urban area without sufficient cause within five years of the institution of the petition. The floor above the demised premises allegedly is being used by them for residential purposes. Their requirement, as such, is stated to be bonafide. Besides the respondent-tenant is claimed to be in arrears of rent, therefore, his eviction from the demised premises has been sought on the ground of personal bonafide requirement and also he being in the arrears of rent.

3. In reply the respondent-tenant has raised the question of maintainability of the petition and also that all legal heirs of deceased tenant Trilok Chand have not been impleaded as respondents in the petition. On merits, while denying the contentions in the rent petition qua the demised premises bonafidely required by the petitioners-landlords, it has been submitted that not the petitioners but it was late S/Shri Roshan Lal and Raj Kumar were running business under the name and style of M/S Nathu Ram and Sons and also M/S John Raymond Bright in the shop at Mall Road level. Late Shri Roshan Lal later on shifted to Delhi. Recently they occupied two offices behind the shop and another shop after removing the partition. They also took the second shop adjoining to the first shop and removed the partition between the two and then merged the office at the back of the second shop by removing its partition. In this way a big huge shop wherein business of cloth and readymade garments is being carried out by them under the name and style of Nathu Ram and Sons and M/S John Raymond Bright. It is also denied that the demised premises are situated in the heart of town, hence more appropriate and convenient to the petitioners-landlords for running the business. It is also denied that one shop has been divided into three parts by them out of one is with them, another with respondent-tenant and the third one with Raman Jain. The petitioners-landlords have nothing to do with the shops in the occupation of the respondent-tenant and Raman Jain. The tenants in the demised premises were late Shri Trilok Chand and late Shri Devi Chand. The petition without impleading all the legal heirs of said Shri Trolok Chand and Shri Devi Chand is stated to be not maintainable. It is also denied that the petitioners-landlords were not occupying any other premises owned by them in urban area. One big hall below entire building No. 84, the Mall Shimla in their possession is stated to be lying vacant. Besides, the shops on Mall road level and top floor of the said building including an attic is also with them. They have concealed such facts from the Court. It is also pointed that they have not vacated any such premises in the urban area without sufficient cause within five years of the institution of the petition. They rather have recently merged the two shops, two offices and mezzanine floor into one big shop within five years of the institution of the petition. This fact has also been

concealed from the Court. It is also denied that first floor is being used by the petitioner for their residential purposes and partly for running their business. It is also submitted that they are residing in the top floor of Shop No. 36, the Mall Shimla belonging to one Chander Giri and also in a kothi known as Harkar, Lower Jakhoo, Shimla. The petition, as such, has been sought to be dismissed.

4. The petitioners-landlords have also filed the rejoinder. Issues were framed in the petition on 31.3.2014. However, evidence could not be recorded as yet. In view of the respondent-tenant having filed the application hereinabove registered as CMA No. 75-6 of 2014 under Order 6 Rule 17 CPC for seeking permission to amend the reply to the rent petition initially filed. By way of amendment, following preliminary objections have been sought to be incorporated:

> "4. That the petition is malafide. As per the alleged receipt regarding handling over the possession with regard to 36 The Mall Shimla placed on file by the petitioners, after the institution of the eviction petition against the respondent, the petitioner Raj Kumar Mehra is stated to have vacated the spacious flat on the Mall in Building No. 36, the Mall Shimla without any rhyme or reason and without there having any sort of litigation and is allegedly showing his residence, in the five storeyed Non-residential building (bearing No. 84, the Mall Shimla, the building in question). Had there been any need for the alleged expansion of the business, the petitioner would have never allegedly shifted in that. Further he has got another spacious residential set at Harkar Jakhoo, Shimla, which depicts that his alleged need for the expansion of the business is malafide with the only motive, to enhance the rent exorbitantly, from Rs. 2071/- per annum (i.e. about Rs. 173/- per month) to Rs. 10,000/- per month and to which the respondent showed his inability to pay and the petitioner refused to accept rent, when tendered number of times, in cash, by cheque, by money orders, by pay orders, much prior to the filing of the eviction petition dated May, 2012 in the Hon'ble Court.
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> 5. That the petitioners/non-applicants have concealed material facts from the Hon'ble Court and have not come to the Hon'ble Court with clean hands. The petition deserves dismissal on this ground alone, at the very outset, with exemplary costs.
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> i. The petitioners failed to mention regarding merging of two shops (by partition between the two shops), merging of two offices behind the said shops) in their eviction petition.
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> ii. The petitioner further failed to mention regarding the removal of mezzanine floor over the said two offices, which depicts that they had got surplus accommodation and that is why they had taken this step.
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> ii. That the petitioner concealed the facts that they are having residential accommodation at No. 36, The Mall Shimla and at 'Harkar' Jakhoo, Shimla. Further, the accommodation got vacated for their personal requirement for business purpose was never utilized for the said purpose and the same is lying vacant.
>
> iv. That the petitioners have concealed material facts regarding their family members. The family members have since reduced. Sh. Roshan Lal (father of Sh. Raj Kumar) had sine expired, as according to the respondent, the Landlords of the premises are M/s Roshan Lal, Raj Kumar. Further, Raj Kumar had almost retired from his business due

to his old age (who is aged about 82 years), suffering from various heart ailments, diabetes keeping indifferent health and undergoing treatment in Delhi. As such, the business of both the Firs M/s Nathu Ram & sons and M/s John Raymond Bright are suffering.

v. That the entire five storeyed non residential building bearing no. 84, The Mall Shimla is lying vacant, except the shops, on The Mall road level. The petitioners have got even surplus accommodation, on the Mall Road level (for carrying on their business) which bears no. 84/1, The Mall Shimla, H.P.

6. That the eviction petition has been filed against the respondent with an oblique motive.

Respondent's father Late Sh. Trilok Chand was a witness in an earlier eviction case against petitioner tenant Sh. R.L. Seth, which he lost. Further there is a clash of business, as the petitioners are carrying on readymade business, in the name of M/S John Raymond Bright and the respondent is carrying on tailoring business in the name of M/s Bhagat Sons Tailors in that every building."

5. In order to explain as to why the preliminary objections sought to be incorporated by way of seeking amendment were not initially incorporated, it has been submitted that new facts having came into existence and to the notice of the respondent-tenant after institution of the petition has necessitated the same after the reply was initially filed.

6. The petitioners-landlords in reply filed to the application have contested and resisted the same on grounds, inter-alia, that the same is not maintainable and rather filed with malafide intention to delay the proceedings in the rent petition. The facts now sought to be incorporated by way of amendment were already in the knowledge and notice of the respondent-tenant. The same otherwise are also not necessary for the decision of the rent petition.

7. It is interesting to note that the application initially was decided by learned Rent Controller below vide order dated 24.11.2014, Annexure A1 to CMP No. 2843 of 2017. This order was challenged in this Court in Civil Revision No. 3 of 2015 which was disposed of vide judgment dated 23.4.2015 Annexure A2 to the above application CMP No. 2843 of 2017. The application was remanded to learned Controller below for fresh disposal by assigning reasons. Consequently, the application was decided afresh by learned Rent Controller on 7.10.2015 vide order Annexure A3 to this application. The matter was again agitated in this Court in Civil Revision No. 4 of 2016 which was disposed of vide judgment Annexure A4 and the application again remanded to learned Rent Controller with a direction to decide the same afresh by recording reasons. Consequently, learned Rent Controller has decided the application afresh vide Annexure P1 to this petition. Again the order Annexure P1 has been assailed in this petition.

8. Mr. R.K. Bawa, learned Senior Advocate assisted by Mr. Ajay K. Sharma, Advocate, representing the respondent-tenant has drawn the attention of this Court to various judgment of the Apex Court in which it is held that while considering an application under Order 6 Rule 17 CPC the approach should be liberal and the amendment if necessary for just decision of the *lis* should be allowed even if sought to be made at some belated stage. On the other hand, Mr. Bhupender Gupta, learned Senior Advocate assisted by Mr. Naresh Sharma, Advocate while inviting the attention of this Court to the provisions contained under Section 14(3) of H.P. Urban Rent Control Act has contended that the petitioners-landlords are not in occupation of any other residential/non-residential building owned by

them in Shimla town nor they vacated any such building within five years from the institution of the present petition. The contentions sought to be raised by way of having preliminary objection No. 4 are, therefore, of no help to the case of the respondent-tenant. On merits, it is submitted that what he now intend to incorporate in reply by way of preliminary objection No. 5 is already there in the reply he originally filed. As regard preliminary objection No. 6, the facts he averred therein were in his knowledge and notice when the reply was originally filed. Therefore, according to Mr. Gupta the amendment now sought is neither essential nor required for just decision of the rent petition.

9. Before coming to the point in issue, it is desirable to note at the outset that in terms of the provisions contained under Order 6 Rule 17 CPC amendment in the pleadings if required for just decision of the *lis* can be allowed at any stage of the proceedings. The proviso to Order 6 Rule 17 CPC take away the power of the Court to allow an application for amendment when the trial already commenced unless satisfied that inspite of due diligence the party seeking amendment in the pleadings has failed to do so before commencement of trial. The support in this regard can be taken from the judgment of the Hon'ble Apex Court in ***Vidyabai and others*** versus ***Padmalatha and another,*** (2009) 2 Supreme Court Cases 409. The relevant portion of this judgment reads as follow:

> "10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:
>
> > "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."
>
> It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial."

10. Similar is the view of the matter again taken by the Hon'ble Apex Court in ***Ajendraprasadji N. Pandey*** versus ***Swami Keshavprakeshdasji N. and Others***, (2006) 12 SCC 1. This judgment also reads as follow:

> "41. We have carefully considered the submissions made by the respective senior counsel appearing for the respective parties. We have also carefully perused the pleadings, annexures, various orders passed by the courts below, the High Court and of this Court. In the counter affidavit filed by respondent No.1, various dates of hearing and with reference to the proceedings taken before the Court has been elaborately spelt out which in our opinion, would show that the appellant is precluded by the proviso to rule in question from seeking relief by asking for amendment of his pleadings.
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> 42. It is to be noted that the provisions of Order VI Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.
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> 43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless inspite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order VI Rule 17 was due to the recommendation of the Law Commission since Order

> 17 as it existed prior to the amendment was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the Amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of Courts and, therefore, by Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognizing the power of the Court to grant amendment, however, with certain limitation which is contained in the new proviso added to the Rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their Court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

11. The legal principles settled in these judgments supra, therefore, are that the power of the Court to allow amendment in the pleadings at any stage of the proceedings are controlled by the proviso to Order 6 Rule 17 CPC. Under the proviso no application for amendment can be allowed after the trial has commenced unless the Court is satisfied that the party seeking amendment despite due diligence could not raise the contention sought to be incorporated by way of amendment ordinarily at the time of drafting and filing the pleadings.

12. It is also well settled that amendment in the pleadings should normally be allowed even a prayer in that regard made at some belated stage in case the same is essential and required for just and effective decision of the pending *lis*. It has also been emphasized that approach of the Court ceased of the matter should be liberal and not technical while considering an application for amendment. The Apex Court in ***Surender Kumar Sharma*** versus ***Makhan Singh***, (2009) 10 Supreme Court Cases 626 has held that the application for amendment merely belated should not be dismissed if the Court finds that allowing the same would facilitate to resolve the real controversy between the parties. The relevant portion of this judgment is reproduced hereunder:

> "5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the Court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the Court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and latches in making the application for amendment cannot be a ground to refuse amendment.
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> 6. It is also well settled that even if the amendment prayed for is belated, while considering such belated amendment, the Court must bear in favour of doing full and complete justice in the case where the party against whom the amendment is to be allowed, can be compensated by cost or otherwise. [See B.K. N. Pillai Vs. P. Pillai and another [AIR 2000 SC 614 at Page 616]. Accordingly, we do not find any reason to hold that only because

there was some delay in filing the application for amendment of the plaint, such prayer for amendment cannot be allowed.

7. So far as the second ground is concerned i.e. the prayer for amendment of plaint, if allowed, shall change the nature and character of the suit, we are unable to accept this view of the High Court. We have carefully examined the amendment prayed for and after going through the application for amendment of the plaint, we are of the view that the question of changing the nature and character of the suit, if amendment is allowed, cannot arise at all. The suit has been filed for eviction inter alia on the ground of arrears of rent. It cannot be disputed that even after the amendment, the suit would remain a suit for eviction. Therefore, we are unable to agree that if the amendment of the plaint is allowed, the nature and character of the suit shall be changed. Accordingly, the High Court was not justified in holding that the nature and character of the suit shall be changed, if such prayer for amendment is allowed.

8. For the reasons aforesaid, the orders of the High Court as well as of the trial Court are set aside. The application for amendment of the plaint filed by the appellant stands allowed, subject to the payment of costs of Rs.10,000/- to the opposite party, which shall be deposited/paid within a period of six weeks from the date of supply of a copy of this order. In default of deposit/payment of such costs, the application for amendment of the plaint shall stand rejected."

13. The Apex Court has again held in ***State of Madhya Pradesh*** Versus ***Union of India and another***, (2011) 12 Supreme Court Cases 268 that while considering an application for amendment the liberal approach should be general rule and to adjust the equity, the other side can be compensated with costs. It has also been settled in this judgment that the amendment which would render the suit infructuous, introduce a totally different, new and inconsistent case or challenges fundamental character of the suit, hence sought after unusual delay should not be allowed. This judgment also reads as follow:

"6. In order to consider the claim of the plaintiff and the opposition of the defendants, it is desirable to refer the relevant provisions. Order VI Rule 17 of the Code of Civil Procedure, 1908 (in short 'the Code') enables the parties to make amendment of the plaint which reads as under;

"17. Amendment of pleadings - 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:

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."

7. The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being 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. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after

commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.

8. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

9. Inasmuch as the plaintiff-State of Madhya Pradesh has approached this Court invoking the original jurisdiction under Article 131 of the Constitution of India, the Rules framed by this Court, i.e., The Supreme Court Rules, 1966 (in short 'the Rules) have to be applied to the case on hand. Order XXVI speaks about "Pleadings Generally". Among various rules, we are concerned about Rule 8 which reads as under:

"8.The Court may, at any stage of the proceedings, allow either party to amend his pleading in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The above provision, which is similar to Order VI Rule 17 of the Code prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties.

10. This Court, while considering Order VI Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626, at para 5:

"5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

(ii) North Eastern Railway Administration, Gorakhpur v.

Bhagwan Das (dead) by LRS, (2008) 8 SCC 511, at para16:

"16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil which still holds the field, it was held that all

amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

(iii) Usha Devi v. Rijwan Ahamd and Others, (2008) 3 SCC 717, at para 13:

"13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court in Baldev Singh v. Manohar Singh. In para 17 of the decision, it was held and observed as follows: (SCC pp. 504-05)

'17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

(iv) Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, at paras 15 & 16:

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

(v) Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84, at para 63:

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties."

14. Similar is the view of the mater taken by the Hon'ble Apex Court in ***Rameshkumar Agarwal*** versus ***Rajmala Exports Private Limited and others,*** (2012) 5 Supreme Court Cases 337. The relevant para is reproduced as under:

> "It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

15. It is worth mentioning that the application for amendment in the case ibid was filed immediately after filing of the suit i.e. before commencement of the trial which certainly is not the situation in the case in hand because here on framing of issues the trial has already commenced. However, on legal principles governing the field the ratio of this judgment is also attracted in the case in hand. The support can also be drawn from the judgment again that of the Hon'ble Apex Court in ***Abdul Rehman and another*** versus ***Mohd. Ruldu and others***, (2012) 11 Supreme Court Cases 341.

16. Now if examining the claims and counter claims in the light of the legal principles discussed hereinabove, prima-facie, the petitioners-landlords have vacated the premises, building No. 36, The Mall Shimla and Harker building, lower Jhakoo Shimla which were being used by them for residential purposes. In the reply originally filed the respondent-tenant has averred in para-19 thereof that the petitioners were residing in top floor of shop No. 36, The Mall Shimla owned by Shri Chander Giri and in Kothi known as 'Harker' lower Jhakoo. In rejoinder, the stand of the petitioners is that the accommodation i.e. 36, The Mall Shimla is irrelevant for the purpose of the present controversy as the same was not owned by them. The same according to them was vacated on 10.8.2010. In reply to the application they, however, have came forward the version that for want of the date of vacation of such residential premises by them allowing the respondent-tenant to incorporate preliminary objection No. 4 in his reply by way of amendment should be a futile exercise. Anyhow, in the considered opinion of this Court no prejudice is likely to be caused to the petitioners-landlords in case preliminary objection No. 4 is permitted to be incorporated to the reply for the reasons that prima facie they seems to have vacated top floor of building No. 36 and kothi known as 'Harker' which were being used by them for residential purpose. Although as per their version in rejoinder such premises were vacated

by them in 2010, however, it is a fact to be gone into and proved during the course of trial of the rent petition. Since the vacation of the respondent-tenant has been sought on the ground of the demised premises required by the petitioners for expansion of their business, therefore, the averments in preliminary objection No. 4 are relevant and necessary for deciding the controversy as to whether they are really in need of additional accommodation to expand their business or not. Therefore, the amendment sought to be incorporated in reply by way of preliminary objection No. 4 should have been allowed. Learned Rent Controller, however, has not appreciated this part of the controversy in its right perspective. Being so, the findings to the contrary recorded by learned Rent controller are quashed and set aside.

17. Similarly, no prejudice is likely to be caused to the petitioners-landlords in case preliminary objection No. 6 is also allowed to be incorporated in the reply for the reasons that the respondent-tenant is running a tailoring shop whereas the petitioners-landlords a shop of readymade garments. Therefore, the requirement of the petitioners-landlords is bonafide alone and not malafide to oust the respondent-tenant due to business rivalry also need to be gone into to arrive at a just decision in the petition.

18. However, the averments sought to be incorporated in the reply by way of preliminary objection No. 5 have already been raised in the reply filed originally, therefore, this part of the amendment is not required to be made, hence, the prayer to this effect being not legally and factually sustainable is rejected.

19. True it is that the application for amendment has been filed at a stage when the trial has already commenced. The record reveals that issues were framed in the writ petition on 31.3.2014. The application for amendment was filed on 5.7.2014 at a stage when the rent petition was fixed for recording of petitioners' evidence. No witness is yet recorded. Although, there is delay in filing the application and the prayer for amendment as such falls under the mischief of the proviso to order 6 Rule 17 CPC. The present, however, is a case where the petitioners-landlords have vacated the residential accommodation i.e. top floor of building No. 36, The Mall, Shimla and 'Harker' lower Jhakoo after filing the reply to the writ petition. Had it been not so the respondent-tenant would have raised such plea in the reply filed originally. True it is that the factum of the respondent-tenant is running tailoring business, whereas the petitioners-landlords cloth shop as well as business of readymade garments can reasonably be believed to be in the knowledge and notice of the respondent-tenant at the time of filing the reply to the rent petition. The possibility of he bonafidely omitted to raise such plea at the relevant time and realized the same at a later stage cannot be ruled out. Therefore, when the delay is not inordinate because the application was filed within four months of the commencement of trial cannot be said to be belated. On the other hand, this Court is of the view that the proposed amendment is essentially required to decide the rent petition judiciously and more effectively if allowed to be incorporated.

20. For all the reasons hereinabove the application for amendment filed by the respondent-tenant to the extent of incorporating preliminary objections No. 4 and 6 is allowed. The prayer to allow him to incorporate preliminary objection No. 5 also in the reply is however, declined. The application as such is partly allowed. Let him to file the amended reply accordingly before learned Rent Controller on 6.4.2018 the date fixed for appearance of the parties before learned Rent Controller below. The rent petition being old one, learned Rent Controller is directed to expedite the disposal thereof as early as possible of course subject to rendering effective assistance by the parties on both sides.

21. The parties through learned Counsel representing them are directed to appear before learned Rent Controller on the date already fixed.

22. The record be sent immediately so as to reach in the Court of learned Rent Controller well before the date fixed.

23. Before parting, it is made clear that the observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case.

24. The petition is accordingly allowed partly and stands disposed of. Pending application(s), if any, shall also stand disposed of.

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

Ajay Sharma ....Petitioner.

Versus

Assistant Collector 1st Grade, Ghanari, Tehsil Ghanari District Una and others ... Respondents.

CMPMO No. 290 of 2017
Reserved on 7.3.2018
Decided on: 16.3.2018

Code of Civil Procedure, 1908- Order 5- The process issued returned back with a report that the addressee not residing at the mentioned address, stated to be residing in Shimla – Oblivious of the report the respondent ordered to be served by way of proclamation and eventually proceeded against exparte- **Held –** that the authority concerned acted mechanically, without even perusing the report of the Process Server- In fact, the only course available to the authority was to have directed the applicants to file the correct address of the parties in issue and then effect the service accordingly- the order of service by way of proclamation held to be wrong- Consequently, order dated 16.5.2017 whereby the respondent proceeded exparte, quashed and set aside. (Para-7)

For the petitioner.	Mr. Bhupender Gupta, Sr. Advocate with Ms. Poonam Gehlot, Advocate.
For respondents	Mr. Desh Raj Thakur, Addl. Advocate General with Mr. Kamal Kant Chandel Dy. AG for respondent No.1. Remaining respondents ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this petition, the petitioner has prayed for the following relief:-

"It is, therefore, most humbly and respectfully prayed that this petition may kindly be allowed and the impugned orders dated 16.5.2017 passed by Assistant Collector, 1st Grade, Ghanari, Tehsil Ghanari, District Una, HP whereby petitioner has been proceeded against ex parte and matter has been ordered to be posted for reply etc on 5.7.2017, may very kindly be set aside, with directions to the respondent No.1 to proceed in the matter afresh in accordance with law, in the interest of law and justice."

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

Respondents No.2 and 3 have filed an application for partition of land measuring 1-01-20 hectares comprised in Khewat No. 395, Khatoni No. 449 (Khasra No. 134) as per Jamabandi for the year 2010-2011 situated in village Bhaderkali Tehsil Amb, District Una, H.P., in the Court of Learned Assistant Collector 1st Grade, Ghanari, Tehsil Ghanari District Una, Himachal Pradesh. Present petitioner has been impleaded as respondent No.6 in the said application. Notice to the petitioner was issued by the Court of Assistant Collector 1st Grade returnable for 16.2.2017, which was returned back with the report that Ajay Sharma was not residing at the address mentioned in the notice, who was residing at Shimla. This is evident from the report of the Process-Server dated 29.1.2017 (Annexure P-2 page 21 of the paper book). Zimni orders passed by the Court of Assistant Collector 1st Grade Ghanari, Tehsil Ghanari District Una demonstrate that on 16.2.2017 said authority recorded that out of all the respondents, on behalf of respondent No.2 Mr. Prince Sood submitted his memo, whereas rest of the respondents were not present. Said authority then ordered that the remaining respondents be served through proclamation for 17.4.2017. While passing this order, the report of the Process Server was perhaps both ignored and overlooked. On 17.4.2017 said authority again passed the similar order as was passed on 16.2.2017 and listed the case for 16.5.2017. Thereafter on 16.5.2017 said authority passed an order that as none of the respondents except respondent No.2 were present, hence they were ordered to be proceeded against ex parte and the case was ordered to be listed for 5.7.2017.

3. Feeling aggrieved by this order, the petitioner has preferred this petition.

4. As respondents No.2, 3 and 5 did not appear despite service, they were ordered to be proceeded against ex parte.

5. I have heard learned Senior Counsel for the petitioner as well as learned Addl. Advocate General for the State and have also gone through the records of the case appended with the petition.

6. Mr. Gupta learned Senior Counsel has strenuously argued that impugned order vide which the petitioner was ordered to be proceeded against ex parte is, prima facie, bad in law as while passing the said order, the authority concerned erred in not appreciating that as said report of the Process Server dated 29.1.2017 mentioned Ajay Sharma was residing Shimla, the petitioner could not have been proceeded against ex parte in the mode and manner in which it was done by the authority concerned. Mr. Gupta submitted that it is apparent that orders dated 16.2.2017, 17.4.2017 and 16.5.2017 were passed by the authority concerned without even caring to peruse the report of the Process Server.

7. In my considered view, there is force in the contention of Mr. Gupta. When it stood reported by the Process Server in his report dated 29.1.2017 that the present petitioner, who was respondent No.6 in the partition proceedings was residing in Shimla, then the proper course for the authority concerned was to have had directed the applicants therein to file the correct address of party in issue and then effect the service of the petition on the said correct address. Of course, thereafter if said party was found to be evading service, then the Authority could have resorted to other means of effecting service. Rather than doing so, the authority concerned apparently in a mechanical manner passed orders dated 16.2.2017, 17.4.2017 and thereafter order dated 16.5.2017, vide which the present petitioner was ordered to be proceeded against ex parte. This Court is satisfied that all these orders were passed by the authority concerned by ignoring and overlooking the report of the Process Server dated 29.1.2017. In other words, when the authority concerned passed orders referred to above, it did not even care to peruse the file including the report of the Process Server. This Court expresses its displeasure over the mode and manner in which the authority concerned has conducted itself. The authority has erred in not appreciating that it was performing quasi judicial function and was conferred with the duty of adjudicating upon the rights of the parties and in this background, it was not to act in a callous manner, in which it actually has acted which has indeed caused grave prejudice to the present petitioner. The order of service by way of proclamation has been passed in a

mechanical manner without any satisfaction being mentioned in the orders by the authority that respondents like the present petitioner were in fact evading the service.

In view of above, this petition is allowed and order dated 16.5.2017, vide which the present petitioner has been ordered to be proceeded against ex parte by learned Assistant Collector, 1st Grade, Ghanari, Tehsil Ghanari, District Una, H.P. in partition proceedings initiated against him is quashed and set aside with the direction to the authority to proceed with the case strictly in accordance with law.

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

Ravi Azta and others ...Petitioners

Vs.

Union of India & others ...Respondents.

CWP No. 4652 of 2015
Reserved on 13.3.2018
Decided on: 17.3.2018

Constitution of India, 1950- Civil Writ Petition- Article 226- Code of Civil Procedure, 1908- Order 2 Rule 2- Res-judicata- If the reliefs claimed in the subsequent writ petition and the prayers made therein are in majority the same and if some of the prayers though available had not been claimed in the earlier writ petition- the subsequent writ petition would not be maintainable- It is a hit by the the principles of res-judicata and the principles embodied in Order 2 Rule 2 C.P.C., as, though the provisions of Code of Civil Procedure are not applicable in the writ jurisdiction but the principles enshrined therein are applicable- the principles of res-judicata discussed- further **Held-** that the doctroine is applied so that the lis attained finality- It is not opened and re-opened twice over, which is a fundamental doctroine of law and consequently, writ petition dismissed as not being maintainable since the majority of the reliefs claimed therein had already been decided in the earlier writ petition. (Para-7 to 19)

Cases referred:

Gulabchand Chhotalal Parikh vs. State of Gujarat, AIR 1965 SC 1153
Babubhai Muljibhai Patel vs. Nandlal Khodidas Barot, AIR 1974 SC 2105
Sarguja Transport Service vs. STATE, AIR 1987 SC 88
Kundlu Devi and another vs. State of H.P. and others Latest HLJ 2011 (HP) 579
T. Arivandandam vs. T.V. Satyapal and another (1977) 4 SCC 467

For the Petitioners : Ms. Anu Tuli Azta, Advocate.

For the Respondents: Mr. Shashi Shirshoo, Central Government Counsel, for respondent No.1.
Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals with Mr. Bhupinder Thakur, Dy. Advocate General, for respondents No. 2 to 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

This Court vide its order dated 18.12.2017 had asked the petitioners to justify the maintainability of the instant writ petition, more particularly, in light of the fact that the

earlier writ petition being CWP No. 5269 of 2014 filed by the predecessor-in-interest Sh. Mangat Ram Azta had already been dismissed by a learned Division Bench of this Court on 29.8.2014 and even the SLP filed against the same had been withdrawn to enable him to approach this Court with the plea to extend the period for complying with the order passed by further four months.

2. It is not in dispute that Sh. Mangat Ram Azta had earlier approached this Court by way of CWP No. 5269 of 2014, wherein he had sought the following reliefs:

> *(a) The proceedings initiated against the petitioner under Section 447 IPC and Section 33 of the Forest Act through FIR No. 42/2011 may kindly be quashed and set-aside being void, illegal and unconstitutional and total infringement of the fundamental rights of the petitioner.*
>
> *(b) The notifications attached as Annexure P-6, P-7 and P-8 may kindly be quashed and set-aside being illegal and unconstitutional.*
>
> *(c) A writ of mandamus may also be issued directing the State Government to make entries regarding the proprietary rights of the petitioner and other persons of the same community in column No.5 of the jamabandi as per their legal rights.*
>
> *(d) Any appropriate order or direction against the State Government for acting illegally and malafidely and under the colourable exercise of legislation infringing the valuable rights of the petitioner."*

3. Even though the reliefs claimed above are self-speaking, however, it needs to be clarified that Annexures P-6, P-7 and P-8, were the copies of the notifications issued by the State Government, from time to time. Annexure P-6 is the notification FFE-B-A(II)1/2006-11 dated 31.5.2011, whereas Annexure P-7 is the copy of notification dated 25th February, 1952 and Annexure P-8 is a copy of notification issued by the respondents under Section 33 of the Indian Forest Act.

4. It is not in dispute that the writ petition filed by Sh. Mangat Ram Azta had been dismissed on merits and all the contentions raised therein were rejected by a learned Division Bench by concluding as under:

> *"10. The State Government cannot issue direction for regularization of any forest land. However, before parting with the judgment, all the courts in the State of Himachal Pradesh are directed to take into consideration notification dated 24.4.1997 issued by the Financial Commissioner-cum-Secretary (Revenue), Government of Himachal Pradesh for demarcation of private lands touching Government lands or boundaries of another State as well as notification dated 13.9.2012 on the issue of demarcation of land while deciding the cases. The Judicial Magistrate 1st Class, Chopal is directed to decide the case within a period of six months since the FIR was registered in the year 2011. All the courts in Himachal Pradesh are also directed to decide the cases pertaining to encroachment on the forest land within a period of one year.*
>
> *11. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs."*

5. It is further not in dispute that Sh. Mangat Ram Azta aggrieved by the foresaid judgment, approached the Hon'ble Supreme Court by filing appeal, however, the same was withdrawn so as to enable the petitioner to approach this Court with the plea to extend the period by further four months as would be clearly evident from the order dated 6.7.2015, which reads thus:

> *"At the threshold Learned Senior Counsel appearing for the petitioner seeks leave to withdraw the Special Leave Petition so as to enable the petitioner to approach*

the High Court with the plea to extend the period by further four months. The Special Leave Petition is dismissed as withdrawn."

6. As regards the instant writ petition, the same was filed by Sh. Mangat Ram Azta, however, during the pendency of the writ petition, he died and his legal representatives i.e. the present petitioners were ordered to be brought on record. This writ petition has been filed for the following reliefs:

(a) Appropriate orders or direction to the respondents to either notify the respondents to declare the petitioner and its co-habitants as legal occupants of the land situated at Shantha and in possession of the Badhan community.

(b) In the alternative direction to the respondents for adopting appropriate procedure for transfer and occupying of the land as per law applicable from the Badhan community to the State Government with adequate compensation as per market value.

(c) A declaration to the effect that the occupation of the land under the heading of birt bartandaran since times immemorial was justiciable and legal with no infirmity.

(d) Exemplary costs and damages against the respondents for diminishing the reputation of the badhan community classifying them as encroachers who are esteemed estate land owners and not liable for disobeyance of law of the land.

(e) Quashing of the notification dated 25.2.1952 being unjust, illegal, void and improper.

7. A bare perusal of the aforesaid reliefs would clearly establish beyond any doubt that the majority of the prayers as made therein had already been sought for in the earlier writ petition (CWP No. 5269 of 2014) and some of the prayer though available, had not been claimed while filing the earlier writ petition.

8. As regards the notification dated 25.2.1952, the same was subject matter of the previous writ petition and had in fact been annexed as Annexure P-1 therewith and a specific prayer for quashing the same had been made. However, the said prayer was rejected by a learned Division Bench of this Court by holding as under:

"8. It is settled law that no limitation has been prescribed to the writ proceedings, but the delay has to be explained satisfactorily. Petitioner cannot be permitted to challenge Annexures P-7 and P-8 dated 25.2.1952, respectively by way of present petition. He cannot be conferred with proprietary rights once the State of Himachal Pradesh, in fact, is owner of the land as per revenue record."

9. As observed above, the reliefs as sought for in this writ petition, have already been rejected by this Court while adjudicating upon CWP No. 5269 of 2014, while the additional relief claimed therein are only the result of clever drafting and were otherwise available to the petitioners while filing the earlier writ petition and, therefore, the moot question is whether the petitioners can file and maintain the writ petition in view of the dismissal of the earlier writ petition.

10. The complete answer to the proposition is contained in the principles of res judicata as also in the principles embodied in Order 2 Rule 2 CPC.

11. However, the learned counsel for the petitioners would vehemently argue that the provisions of the Code of Civil Procedure, do not apply to the writ petition and have rather been excluded by making a specific provision in the Code by itself incorporating Section 141 CPC, which reads thus:

***"141. Miscellaneous proceedings**. – The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.*

Explanation. – In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

12. Undoubtedly, the provisions of the CPC are not applicable in the writ jurisdiction by virtue of provision of Section 141 but the principles enshrined therein are applicable. (vide ***Gulabchand Chhotalal Parikh*** vs. ***State of Gujarat, AIR 1965 SC 1153, Babubhai Muljibhai Patel*** vs. ***Nandlal Khodidas Barot, AIR 1974 SC 2105 and Sarguja Transport Service*** vs. ***STATE, AIR 1987 SC 88***.)

13. The doctrine of *res judicata* is applied to give finality to 'lis' and in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated twice over. The literal meaning of res is 'everything that may form an object of rights and includes an object, subject-matter or status; and res judicata literally means 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Even otherwise, the provision of CPC, more particularly, those contained in Section 11 are not exhaustive and contain only the general principles of res judicata.

14. The principle of res judicata is a fundamental doctrine of law, that there must be an end to litigation. The same is based on the rule of the conclusiveness of the judgment based upon the maxim of Roman jurisprudence '*Interest reipublicae ut sit finis litium'*(it concerns the state that there be an end to law suits*);* and, partly on the maxim '*Nemo debet bis vexari pro una at eadam causa'* (no man should be vexed twice over for the same cause).

15. Whereas, Order 2 of CPC deals with the frame of the suit and each party is supposed to include the whole of the claim which he is entitled to make in respect of the cause of action. The principles laid down therein confers certain privileges in favour of the party, who brings the suit, but simultaneously it imposes an embargo or restriction in claiming/bringing another suit for any of the reliefs which he could have prayed in the earlier suit. The underlying principle of this provision is based on the principle that defendant may not be and should not be vexed twice for one of the same cause of action.

16. Even otherwise, it is settled law that in every proceeding whole of the claim which party entitled to should be made and when a party omitted to sue in respect of any portion of the claim, he cannot afterward sue for the portion so omitted and this is based upon the principle of constructive res judicata.

17. At this stage, it shall be apposite to refer to a Division Bench judgment of this Court in ***Kundlu Devi and another vs. State of H.P. and others Latest HLJ 2011 (HP) 579*** wherein the aforesaid principles of law was lucidly dealt with and it was observed as follows:

"3. It is seen that the Petitioners were not satisfied with the award dated 9.8.1995 and hence they had pursued their grievance before the Reference Court leading to Annexure P-1, order. The Civil Court, as per Annexure P-1 order, granted certain reliefs. Still not satisfied, the matter was pursued in RFA No. 155 of 1998 before this Court. The appeal was disposed of vide judgment dated 28.6.2007.

4. The contention of the learned Counsel for the Petitioners is that though the grievance with regard to quantum was dealt with, the grievance with regard to the claim for rent and occupation charges during the period the property was in possession of the Government has not been dealt with. According to the Petitioners, they are entitled to the same in view of the decision of the Apex Court in R.L. Jain v. DDA, 2004 4 SCC 79. We do not think that it will be proper for this Court at this stage in proceeding under Article 226 of the Constitution of India to go into the question as to whether the Petitioners are entitled to that component of compensation. That grievance the Petitioners have pursued in accordance with the procedure prescribed under the Land Acquisition Act, 1894 initially before the Collector, thereafter before the Civil Court and finally in appeal before the High Court. According to the Petitioners, though this grievance was raised, the same has

not been adverted to. If that be so, a civil writ petition or for that matter any other collateral proceeding is not the remedy. All contentions, which a party might and ought to have taken, should be taken in the original proceedings and not thereafter. That is the well settled principle under Order II Rule 2 CPC. Order II Rule 2 reads as follows:

*"**2. Suit to include the whole claim**. –*

(1) Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim. - Where a Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several relief's. - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such relief's; but if he omits, except with the leave of the Court, to sue for all such relief's, he shall not afterwards sue for any relief so omitted."

5. This Rule is based on the principle that the Defendant shall not be vexed twice for one and the same cause. The Rule also seeks to prevent two evils, one the splitting of claims and the other splitting of remedies. If a Plaintiff omits any portion of the claim or omits any of the remedies in respect of the cause, he shall not be permitted to pursue the omitted claim or the omitted remedy. The requirement of the Rule is that every suit should include the whole of the claim which the Plaintiff is entitled to make in respect of a cause of action. Cause of action is a cause which gives occasion for and forms foundation of the suit. If that cause of action enables a person to ask for a larger and broader relief than to which he had limited his claim, he cannot thereafter seek the recovery of the balance of the cause of action by independent proceedings. This principle has been also settled by the Apex Court in Sidramappa v. Rajashetty, AIR 1970 SC 1059.

6. Order II Rule 2 applies also to writ proceedings. The left out portion of a cause of action cannot be pursued in a subsequent writ proceedings. All claims which a Petitioner might and ought to have taken, should be taken in one proceedings and only in one proceedings.(See the decision of the Supreme Court in Commissioner of Income-tax v. T.P. Kumaran, 1996 (1) SCC 561.)

7. Equally, a person who has filed the suit seeking certain relief in respect of a cause of action is precluded from instituting another suit for seeking other relief's in respect of the same cause of action. He shall not be entitled to invoke the writ jurisdiction of the High Court for obtaining the very same relief. In other words, if a second suit is barred, a writ petition would also be barred. What is directly prohibited cannot be indirectly permitted. That is the principle underlying under Order II Rule 2 CPC."

18. Similar issue came up before a Division Bench of this Court in ***CWP No.1228 of 2014*** titled ***Ajay Kumar Sharma and another*** vs**. *State of H.P. and another,*** decided on 31.08.2017, wherein it was held as under:

*"7. Even though the petitioners would vehemently argue that the bar of Order 2 Rule 2 of the CPC does not apply to the petition filed under Article 226 of the Constitution and would rely upon the Constitutional Bench decision of the Hon'ble Supreme Court in **Devender Pratap Narain Rai Sharma, v. State of Uttar Pradesh and others, AIR 1962 1334** and **Gulabchand Chhotalal Parikh v. State of Gujarat, AIR 1965 1153**.*

However, we find no merit in the said contention as this legal proposition has already been considered by us in detail in ***Review Petition No. 108 of 2016, in case titled as Ex-Petty Officers No.114294-K Hari Pal Singh vs. State of H.P.****, wherein it was held as under:-*

> *"2. The review is primarily sought on the ground that this Court while denying relief to the appellant had wrongly invoked the principles contained in order 2 rule 2 of the Code of Civil Procedure (CPC) as the same were not applicable to the proceedings under Article 226 of the Constitution of India.*
>
> *3. In support of his submission, strong reliance was placed by the petitioner on the judgment of the Hon'ble Constitution Bench of the Supreme Court in* ***Devendra Pratap Narain Rai Sharma*** *vs.* ***State of Uttar Pradesh and others****,* ***AIR 1962 SC 1334****, particularly observations contained in para 12, which read thus:*
>
> > *"[12] The High Court has disallowed to the appellant his salary prior to the date of the suit. The bar of O. 2 R. 2 of the Civil Procedure Code on which the, High Court apparently relied may not apply to a petition for a high prerogative writ under Art. 226 of the Constitution, but the High Court having disallowed the claim of the appellant for salary prior to the date of the suit, we do not think that we would be justified in interfering with the exercise of its discretion by the High Court."*
>
> *4. Undoubtedly, the aforesaid observations support the contention of the petitioner, but this Court has nowhere in the judgment under review held the provisions of order 2 rule 2 CPC to be applicable but has only made the principles contained therein applicable to the facts of the case.*
>
> *5. It is more than settled that avoiding the multiplicity of legal proceedings should be the aim of all courts and, therefore, a litigant cannot be allowed to split up his claim and file writ petition in piecemeal fashion. If the litigant could have, but did not without any legal justification claim a relief which was available to him at the time of filing earlier writ petition, the same claim cannot be allowed to be subsequently agitated by filing another writ petition.*
>
> *6. In this context, it shall be apt to refer to the judgment of the Hon'ble Supreme Court in* ***M/s. D. Cawasji and Co.****,* ***etc*** *vs.* ***State of Mysore and another****,* ***AIR 1975 SC 813*** *wherein it was held as under:*
>
> > *"[18] But, that however, is not the end of the matter. In the earlier writ petitions which culminated in the decision in* ***(1968) 2 Mys LJ 78*** *=* ***(AIR 1969 Mys 23)*** *the appellants did pray for refund of the amounts paid by them under the Act and the High Court considered the prayer for refund in each of the writ petitions and allowed the prayer in some petitions and rejected it in the others on the ground of delay. The Court observed that those writ petitioners whose prayers had been rejected would be at liberty to institute suits or other proceedings. We are not sure that, in the context, the High Court, meant by 'other proceedings', applications in the nature of proceedings under Article 226, when it is seen that the Court refused to entertain the relief for refund on the ground of delay in the proceedings under Article 226 and that in some cases the Court directed the parties to file representations before Government. Be that as it may, in the earlier writ petitions, the appellants did not pray for refund of the amounts paid by way of cess for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in these writ petitions why they did not make the prayer for refund of the amounts paid during the years in question. Avoiding multiplicity of unnecessary legal proceedings should be an aim of all courts. Therefore, the appellants could not be allowed to split*

up their claim for refund and file writ petitions on this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund and directing them to resort to the remedy of suits."

7. *In* ***Commissioner of Income Tax, Bombay*** *vs.* ***T.P. Kumaran****,* ***(1996) 10 SCC 561****, the Hon'ble Supreme Court observed as under:*

"[4] The tribunal has committed a gross error of law in directing the payment. The claim is barred by constructive res judicata under Section 11, Explanation IV, Civil Procedure Code which envisages that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in a subsequent suit. Hence when the claim was made on earlier occasion, he should have or might have sought and secured decree for interest. He did not seek so and, therefore, it operates as res judicata. Even otherwise, when he filed a suit and specifically did not claim the same, Order 2 Rule 2 Civil Procedure Code prohibits the petitioner to seek the remedy separately. In either event, the OA is not sustainable."

19. Before parting, it needs to be mentioned that it is only on account of clever drafting that an illusionary cause of action has been carved out. Whereas, it is more than settled proposition that clever drafting creating the illusion of a cause of action are not permitted in law and a clear right to sue has to be shown in the petition (Refer: ***T. Arivandandam vs. T.V. Satyapal and another (1977) 4 SCC 467***).

20. On the basis of the aforesaid exposition of law, it can conveniently be concluded that the petition has been instituted by the predecessors-in-interest of the petitioners Sh. Mangat Ram Azta was not maintainable and is barred by principles of not only constructive res judicata but also res judicata as the majority of the reliefs as claimed therein, have already been decided against the petitioner and the other reliefs which even if assumed to have not been raised in the earlier writ petition, but definitely available to him at the time of filing of the earlier writ petition and, therefore, cannot be permitted to be raised in the instant petition.

21. In view of the aforesaid discussion, this Court has no difficulty to conclude that the instant petition is not maintainable 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 SURESHWAR THAKUR, J.

Ashish Dass Gupta .....Petitioner.

Versus

State of H.P. & others ....Respondents.

Criminal Revision No. 102 of 2013.
Reserved on : 8th March, 2018.
Decided on : 19th March, 2018.

Code of Criminal Procedure, 1973- FIR- Section 173 Cr.P.C.- Indian Penal Code, 1860- Sections 420, 467, 468 and 120-B- Cancellation report submitted by the Investigating Officer accepted by the Learned Magistrate based on the findings recorded by the Company Law Board vis-à-vis share holdings of the parties- High Court, however, **held-** that the findings recorded by the Company Law Board pertained only to half share of 2000 share holdings held by Ashish Das Gupta and one Satvinder Singh, but did not pertain to the transfer of 2000 shares individually held by Ashish Das Gupta in the Company – the findings arrived at by the Company Law Board were, thus, not conclusive at least qua the share individually held by Ashish Das Gupta – the continuation of criminal proceedings against the accused vis-à-vis the individual share of Ashish Das Gupta, thus, were permissible- Consequently, orders passed by the Learned Trial Court set aside. (Para-4)

Cases referred:

Life Insurance Corporation of India versus Escorts Ltd. And others, (1986)1 SCC 264

Chandran Ratnaswami vs. K.C. Palanisamy and others, (2013)6 SCC 740

For the Petitioner:	Mr. Raman Sethi, Advocate.
For Respondents No. 1:	Mr. Hemant Vaid, Addl. Advocate General
For Respondents No.4:	Mr. B.C. Negi, Senior Advocate with Mr. Sanjay Bhardwaj, Advocate.
For Respondents No.2, 3, 5 & 6:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner is aggrieved by the orders recorded by the learned Judicial Magistrate 1st Class, Kasauli, whereby, he accepted the proposal of the Investigating Officer concerned, for closure of FIR No.41 of 1999, lodged on 19.04.1999, with Police Station, Parwanoo, wherein, offences constituted under section 420, 467, 468 and 120B of IPC, stood embodied. The substratum of the allegations encapsulated in the apposite FIR are (a) of the respondents herein with inter se collusions besides with theirs inter se holding criminal conspiracy, hence producing forged documents before the Sub Registrar of Companies, Jallandhar, (b) whereupon, there occur(s) reduction(s) of the share holdings, in, M/s Parwanoo Enterprises Private Limited, of, the petitioner, from majority to minority, (c) AND, with the handwriting expert concerned, rather attributing, the relevant tamperings and forgery(ies) vis-a-vis accused Satvinder Singh, and, other co-accused, namely, Sarvshri M. Kamal Mahajan and Vijay Kumar Bansal, besides also with the latter swearing affidavits before the Investigating Officer, wherein, they admitted their signature(s) and handwritings, borne, on the purportedly forged and fabricated documents, hence the aforesaid prima facie, establishing the contents of the FIR, and, it being untenable for the learned Magistrate, to accept the proposal(s), made, by the Investigating Officer concerned

2. The entire dispute, especially, vis-a-vis the allegations constituted in the FIR aforesaid, came to be adjudicated upon, under a verdict recorded by the Company Law Board, Principal Bench, New Delhi, (hereinafter referred to as the Company Law Board). The verdict pronounced, by the Company Law Board, stood rendered, on 31.01.2000. Obviously, hence its emanation occurred prior to the recording of the impugned order. The verdict recorded by the Company Law Board, appertains to a subject matter holding absolute analogity, with, the allegations constituted in the FIR. The verdict recorded by the Company Law Board, is borne in Annexure OC/2, annexure whereof is appended, with, the record of the trial Court, and, was affirmed by the Division Bench of this Court, in a verdict rendered on 19.10.2009, upon, Co. Appeal No.2 of 2000. Consequently, it has to be determined, whether, in view of finality besides conclusivity, hence, acquired by the verdict pronounced by the Company Law Board, and, its appertaining to a subject matter, which also stands encapsulated in FIR No.41/99, qua whether

the continuation, of criminal proceedings against the respondents herein, is hence construable to legally befitting. In making the aforesaid fathoming(s), extraction(s) of paragraphs No.33 to 40, of the verdict rendered by the Company Law Board, is imperative. Paragraphs No.33 to 40 whereof, read as under:-

> "33. Then in the Annual return made upto 30.09.97, it is indicated that on 31.3.97, he has acquired by transfer 100 shares each from Ashish Das Gupta and from Ashish Das Gupt jointly with Sh. Satvinder Singh, details given earlier. In that even in his own showing he should be holding entire 4000 shares (2000 acquired on 7.10.95 and 2000 acquired on 31.3.97 by transfer), whereas, the shareholding pattern in the Annual Return upto 30.9.97-Annexure-2, the share holding pattern is shown as :-
>
> | **Sr. No.** | **Shareholder** | **Shares** |
> |---|---|---|
> | 1 | Sh. Ashish Das Gupta | 1000 |
> | 2. | Sh. Ashish Das Gupta jointly with Satvinder Singh | 1000 |
> | 3. | Sh. Satvinder Singh | 2000 |
> | | | 4000 |
>
> 34. The two positions claimed by him as on 30.9.96 and 30.9.97 are, therefore, contradictory. The respondent has not produced any transfer deeds duly executed by Sh. Ashish Das Gupta and Sh. Ashish Das Gupta jointly with Sh. Satvinder Singh in support of the alleged transfers on 31.3.97 in his favour. Under the circumstances reliance placed by him on Annual Return made upto 30.9.97 cannot be accepted. Further in regard to Respondent's contentions that he is the owner of 2000 shares earlier held by Sh. Praveen Kant and Sh. R.K. Gard, he has admitted that the shares from these persons were first acquired by him jointly with petitioner on 6.10.95 and thereafter on 7.10.95, he has purchased the interest of Sh. Ashish Das Gupta. The shares stands transferred on 6.10.95 in their joint names in the records of the company, the transfer deeds dated 7.10.95 executed by these two persons cannot be acted upon by the company without the mandatory compliance of the provisions of section 108 of the Act.
>
> 35. Another point of dispute is regarding the appointment of Sh. Bhushan Ahuja as Additional Director of the company on 31.3.97 the petitioner has emphatically denied of having attended any Board meeting in which Sh. Bhushan Ahuja was appointed as Additional Director as he has travelling and in his absence the appointment could not have been made in any Board meetings for want of quorum, there being only two directors of the company at that point of time. No minutes of the Board of Directors meeting wherein he was allegedly appointed as Additional Director have also been filed. We also note that his appointed as Additional Director has been notified in Form. 32 to Registrar of Companies on 22.2.99 almost after two years from the date of his appointment on 31.3.97 gives support to petitioners assertion that no Board Meeting was held and he was never appointed as Additional Director. Further Sh. Bhushan Ahuja whose appointment is under challenge and who has been made on of th parties in the proceeding u/s397/398 of the Act has not taken part in these proceedings by filing the submission or appearing before this Board. Under the circumstances we hold that Sh. Bhushan Ahuja was never appointed as an Additional Director of the company.
>
> 37. Another point of dispute relates to holding of Annual General Meeting on 30.9.97. As there are only two share holder and Sh. Ashish Das Gupta's categorical denial of his having attended any alleged Annual General Meeting of the shareholders held on 30.9.97, wherein the accounts for the year 1996-97 were laid and adopted and Sh. Bhushan Ahuja was allegedly appointed as regular director of

the company could not have been held for want of quorums. No minutes of the said alleged Annual Meeting were filed. Under the circumstances, we hold that no Annual Meeting of the Company was held on 30.9.97. Consequently, appointment of Sh. Bhushan Ahuja as regular Director of the company and as also adoption of the account or the year 1996-97 has not taken place.

38. In the 397/398 petitions, respondent has also claimed that the petitioner has ceased to be the Director of the company w.e.f. 28.8.98 pursuant to the pursuance of section 283(1)(g) of the Act for having not attended three consecutive Board meetings, the required Form No.32 for his cessation has also been filed almost after 6 months. However, in the reply to the section 186 petition, he has stated that petitioner was removed for siphoning funds of the company. Further since there are only two directors, the question of any Board Meeting being held does not arise unless both te directors attend the meeting as no proper Board meeting could have been held for want of proper quorum, the question of petitioner ceasing to be Director of the company pursuant to section 283(1)(g) of the Act does not arise. We therefore, hold that Sh. Ashish Das Gupta continues to be a Director of the company and the present Board of Director consists of Sh. Ashish Das Gupta and Sh. Satvinder Singh.

39. The petitioner has also alleged that the accounts prepared for the year 1996-97 do not reflect the correct position of assets and bank balance of the company. We have gone through these account and note that there is only one transaction in the Profit and Loss A/c i.e. Audit fee of Rs.2500/- on expenses side and the loss for the year has been shown equivalent to that amount. Further in the Balance Sheet, this fee has been shown as payable and correspondingly Accumulated losses have been increased. There is no other change n the figures in the Balance Sheet. The petitioner in support of his contention has filed Bank certificates of State Bank of India showing balance tot he credit of the company as on 31.3.97 at Rs.1008/- and Punjab National Bank of Rs.1659/- (Annexure A-26 & 27), page 39 &40 attached to the petitioner's reply to Sur Rejoinder which do not tally with the figures of Bank Balance shown for these two Banks in the Balance Sheet as at 31.3.97 filed by the Respondent with Registrar of Companies. Further the number of shares held by the company in M/s Sirmour Sudberg Auto Ltd. Are also not correctly reflected. Therefore, the contention that the Balance Sheet as at 31.3.97 does not reflect true and correct position appears to be correct.

40. Having held that 2000 shares are hled in the name of Sh. Ashish Das Gupta in his individual name and that another 2000 shares are jointly held in the name of Sh. Ashish Das Gupta and Sh. Satvinder Singh and that they are the only validly appointed directors, the question is the nature of relief to be granted. There are two petitions before us. One is under Section 186 of the Act and another under Section 397/398 of the Act. As far as the 1st petition is concerned, the relief sought is for directions to convene a General Body Meeting with the stipulation that even the presence of a single shareholder would constitute a valid quorum for the meeting. As far as the 2nd petition is concerned, we having already given our findings on the prayer relating to the shareholding in the company as well as the appointment of 3rd respondent as and additional director. There is another prayer in the 2nd petition that we should order removal of the 2nd respondent from the directorship of the company The company consists of only 2 shareholder and the proceedings before us already brought that the difference between the parties such that they cannot carry on together. The petitioner is admittedly the majority shareholder having 50% shares in the company in the individual capacity and another 50% shares jointly with 2nd respondent. Therefore, we given an option to the 2nd respondent either to continue as joint shareholder in the company or to transfer his interest in the joint holding to the petitioner or his nominee for a fair consideration to be determined by

> an independent valuer. He should indicate to the petitioner and to this Bench within 15 days from the date of his order choosing either of the option that we have given to him. In case the respondent likes to continue as joint shareholder in the company then, the petitioner is at liberty to convene a General Board Meeting within 45 days thereafter in which meeting the presence of a single shareholder would constitute a valid quorum....."

3. An incisive reading of the aforesaid paragraphs, makes apparent upsurgings, of apart from compliance with section 108 of the Companies Act, being not meted, there rather occurring evidence on record, of, under validly executed transfer deed(s), of hence the respondent concerned, acquiring shareholdings, of the petitioner, in the company concerned. The apt sequel therefrom, is, all the purported accretions in the shareholdings, of one Satvinder Singh, in the company concerned, besides diminutions, of the petitioner's shareholdings in the company concerned, being not, as contended by the counsel for the petitioner, (i) being an aftermath of any purported tamperings or alterations, occurring in the apposite record(s) of the company, (ii) rather occurrence in the orders impugned before this Court, of, receipt(s) in respect thereto being issued by the petitioner vis-a-vis the respondent concerned, does erode, the substratum of some of the allegations constituted in the FIR concerned. However, for the reasons to be ascribed hereinafter, a substantial part, of the allegations constituted in the FIR, do not hence suffer any effacement.

4. Nowat, the effect(s) of the requisite transfer deeds, standing echoed in the aforesaid extracted paragraph, of the verdict rendered by the company law board, to yet not beget any satiation with the mandatory provisions of Section 108, of the Companies Act, is, to be delved into besides adjudicated upon by this Court. In a verdict rendered by the Hon'ble Apex Court, in case titled as ***Life Insurance Corporation of India*** versus ***Escorts Ltd. And others***, reported in ***(1986)1 SCC 264***, the Hon'ble Apex Court, in, paragraph No.79, has held as under:-

> "In Mathalone and Ors. v. Bombay Life Assurance Company Ltd., AIR 1953 SC 385, (supra), the question of relationship between the transferor and transferee of shares before registration of the transfer in the books of the company came to be considered in connection with the right of the transferee to the 'right-shares' issued by the company. On the transfer of shares transferee became the owner of the beneficial interest though the legal title was with the transferor the relationship of trustee and 'cestui que trust' was established and the transferor was bound to comply with all the reasonable directions that the transferee might give and that he became a trustee of dividends as also a trustee of the right to vote. The relationship of trustee and cestui que trust arose by reason of the circumstance that till the name of the transferee was brought on the register of shareholders in order to bring about a fair dealing between the transferor and the transferee equity clothed the transferor with the status of a constructive trustee and this obliged him to transfer all the benefits of property rights annexed to the sold shares of the cestui que trust. The principle of equity could not be extended to cases where the transferee had not taken active steps to get his name registered as a member on the register of the company with due diligence and in the meantime, certain other privileges or opportunities arose for purchase of new shares in consequences of the ownership of the shares already acquired. The benefit obtained by a transferor as a constructive trustee in respect of the share sold by him cannot be retained by him and must go to the beneficiary, but that cannot compel him to make himself liable for the obligations attaching to the new issues of shares and to make an application for the new issue by making the necessary payments, unless specially instructed to do so by the beneficiary."
>
> (p.323)

also therein the Hon'ble Apex Court, after, considering the effects, of non compliance(s) vis-a-vis the mandatory statutory provisions, borne in the Companies Act, and, their consequential effect(s)m upon the rights of the transferees', has drawn conclusion(s), (i) that the transferee of

shares, even before without registration, of the apposite transfer(s), in the books of company, (ii) yet becoming owners of all beneficial interest(s) thereof, despite the legal title thereof, continuing to vest in the transferor, especially when hence the relationship of trustee, and, *cestui que* trust, stands established, and, the transferor hence is obliged, to comply with all the directions, meted by the transferee. However, the aforesaid submission, holds good, only with respect to 2000 shares jointly held by Ashish Das Gupta alongwith one Satvinder Singh, and, it does not, in view of reflections occurring in paragraph No.35, of the verdict recorded by the Company Law Board, (iii) the least effect the share holdings, of one Ashish Das Gupta vis-a-vis 2000 shares exclusively held therein by him, (iv) the reason being the propagation, of, one Satvinder Singh, of his, in his individual capacity holding 2000 shares in the company concerned, standing negatived, under a conclusive verdict recorded by Company Law Board. Further, the effects thereof, are, (v) that any purported accretions or diminutions, manifested in the apposite annual return, furnished by the accused before the Registrar concerned, vis-a-vis share(s), held respectively by one Satvinder Singh, and, the petitioner in the company concerned, rather being a sequel of purported tamperings or forgery(ies) being made, in the relevant documents by the accused concerned. (vi) Predominantly, for re-emphasis rather with the aforesaid assertion, of one Satvinder Singh, of, his individually holding 2000 shares, in the company concerned, being repelled besides negatived, under, a conclusive verdict recorded by the Company Law Board. Since, the aforesaid Satvinder Singh, was, aggrieved by the findings recorded by the Company Law Board, hence, came to institute company appeal bearing No. 2 of 2000, before the Division Bench of this Court, appeal whereof, was admitted, on the hereinafter extracted substantial question of law:-

> "(a) Whether respondent No.3 has authority to decide the fact regarding title of a person regarding shares in the company?
>
> (b) Whether respondent No.3 has authority to challenge the Balance Sheet submitted and signed by the statutory auditors and registered with the Registrar of Companies?
>
> (c) Whether the consistent entries in the records registered with the Registrar of the Companies regarding Share holding can be ignored in comparison to the belated records submitted by one of the Directors under his sole signatures, which position is highly disputed?
>
> (d) Whether the Respondent Board can direct particular share holder to transfer his share so as to transfer the entire share holding in favour of one person?"

therein, in respect of the substantial questions of law, occurring at serial No. (a) to (c), apposite answers stood not meted vis-a-vis them, hence, ipso facto, and, impliedly (i) the determination(s), of, share holding patterns, of one Ashish Das Gupta and, of, Satvinder Singh, in the company concerned, conspicuously by the Company Law Board, hence, remain intact besides undisturbed, (ii) thereupon, consequential effects thereof, are, of, the purported tamperings and forgery(ies), allegedly committed in the relevant documents, by the concerned, and theirs sequelly hence begetting all purported accretions, and, diminutions, in the share holdings, of Ashish Das Gupta, and, of, one Satvinder Singh, in the company concerned, are, obvious prima facie, inferences, generated therefrom. The learned Judicial Magistrate concerned has ignored, all the aforesaid facets, and, merely upon anvill of receipts issued by one Ashish Das Gupta vis-a-vis Satvinder Singh, qua transfer of some shares, thereupon, omnibusly concluded that all controversies in respect thereof, hence, coming to be rested, without, his considering, qua the aforesaid transfers, appertaining only vis-a-vis one Satvinder Singh, acquiring only 2000 shares jointly alongwith Ashish Das Gupta, (iii) whereas, the apposite FIR, contains allegations, of ,Satvinder Singh, while his holding criminal conspiracy with other co-accused, his purportedly committing forgery(ies) and tamperings, with the apposite record, for his untenably increasing his shareholdings in the company concerned, besides his untenably reducing the shareholdings therein, of one Ashish Kumar Gupta. Since, for reasons aforestated, inferences, of, accrual of all untenable reductions, and, accretions respectively, of Ashish Das Gupta and of Satvinder Singh, in their respective shareholding(s) in the company concerned, rather hence, emerge (iv) also when factum thereof, is

established, under, by a conclusive verdict recorded by the Company Law Board, verdict whereof stood affirmed by the Division Bench, of this Court, (v) reiteratedly, the verdict pronounced, by the Company Law Board is applicable only vis-a-vis acquisition by one Satvinder Singh, from, one Ashish Das Gupta of ½ shares from amongst 2000 shareholdings, hitherto held by Ashish Das Gupta, and, its not appertaining to any transfer , of 2000 shares individually, held, by Ashish Das Gupta, in the company concerned.

5. Since, the Hon'ble Apex Court, has, in its judgment, pronounced, in a case titled as ***Chandran Ratnaswami vs. K.C. Palanisamy and others,*** reported in ***(2013)6 SCC 740***, the relevant paragraph No.59, whereof extracted hereinafter;-

> "59. Neither the High Court nor the Magisterial Court have ever applied their mind and considered the conduct of the respondent and continuance of criminal proceedings in respect of the dispute, which are civil in nature and finally adjudicated by the competent authority i.e. the Company Law Board and the High in appeal." ...(p.769)

held that when the apposite FIR, contains, a subject matter in respect whereof, conclusive findings are rendered by the Company Law Board concerned, and, by the High Court, thereupon, the conclusive verdict recorded by the Company Law Board, rather prevailing. Consequently, with the Company Law Board, conclusively establishing the share holding patterns, in the company concerned, respectively of the petitioner, and, of one Satvinder Singh, besides its negativing the assertion(s) aforesaid reared therebefore, by one Satvinder Singh, hence, the ascriptions of guilt vis-a-vis the accused, prima facie hold vigour and veracity, and, the continuation of criminal proceedings, against, the accused vis-a-vis the allegations borne in the FIR , are, also permissible.

6. For the foregoing reasons, the instant petition is allowed and the order impugned before this Court, is quashed and set aside. The learned trial Court is directed to, in accordance with law, proceed in the matter. However, it is made clear that the observations made hereinabove shall have no bearings, on the merits of the case. All pending applications also stand disposed of. Records be sent back forthwith.

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

H.P. State Forest Corporation .....Appellant/Plaintiff.

Versus

Sh. Kahan Singh (since deceased) through his legal heirs.

....Respondent/defendant.

RSA No. 425 of 2007
Reserved on : 8th March, 2018
Decided on : 19th March, 2018

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Appellant/plaintiff seeking recovery of Rs.2,43,088/- and the defendant on the other hand by way of a counter-claim seeking a sum of Rs. 86,483/- the Learned Trial Court dismissed the suit of the plaintiff- It, however, allowed the counter-claim of the defendant for the recovery of Rs. 86,483/- In appeal too the said findings affirmed by the Learned 1st Appellate Court- **While deciding the Regular Second Appeal the Court Held-** that promisee could not extract pure resin as per the stipulation of the contract due to heavy rain fall- Resultantly the defendant could not abide by the terms of the Contract and as per Section 56 of the Indian Contract Act it was permissible in law- the frustration of the contract, thus, was due to the supervening circumstances and beyond the

control of the defendant – Hence, the conclusion arrived at by the learned trial Courts below was based upon a proper appreciation of evidence on record- Consequently, appeal dismissed.

(Para-9 and 10)

For the Appellant: Mr. Bhupender Pathania, Advocate.
For the Respondent(s): Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Regular Second Appeal stands directed by the plaintiff/appellant, against, the impugned rendition of the learned Additional District Judge, Mandi whereby he dismissed the first appeal, of the plaintiff/appellant herein, and, affirmed the judgment and decree rendered by the learned Civil Judge (Senior Division), Mandi, District Mandi, H.P., whereby, the latter Court dismissed, the plaintiff's suit for recovery of Rs.2,43,088, whereas, it decreed the counterclaim of the defendant, for recovery of a sum of Rs.86,483/- along with interest @ 6% per annum, from, the date of filing of the counter claim, till, realization of the decretal amount. The plaintiff/appellant herein, stands, aggrieved by the judgment and decree of the learned Additional District Judge, Mandi. Its standing aggrieved, hence it has therefrom preferred the instant appeal before this Court, for seeking from this Court reversal(s), of, the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff is independent wing of Forest Department of Himachal Pradesh, which deals in timber, charcoal, resin and fuel wood. The plaintiff invited tenders from labour supply mates for setting up crop extraction of resin and carriage of the same upto road side Depot, for forest lot No.32/1997, Jogindernagar for the year 1997. The tender filled in by the defendant was accepted and the resin extraction work was allotted to the defendant vide agreement of 20.03.1997 which was signed by both the parties. As per agreement a target of 280.500 Qtls, pure resin, was fixed to be extracted from 7185 blazes and carriage of the same upto road side Depot at the rate of 620/- per Qtls. The defendant deposited earnest money of Rs.10,000/- by way of FDR of Himachal Gramin Bank and pledged the same in favour of the plaintiff. As per agreement all the necessary articles were provided to the defendant and trees were also handed over to him well in time on 29.3.1997. But the defendant during the entire period extracted only 180.620 Qtls. pure resin as against the target of 280.500 Qtls. as agreed between the parties. Thus the defendant extracted 99.87 Qtls. less resin than the target and the defendant caused loss of Rs.3,29,571/-. Thus, the plaintiff is entitled to recover the amount of Rs.2,44,088/- after deducting the amount of Rs.86,483/-, which is with the plaintiff. Hence the suit.

3. The defendant contested the suit and he also filed counter claim against the plaintiff for the recovery of Rs.86,483/-. In the written statement, the defendant has taken preliminary objections qua maintainability, limitation and estoppel. On merits, he averred that the agreement was in the form of Cyclostyled already prepared by the plaintiff and only signatures of the defendant were obtained on the same which was not readover and explained to him. Thus, the terms and conditions of the agreement are not binding upon him. He further averred that the target of extraction of resin could not be achieved due to heavy rain fall. However, the defendant supplied 180.630 Qtls. Pure resin worth of Rs.1,11,990/- to the plaintiff out of which a sum of Rs.38,952/- was paid to the defendant and the remaining amount of Rs.73,038/- is still due to the defendant from the plaintiff. Besides this the defendant is also entitled to recover the earnest money of Rs.13,455/- which was deposited with the plaintiff by way of F.D.R. Thus, the defendant is entitled to recovery Rs.86,483/- from the plaintiff. The defendant prayed for dismissal of the suit and for a decree of Rs.86,483/- in his favour.

4. The plaintiff/appellant herein filed replication to the written statement of the defendant/respondent as well as written statement to the counter claim instituted by the defendant, wherein, he denied the contents of the written statement as well as of counter claim besides re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the agreement dated 20.03.1997 for lot No.32/1997, Jogindernagar is signed by the parties? OPP.

2. Whether the above stated agreement is genuine and legal one? OPP.

3. Whether the defendant is failed to achieve the target of 280.500 Qtls. Pure resin as prayed in the agreement? OPP.

4. Whether the plaintiff is entitled for the recovery of Rs.2,43,088/- from the defendant? OPP.

5. Whether the suit is not legally instituted and constituted? OPD

6. Whether the plaintiff has no enforceable cause of action and right to sue against the replying defendant?OPD

7. Whether the suit of the plaintiff is time barred?OPD

8. Whether the plaintiff is estopped by his own act, conduct ad deed to file the present suit?OPD

9. Whether the defendant is entitled to recover the amount of Rs.86,483/- by way of counter claim alongwith interest from the plaintiff?OPD

10. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court, dismissed, the plaintiff's suit, whereas, it decreed the counter claim instituted by the defendant against the plaintiff/appellant herein. In a first appeal, preferred therefrom by the plaintiff/appellant herein, the learned first Appellate Court dismissed its appeal.

7. Now the plaintiff/appellant has instituted the instant Regular Second Appeal before this Court, wherein, it assails the findings recorded by the learned First Appellate Court, in its impugned judgment and decree. When the appeal came up for admission on 18.09.2007, 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 question of law:-

a) Whether the Courts below have erred in law in concluding that the agreement Ex. PW2/A had become impossible and become void when it became impossible. Have not the Courts below wrongly construed the provisions of Section 56 of the Indian Contract Act and have thereby wrongly applied the same in favour of the respondent/defendant. Had the agreement Ex.PW2/A becoming impossible and whether there was sufficient evidence to prove that the agreement had become impossible?

Substantial question of Law No.1:

8. Uncontrovertedly, the defendant/respondent herein omitted, to abide by the terms of allotment of the apposite work, made, in his favour by the plaintiff/appellant. The apposite breach occurred in the defendant/respondent herein not meteing the requisite target enjoined to be accomplished by him under the relevant contract, (i) breach whereof, is contended to stand occasioned, by occurrence, of, heavy rain fall, in the area whereat the relevant work stood allotted to him. (ii) Ex.DW2/A, makes an evident display, of, occurrence of heavy rain fall, in the area whereat the relevant work stood allotted, to the defendant/respondent herein, by the plaintiff/appellant herein. Recitals qua the facet aforesaid, occurring in Ex.DW2/A stand corroborated by PW-2, PW-5 and PW-6. Given the evident occurrence of heavy rainfall, in the area

whereat the relevant work stood allotted by the plaintiff, for its execution, by the defendant, obviously hence deterred him to mete the relevant target imposed upon him, under agreement borne in Ex.PW2/A. Also with PW-4 admitting, of, on his visiting the relevant site, his noticing of the defendant, in consonance with the terms and conditions, of agreement Ex.PW2/A, hence employing sufficient manpower, does give leverage, to an inference of the defendant, not, dereliciing in achieving the target imposed upon him, under agreement Ex.PW2/A, rather the evident fact of occurrence of heavy rainfall, in the relevant area, rather hence deterring him to achieve the target imposed upon him, under Ex.PW2/A.

9. Be that as it may, even if, in Ex.PW2/A, there occurs no recital of occurrence of heavy rainfall, whereupon , the accomplishment by the defendant of the relevant contractual target, stood, rendered impossible, hence rendering tenable the imposition, of, mandatory pecuniary liability(ies) upon the defendant, (I) nonetheless, the evident fact, of occurrence of heavy rainfall in the relevant area, factum whereof is a *vis major,* occurrence whereof supervenes, the execution of Ex.PW2/A, rather imminently hence frustrated the accomplishment, of the relevant contractual target, by the defendant. (ii) Even if, the factum aforesaid remained unembodied in Ex.PW2/A, nonetheless, with the provisions of Section 56 of the Indian Contract Act, 1872 (hereinafter referred to the "Act"), provisions whereof, stands extracted hereinafter, enshrining the doctrine of frustration of contracts, frustration whereof arises, from occurrence of events supervening the recording of the relevant contract, enjoin or warrant their workability hereat:-

> "56. **Agreement to do impossible act**.- An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful- A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Compensation for loss through non-performance of act known to be impossible or unlawful- Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

(iii) Imperatively, when hereat the frustrating supervening event, since, the execution of Ex.PW 2/A, is the aforereferred *vis major,* occurrence whereof evidently frustrated, the defendant to achieve the relevant contractual target, hence enjoined to be accomplished by him, rather hence renders its attraction hereat, (iv) dehors recitals inconsonance therewith standing un-enunciated, in Ex.PW2/A, (v) preeminently when statutory postulations, even when remain unrecited in the relevant agreement, their workability when, on evident material, as exists hereat, in display qua their awakening hence stands enlivened, (vi) thereupon their apposite invocation hereat, is not amenable, to face the ill fortune, of theirs being rather blunted and benumbed. Consequently, while galvanizing the provisions of Section 56 of the Act, the inevitable sequel, is of, with evident material in satiation thereof existing hereat, obviously, hence constrain this Court to conclude of the apposite supervening *vis major,* rather frustrating, the execution, to the fullest, by the defendant, of, all the obligations cast upon him, under Ex.PW2/A.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court stand based upon a proper and mature appreciation of the 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 stands answered in favour of the defendant/respondent and against the plaintiff/appellant.

11. Since, no appeal stands preferred hereat by the plaintiff/appellant against the concurrently recorded judgments and decrees, of, both the learned Courts below whereby they

decreed the counterclaim instituted thereat, by the defendant/respondent herein nor any substantial question of law in consonance therewith stands either framed nor obviously, thereupon, the appeal of the plaintiff/appellant herein stands admitted, hence renders the renditions of both the learned courts below, whereby they decreed the counterclaim instituted by the defendant/respondent herein, and, against the plaintiff/appellant herein, to not warrant any interference by this Court.

12. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. 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.

Rajesh Kumar ..Appellant/defendant.

Versus

Ravinder Kumar & Ors. ..Respondents/Plaintiffs.

RSA No. 245 of 2006.
Reserved on : 9th March, 2018.
Decided on : 19th March, 2018.

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Indian Succession Act, 1925- Section 63- Ingredients necessarily enjoined to be proven are as provided in Section 63 of the Indian Succession Act- The registered will duly proved by marginal witness DW-2 Vijay Paul held to be in consonance with the provision of Section 63- The Will Ex.DW-2/A bearing an endorsement Ex.DW-2/B, which was duly proved by the witnesses- Will held to be valid and duly executed. (Para-9)

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Indian Succession Act, 1925- Section 63- The marginal witness DW-2 proving the endorsement made by the Sub Registrar concerned occurring in Ex.DW-2/A - **Held-** that the endorsement, thus made enjoys the presumption of truth, more particularly as no evidence was led to disapprove the said fact- The sub Registrar concerned summoned by the plaintiff but was omitted to be examined- the presumption of truth, thus, enjoined by the endorsement Ex.DW-2/B borne in Ex.DW-2/A. Will thus duly held to be proved. (Para-10)

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Indian Succession Act, 1925- Section 63- Suspicious Circumstances- Beneficiary of the testamentary disposition actively participated, in the preparation and execution of the Will - **Held** not to be suspicious circumstances- the marginal witness being a P.A. in the office of the District Collector also held not be a suspicious circumstance- **Further held-** that the testator going to the Hospital for some medical tests from the Sub Registrar's Office - Also held not to be a suspicious circumstance. (Para-12 to 14)

Cases referred:

Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others, (2005)8 SCC 67

Deep Ram and others vs. Laxmi Chand and others, 2000(1) Shim.L.C. 240

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

For Respondents: Mr. R.K. Sharma, Sr. Advocate with Ms. Anita Parmar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, as well as for, rendition of a decree for permanent prohibitory injunction besides for rendition in the alternative of a decree for possession qua the suit khasra number(s), was, hence partly decreed.

2. Briefly stated the facts of the case are that the suit was filed by one deceased Duni Chand and is being contested on his behalf by his next friends/heirs. The claim of the plaintiff is that the land comprised in Khata No.24, Khatauni No.50, Khasra Nos. 1111, 1112, 1113 and 1114, plot 4, area measuring 0-04-12 hectares, situated at Mohal Mant Khas, Mauza Mant, Teh. Dharamshala, District Kangra is owned and possessed by the plaintiff. The plaintiff has also sought declaration that he is owner in possession and the will dated 24.11.19888 allegedly executed in favour of defendant Rajesh by deceased Kirpa Ram, father of the plaintiff is not a genuine Will but is the outcome of fraud, mis-representation since Kirpa Ram was not in fit state of mind to execute a Will nor it was ever executed by him. The mutation attested on the basis of Will is also claimed to be invalid having provided not rights to the defendant. It has also been prayed that the decree for injunction be also issued against the defendant from interfering over the suit land in any manner. In the alternative prayer for decree of possession has been made. Kirpa Ram is stated to be the last male holder of the property and after his death, it is claimed to have been devolved upon the plaintiff to the exclusion of all. It is claimed that the defendant has got mutation attested on the basis of forged Will.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections inter alia limitation, estoppel, cause of action, locus standi, maintainability, valuation, non joinder etc. On merits, it has been submitted that the suit land was owned and possessed by Kirpa Ram and the plaintiff to the extent of half share each. The allegations made by the plaintiff are absolutely wrong. After the death of Kirpa Ram, there is a testamentary disposition of his estate by way of Will dated 24.11.1988 which was duly registered and as such the defendant has become owner in possession and no rights are left with the plaintiff qua the share of Kirpa Ram. It has also been submitted that deceased Kirpa Ram had conducted two marriages and one of his wife was Achhari, who gave birth to the plaintiff. The second wife was named Smt. Suni Devi, who provided a daughter and son, Daya Parkash and Ranjba Devi. Defendant No.1 is the son of Daya Parkash one of the sons of deceased Kirpa Ram, i.e. grand son of deceased Kirpa Ram. The information has been withheld by the plaintiff from the court since the defendant was rendering services to deceased Kirpa Ram, who was aged about 80 years at the time of his death. He out of love and affection executed the Will in favour of the defendant. The plaintiff never looked after the deceased Kirpa Ram, during his life time when he was not well. It is stated that Kirpa Ram was never confined to bed nor Will has been executed under mis-representation or fraud and the mutation has rightly been attested The property having devolved upon the defendant by way of Will, the plaintiff has got no cause of action and locus standi to file the suit.

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

5. On the pleadings of the parties, the learned trial Court struck 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 Kirpa Ram did execute any valid Will in favour of the defendant? OPD

3. If issue No.2, is proved against the defendant, whether the Will dated 24.11.1988 is the result of mis- representation and fraud, as alleged? OPP

4. Whether the suit is time barred? OPD.

5. Whether the suit is bad for non joinder of necessary parties, as alleged?OPD.

6. Whether the plaintiff is estopped from filing this suit by his act and conduct? OPD.

7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly decreed the suit of the plaintiffs/respondents 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.

7. 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, this Court, on 9.5.2007, admitted the appeal instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether there has been misreading of evidence by the Courts below in regard to the validity of the Will?

2. Whether the Courts below have committed gross error of law and jurisdiction in not dismissing the suit which was bad for non joinder of necessary parties i.e. natural heirs of the executant?

Substantial questions of Law No.1 to 2:

8. The defendant, relied upon a registered Will executed vis-a-vis him by the deceased testator, for his hence staking an exclusive claim to the suit property. The registered testamentary disposition of the deceased, testator, is borne in EX.DW2/A. For establishing the trite factum, of Ex.PW2/A being proven to be validly and duly executed by the deceased testator, all the ingredients occurring, in the provisions of Section 63 of the Indian Succession Act, were, necessarily enjoined to proven. The provisions of Section 63 of the Indian Succession Act, read as under:-

"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."

Succinctly, for Ex.DW2/A being formidably proven, to be validly and duly executed by its author, evidence was enjoined to upsurge qua (a) of the deceased testator scribing his signatures thereon, (b) the appending of his signatures thereon, occurring in the presence of the marginal witnesses thereto, latter whereof subsequent, to the appending of the signatures by the deceased testator, upon Ex.DW2/A, also proceeding to, in the presence of the deceased testator also scribe their thumb marks or signatures thereon.

9. In proof of the aforesaid statutory tenets, one of the marginal witness to Ex.DW2/A, namely, Vijay Paul stepped into the witness box as DW-2, and, testified of one Beni Prasad, at the behest of, and, at the instance of the deceased testator, drafting the apposite Will, (a)whereafter, on its, contents being readover and explained, to deceased testator Kirpa Ram, and, on his accepting them to be truthful, Kirpa Ram proceeding to, in the presence of both the witnesses thereto, append his signatures thereon, (b) whereafter, he and the other witness thereto also appending their signatures thereon, conspicuously in the presence of the deceased testator. He has, in his examination-in-chief, continued to testify, of Will borne in Ex.DW2/A, being thereafter presented, for registration before the Sub Registrar concerned, whereat also all the contents thereof, were, readover and explained to him, by the Sub Registrar concerned, (c) and, upon the deceased testator thereat admitting the correctness, of, recitals borne therein (d), of hence, the Sub Registrar, making, his endorsement comprised in Ex.DW2/B. Lastly, he has in his testification, occurring in his examination-in-chief, also echoed, qua at the relevant time of execution of the Will, of, the deceased testator, being in a sound disposing state of mind. The afore rendered testification of one, of, the marginal witness, to Ex.DW2/A, brings forth cogent evidence, in satisfaction, of the trite principle of (a) the deceased testator appending his signatures, in the, presence of the marginal witnesses thereto, (b) marginal witnesses, to Ex.DW2/A thereafter proceeding, to, in the presence of the deceased testator, appending their signatures thereon, obviously, hence Ex.DW2/A is construable to be proven to be validly and duly executed.

10. Furthermore, with DW-2 also proving the making, of an endorsement, comprised in Ex.DW2/B, occurring in Ex.DW2/A, by the Sub Registrar concerned, (a) endorsement whereof is testified to be made therein only subsequent to all contents thereof being readover, and, explained to the deceased testator, (b) and, also his ensuring, of all, recitals borne in Ex.DW2/A being comprehended by the deceased testator, (c) conspicuously also when DW-2 testifies, of, in his presence besides in presence of other marginal witness, to Ex.DW2/A, the deceased testator admitting the truthfulness of all the recitals borne therein, (d) thereupon, with the potent proof standing adduced, with respect to the authenticity of endorsement, comprised in Ex.DW2/B, occurring, in Ex.DW2/A, (e) thereupon the aforesaid endorsement enjoys a presumption of truth. However, the presumption of truth, enjoyed by Ex.DW2/B occurring in Ex.DW2/A, was displaceable, by cogent evidence, yet for dislodging the presumption, of truth, hence acquired by an endorsement, borne in Ex.DW2/B, occurring on Ex.DW2/A, no cogent evidence stood adduced, hence it acquires conclusivity. (f) Even though, the plaintiffs, could by striving, to ensure the stepping into witness box, of Sub Registrar concerned, and, by putting apposite suggestions to him, could shred, the efficacy of the aforesaid presumption, (g) also in case, the Sub Registrar concerned, even though summoned, as plaintiff's witness, yet omitted to in his examination-in-chief support the plaintiffs' version, the plaintiffs' counsel could yet make an endeavour, to ensure his being declared hostile, whereafter, the plaintiff's counsel could, put apposite suggestion(s), to him, for hence eroding the tenacity, of the endorsement borne in Ex.DW2/B, occurring in Ex.DW2/A. However, the plaintiff omitted to make the aforesaid endeavour, wherefrom, an inevitable inference ensues, of the presumption of truth enjoyed by the endorsement borne in Ex.DW2/B, (h) especially for want of cogent evidence in rebuttal thereto being adduced, by the plaintiff, hence acquiring an aura of conclusivity. In sequel, it has to be

concluded that the testamentary disposition borne in Ex.DW2/A, being proven to be validly and duly executed also it is to be concluded, that the testification of DW-2, qua the deceased testator, at the time of execution, of Ex.DW2/A being in a sound disposing state of mind also acquiring immense vigour. More so, reinforcingly, with a valid endorsement borne in Ex.DW2/B, being per se personificatory, of the deceased testator being hence in possession, of enlivened cognitive faculties, especially, when for want thereof, the Sub Registrar concerned, would omit to record an endorsement in Ex.DW2/B, occurring in Ex. Ex.DW2/A.

11. Be that as it may, even if, compelling proof, is adduced by the propounder of Ex.DW2/A, in proof of its valid and due execution, yet certain suspicious circumstances, surrounding the execution of the Will, were hence espoused by the plaintiff. Consequently, it was also incumbent upon the defendant, to dehors, his adducing cogent proof qua valid and due execution, of Ex.DW2/A, to, also remove the taints of suspicion, surrounding the execution of Ex. DW2/A. Both the learned Courts below had dwelt, upon, the exclusion, of all legal heirs, from inheritance by the deceased testator, to be rather constituting a potent suspicious circumstance. However, the aforesaid omissions, existing, in the testamentary disposition of deceased, was not construable to be a suspicious circumstance, as it is settled in a catena of decisions rendered by the Hon'ble Apex Court, that, the exclusion from inheritance, of all the natural heirs, by the deceased testator, being not construable, to be a suspicious circumstance, (a)emphatically, when the purpose of making a testamentary disposition, is for making the apposite exclusion(s).

12. Furthermore, even if, assumingly the beneficiary(ies), of the testamentary disposition actively participated, in the preparation of, and, in the execution, of the apposite Will, yet the aforesaid factum also does not constitute, any suspicious circumstance, hence, surrounding its execution, given, the Hon'ble Apex Court, in a case titled as ***Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others***, reported in ***(2005)8 SCC 67***, the relevant paragraph No.25 whereof stands extracted hereinafter:-

> **"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." (p.84-85)**

(a) dispelling the effect(s) of the active participation, of the beneficiary, in preparation of, and, in the execution of Will, and also, recording a firm mandate that per se thereupon, it being not permissible to be inferable of, hence, any undue influence being exercised by them, upon, the volition of the deceased testator. (b) Even otherwise, any purported aura(s) of fictitiousness or forgery(ies) rather imbuing the execution, of Ex.DW2/A by its author, were required to proven by the plaintiffs, by theirs firmly establishing, by adducing apposite cogent evidence of Ex.DW2/A not carrying the authentic signatures, of the deceased testator besides were enjoined to establish, of the endorsement, borne in Ex.DW2/B occurring in Ex.DW2/A, being not free from any suspicion, (c) whereas, for reasons aforestated, with the plaintiff omitting, to dislodge the presumption of truth enjoyed by Ex.DW2/B, occurring in Ex.DW2/A, (d) whereupon, when hence with Ex.DW2/A, rather acquiring, an aura of conclusivity, thereupon, it is grossly impermissible

to rear any inference of Ex.DW2/A, being a sequel of undue influence or coercion being exerted by the beneficiary upon the deceased testator, (d) even, if, he played any active participation in the preparation or execution thereof. Apart from the above, the learned Courts below, had, on anvil of non occurrence of the name, of one of the legal heirs of the deceased testator, in the apposite testamentary disposition, borne in Ex.DW2/A, especially of one Duni Chand, made conclusion, of execution of Ex.DW2/A being surrounded by suspicious circumstance, hence, merely thereupon, discountenanced the probative vigour, of the testification of DW-2, a marginal witness to Ex.DW2/A also overlooked, the probative sanctity, of endorsement borne in Ex.DW2/B, occurring in Ex.DW2/A. The aforesaid discarding(s) of the testification of DW-2, in proof of valid and due execution, of Ex.DW2/A, and overlooking(s) by both the learned Courts below, of the probative worth, of endorsement, borne in Ex.DW2/B occurring in Ex.DW2/A, was highly inappropriate, (e) more so, when in a verdict recorded by the Court in a case titled as ***Deep Ram and others vs. Laxmi Chand and others***, reported in ***2000(1) Shim.L.C. 240*** , it has been firmly concluded, of, it not being an essential sine qua non, for hence the testamentary disposition, acquiring a mantle of sanctity, of its imperatively, containing the details of all legal heirs. Both the learned Courts below had concluded that with Ex.DW-2 rendering service, as PA in the office of Deputy Commissioner concerned, hence, his appending his signatures thereon, as a marginal witness, rather sparking a suspicious circumstance. However, the ascription, of a suspicious circumstance vis-a-vis appending of signatures by Vijay Paul, upon Ex.DW2/A, is grossly untenable, given his firmly deposing, of the apposite Will being executed, within, the precincts, of, Office of District Collector, and, his also deposing that his taking a short leave of two hours, for ensuring the execution, and, registration of Ex.DW2/A. The aforesaid testification of DW-2, remains uneroded, of, its tenacity, especially for want of any rebuttal evidence, thereto, being adduced. Since DW-2's testification, is not concerted to be imbued with any taint of his colluding or conniving with the beneficiaries thereof, thereupon, the mere factum of his serving as a PA, in the Office of District Collector concerned, can never be construable to be a suspicious circumstance, surrounding the execution of Ex.DW2/A.

13. As aforestated, with this Court, ascribing, the utmost legal sanctity, to endorsement borne in Ex.DW2/B occurring in Ex.DW2/A, occurrence whereof, was a sequel of the Sub Registrar, ensuring, of the deceased testator, being possessed of enlivened cognitive faculties, (a) assurance whereof, emanated on his securing the apposite evincings, from the deceased testator, upon Ex.DW2/A, being presented for registration before him, (b) thereupon, the mere fact, that, during the course of the day, the deceased testator, especially preceding his proceeding, to the office of Sub Registrar concerned, his going to hospital, (c) whereat, some tests were conducted, would not signify, of his not being in a sound mental health or his not possessing enlivened cognitive faculties, (d) unless, the validity of endorsement borne in Ex.DW2/B, occurring in Ex.DW2/A, was eroded. However, with no cogent evidence being adduced, for challenging the validity of the endorsement borne in Ex.DW2/B, occurring in Ex.DW2/A, (e) thereupon, the aforesaid factum, was not rearable as a suspicious circumstance, surrounding the valid and due execution, of testamentary disposition, borne in Ex.DW2/A.

14. 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 appellant/defendant and against the respondents/plaintiffs.

15. In view of the above discussion, the present Regular Second Appeal is allowed. In sequel, the judgements 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.

Smt. Seema Gajta and others .....Appellants.

Versus

The National Insurance Company Ltd. ....Respondent.

FAO No. 321 of 2017.
Reserved on : 6th March, 2018.
Decided on : 19th March, 2018.

Motor Vehicles Act, 1988- Section 163-A- The learned Motor Accident Claims Tribunal declining relief to the claimants on the ground that the insurer had failed to have the vehicle registered after the expiry of the temporary registration number, which was an infraction of the terms and conditions of the insurance policy- Consequently, even the issues framed not answered by the Learned Tribunals- **Held-** that the insurer seeking permanent registration of the vehicle within one month of the issuance of the temporary registration number, a matter of evidence-adducing evidence in this behalf was imperative and the Learned Tribunals has failed answer the issues framed- The MACT accordingly directed to provide opportunity to the claimants lead evidence in this behalf- Consequently, appeal allowed and matter remanded to back to the Learned Tribunal with the aforesaid directions. (Para-2 and 3)

For the Appellants: Mr. Raman Sethi, Advocate.
For Respondent : Mr. Bhupender Pathania, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The legal heirs of deceased Inderjit Singh, are aggrieved by the dismissal, of their MACT Petition No. 7-S/2 of 2015, by the learned Motor Accident Claims Tribunal-II, Shimla, H.P.

2. The predecessor-in-interest of the claimants, one Inderjit Singh, while driving Alto Car bearing No. HP-03 Temp.4243, suffered his demise, on 10.07.2014. The demise, of the predecessor-in-interest, of the claimants occurred, in sequel to an accident befalling upon the aforesaid vehicle. Qua the aforesaid accident, a FIR bearing No. 42/2014, was registered at Police Station Chopal. A claim petition was instituted under Section 163-A, of the Motor Vehicles Act. However, the learned Tribunal, under the impugned award, did not return any findings upon the issue appertaining, to the demise of deceased Inderjit Singh, occurring in a motor vehicle accident nor it rendered any findings upon issue No.1 qua the entitlement for compensation, of his successors-in-interest. The grounds for declining relief to the claimants, are, anvilled upon infraction, with the terms and conditions of the Insurance Policy, being evinced vis-a-vis the relevant vehicle, (a) given deceased Inderjit Singh, in respect of the relevant vehicle, only holding a temporary registration number, and, with the mandate borne in Section 43 of the Motor Vehicles Act, rather enjoining it to hold longevity only upto one month, (b) whereas with the expiry, of the apposite temporary registration number, hence occurring, on 28.06.2014, and, with the relevant accident occurring on 10.07.2014, whereat, it remained unrenewed, (c) thereupon, affirmative findings stood rendered, by the learned tribunal, upon, the apposite issue appertaining to the vehicle, being driving in infraction of the terms and conditions of the insurance policy. The aforesaid conclusion, drawn by the learned tribunal, is solitarily bedrocked, upon its making perusal(s) of the temporary registration certificate issued, by the relevant Motor Licencing Authority concerned, certificate whereof is borne in Ex.PW1/A. However, given the respondent not, making any efforts, to elicit the apposite records, from the licencing authority concerned, with all denotations borne therein, in respect of deceased Inderjit Singh, on expiry of the temporary registration number, issued vis-a-vis the relevant vehicle, his

thereafter seeking issuance vis-a-vis the apposite vehicle, a permanent registration number, (d) whereas, adduction of the aforesaid evidence, was imperative, for ensuring formation of a secure conclusion, qua deceased Inderjit Singh, within one month, since issuance of a temporary registration number qua the vehicle concerned, seeking or not seeking qua it, allotment of a permanent registration number, and, his application for the aforesaid purpose pending approval or an affirmative order being made, upon, his apposite application preferred before the Motor Licencing Authority concerned. Consequently, omission(s) of the learned counsel, for the insurer, to elicit the aforesaid apposite record, from the licencing authority concerned, does foment, a conclusion, (e) of, absence of adduction of best evidence besides consequently its non existence on the record, of the learned Tribunal, rather disabled, it to make any befitting conclusion qua, despite, the longevity, of the temporary registration number issued vis-a-vis the vehicle concerned, remaining or not remaining intact, (f) or even to firmly conclude, of, no permanent registration number qua it being applied for nor approval being meted thereto, (g) whereas, only upon its adduction(s) therebefore, would ensue eruption, of, apt conclusion(s) vis-a-vis the issue appertaining to hence infraction being visited or not being visited qua the terms and conditions, of the Insurance policy.

3. Be that as it may, the absence of adduction, of, the aforesaid material, also constrain(s) this Court, to reverse the affirmative findings rendered thereon, by the learned tribunal. Consequently, for ensuring affording, of opportunities, to the parties at contest, especially for adducing the aforesaid best material before the tribunal, it is deemed fit, and, appropriate that the matter be remanded, to the learned tribunal, for enabling it, to, after affording opportunities, on apposite motions made therebefore, by the litigants concerned, hence ensure adduction of the aforesaid best evidence, from the quarter(s) concerned, whereafter, it shall, in accordance with law, make appraisal(s) thereof, and return fresh findings, upon issue No.4. As aforesaid, the learned tribunal, has, omitted to return findings upon issues No.1 and 2, hence, while it proceeds, to return findings upon issues No.1 and 2, it shall bear in mind, the trite factum of the instant petition, being constituted under the provisions of Section 163-A of the Motor Vehicles Act, thereupon, with the respondent being barred, to raise any defence, of deceased Inderjit Singh being negligent in driving, the aforesaid vehicle, especially, with the Hon'ble Apex Court in a judgment rendered in ***Civil Appeal No. 9694 of 2013,*** in case titled as ***United India Insurance Co. Ltd. vs. Sunil Kumar & Anr***., relevant paragraph No. 9 whereof stand extracted herienafter:-

> "9. For the aforesaid reason, we answer the question arising by holding that in a proceeding under Section 163A of the Act, it is not open for the Insurer to raise any defence of negligence on the part of the victim."

making an explicit mandate therein, (i) of the insurer being barred to, in a petition constituted under Section 163A of the Act, hence rear a defence or plea, of the victim committing any tort, while driving the vehicle concerned, (ii) and, even if assumingly, the victim is a tortfeasor, thereupon, any petition cast under Section 163-A of the Act, yet not warranting its dismissal.

4. For the reasons aforestated, the appeal is allowed, and, impugned award is set aside, and, the petition is remanded to the learned tribunal concerned, to, in the light of the aforesaid directions, render fresh findings upon all apposite issues. The parties are directed to appear before the learned tribunal, on 6th April, 2018. The learned tribunal is directed, to, within three months therefrom, record a fresh decision, upon, the apposite petition. All pending applications also stand disposed of. Records be sent back forthwith.

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

United India Insurance Company Limited .....Appellant
Versus
Smt. Sudarshana Devi and Ors. ..... .Respondents.

FAO No. 522 of 2017
Date of Decision: 19.03.2018

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs. 18,141/- as per the cogent evidence on record- He was indisputably 38 years old at the time of accident- An addition of 50% in actual salary of the deceased towards the future prospect as he was below 40 years- multiplier of 15 shall be used- Thus, Learned Tribunal has rightly determined the compensation for dependency to the tune of Rs.36,73,440/- - The Learned Tribunal, however, fell in error while awarding compensation on account of loss of love and affection, also amounts awarded qua funeral expenses and loss of consortium need to be modified to Rs.15,000/- and Rs.40,000/- in spite of Rs.25,000/- and Rs.1 lacs as awarded by the Learned MACT below in view of judgment of Hon'ble Supreme Court in ***National Insurance Company Limited*** *v.* ***Pranay Sethi and Ors.***, **AIR 2017 Supreme Court 5157** – there is no thumb rule that interest cannot be granted @ 8% as awarded by the learned Tribunal, however, interest is reduced to 7.5% per annum from the date of filing of the petition till the realization of the whole amount in the circumstances of the present case- Claimants are, thus, entitled to Rs.37,68,440/- as compensation. (Para-6 to 8)

Cases referred:
National Insurance Company Limited v. Pranay Sethi and Ors., AIR 2017 Supreme Court 5157
Sarala Verma & Ors. v. Delhi Transport Corporation and Anr., AIR 2009 SCC 3104

For the Appellant: Mr. Jagdish Thakur, Advocate.
For the respondents: Ms. Anjali Soni Verma, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dis-satisfied with award dated 1.9.2017, passed by the learned MACT-II, Kangra at Dharamshala, District Kangra, H.P., in MACP No. 98-N/II/2013/2009, whereby learned Tribunal below while holding the respondents-claimants entitled for compensation, directed the appellant-company to pay a sum of Rs. 39,23,440/- along with 8% interest p.a. from the date of filing of the petition till its deposit, appellant has approached this Court by way of instant petition, praying therein to dismiss the claim petition having been filed by the respondents-claimants after setting aside the impugned award passed by the learned MAC Tribunal, Kangra.

2. Briefly stated facts as emerge from the record are that the respondents-claimants approached the learned Tribunal by way of petition filed under Section 166 of the Motor Vehicles Act, seeking therein compensation to the extent of Rs. 20,00,000/- along with interest on account of death of Mr. Subhash Chand. On 8.5.2009, at about 8.15 pm, when the deceased Subash Chand was sitting on a parapet near Cinema Hall at Raja-Ka-Talab, all of a sudden, a truck bearing No. HP-38-3667, being driven in rash and negligent manner, came and hit the deceased, who subsequently succumbed to injuries. Deceased Subhash, who was 38 years old, was serving as Senior Laboratory Technician in Primary Health Centre, Baranda and was drawing monthly emoluments to the tune of Rs. 18,141/-. Claimants being wife, minor children and mother of the deceased Subash Chand were wholly dependent upon him and due to his untimely death,

claimants, as referred herein above, filed claim petition before MACT, Kangra. Appellant Insurance Company opposed the claim of claimants on the ground that driver of offending vehicle was not having valid/effective driving licence and as such, they are not liable to indemnify the owner of the truck/offending vehicle.

3. On merits, appellant-Company while denying the accident, age and income of the deceased, contended that compensation claimed is exorbitant and same cannot be awarded to the claimants. Insurance company also claimed before the learned Tribunal below that accident did not occur due to rash and negligent driving of respondent No.6. Learned MACT below on the basis of material adduced on record by the respective parties, held the claimants entitled to the compensation to the tune of Rs. 39,23,444/- along with interest @8% p.a. from the date of filing the petition till the realization of the whole amount to be paid by the appellant-Insurance Company. In the aforesaid background, appellant-Insurance Company has approached this Court by way of instant appeal.

4. Mr. Jagdish Thakur, learned counsel representing the appellant while terming impugned award to be illegal and not sustainable in the eye of law, strenuously argued that same is not based upon proper appreciation of evidence and law on the point and as such, same deserves to be quashed and set-aside. Mr. Thakur, further contended that learned Tribunal below has erred in taking the income of deceased as Rs. 27,211/- per month because income tax payable qua the aforesaid salary ought to have been deducted by the court below while ascertaining the monthly income of the deceased. Mr. Thakur further contended that learned Tribunal below has fallen in grave error in deducting 1/4th on account of personal expenses, whereas it had to be 1/3rd. While referring to the age of the deceased, learned counsel representing the appellant-company contended that the multiplier of 14 ought to have been applied instead of multiplier of 15 and as such, judgment being contrary to the basic provisions of law, cannot be allowed to sustain. While placing reliance on the judgment passed by the Hon'ble Apex Court in case titled ***National Insurance Company Limited*** *v.* ***Pranay Sethi and Ors.***, **AIR 2017 Supreme Court 5157**, Mr. Thakur, contended that learned Tribunal has erred in awarding Rs. 25,000/- on account of funeral expenses and transportation charges. He further contended that no amount could be awarded under the head of love and affection and loss of consortium. While inviting attention of this Court to the impugned award, wherein an amount of Rs.1,00,000/-, has been awarded on account of loss of consortium, Mr. Thakur contended that as per latest judgment passed by the Hon'ble Apex Court supra, only Rs.40,000/- could be awarded under this head. Lastly, Mr. Thakur, contended that Tribunal below has awarded 8% interest on the award amount, whereas same could not be more than 6%. In this regard, he placed reliance upon judgment passed by the Hon'ble Apex Court in case titled ***Laxmidhar Nayak and Ors. v. Jugal Kishore Behera and Ors.***, in ***Civil Appeal No. 19856 of 2017*** (arising out of SLP (C) No. 31405 of 2016).

5. Ms. Anjali Soni Verma, Advocate, representing respondents No. 1 to 4, while refuting aforesaid submissions having been made by the learned counsel representing the appellant, contended that there is no illegality and infirmity in the impugned award passed by the learned Tribunal below and as such, same deserves to be upheld. She while inviting attention of this Court to the evidence led on record by the respective parties, contended that the appellant-Insurance Company, has miserably failed to prove its case. She further contended that it stands duly proved on record that deceased Subhash Chand, died due to rash and negligent driving of the driver of offending vehicle, which was admittedly insured with the appellant-Insurance Company at that relevant time. While referring to the quantum of compensation, Ms. Verma further contended that it stands duly proved on record that deceased was drawing salary of Rs. 18,141/- p.m. and as such, there is no force in the argument of learned counsel representing the appellant-company that learned MACT below wrongly took Rs. 27,211/- as monthly salary while determining the monthly income of the deceased Subhash. Ms. Verma while referring to the judgment passed by the Hon'ble Apex Court in ***National Insurance Company Limited v. Pranay Sethi and Ors*** supra fairly conceded that the claimants are entitled to Rs. 15,000/- on account of funeral expenses and Rs. 40,000/- on account of loss of consortium, however she

categorically disputed the contention put forth by Mr. Jagdish Thakur, Advocate, that no amount could be awarded in favour of the claimants under the head of "loss of love and affection".

6. Having heard the learned counsel representing the parties and perused the record, this Court is not inclined to agree with aforesaid submission having been made by the learned counsel representing the Insurance company because it stands duly proved on record that deceased Subash Chand died in an accident due to rash and negligent driving of respondent No.2 i.e. driver of the truck. Similarly, this Court finds from the evidence led on record by the respective parties that onus to prove that respondent No. 2 i.e. driver of the offending vehicle, was not having valid and effective license to drive the vehicle in question, was upon appellant insurance company, who has not been able to discharge the aforesaid onus, rather it stands duly proved on record that at that relevant time, accused was having valid driving licence to drive the offending vehicle. No evidence in support of aforesaid claim of the appellant Insurance company, has been led on record and as such, learned Tribunal below rightly decided the issue against the Insurance Company. Record further reveals that claimants with a view to substantiate the income of the deceased placed on record cogent and convincing evidence that the deceased was drawing salary of Rs. 18141/- p.m. Claimants also proved on record salary certificate of the deceased Ext.PW1/D issued by Block Medical Officer, Gangath and as such, the learned Tribunal below while placing reliance upon the judgment rendered by the Hon'ble Apex Court in ***Sarala Verma & Ors. v. Delhi Transport Corporation and Anr., AIR 2009 SCC 3104***, rightly added 50% of actual income to the income of the deceased towards the future prospects as deceased was admittedly 38 years old at the time of the accident. This Court also sees no illegality in applying the multiplier of "15", because deceased was 38 years of age at the time of the accident. As per the second schedule to the Motor Vehicles Act, 1988, for the age groups 40 to 45 years, multiplier is "15". As per **Sarla verma's** case supra, for the age groups, 41-45 years, multiplier to be adopted is "14", but in the case at hand, as has been noticed above, age of deceased at the time of accident was 38 years. Recently Hon'ble Apex Court in **Pranay Sethi's** case supra has reiterated that 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.

7. In the instant case, admittedly age of the deceased at the time of the accident was 38 years and as such, learned court below rightly made an addition of 50 percent of the actual salary of the deceased towards future prospects but after having perused the aforesaid judgment rendered by the Hon'ble Apex Court in Pranay Sethi's case supra, this Court is persuaded to agree with the contention of Mr. Jagdish Thakur, learned counsel representing the appellant-company that no money, if any, could be awarded under the head "loss of love and affection". Hon'ble Apex Court has categorically held that head relating to cause of loss of care and guidance for the minor children does not exist. There are only three conventional heads i.e. loss of estate, loss of consortium and funeral expenses. Hon'ble Apex Court has further quantified the amount to be paid under the aforesaid conventional heads. Relevent paras of aforesaid judgment are reproduced here in 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 socio-economic 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 nonpecuniary 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."***

49. Be it noted, Munna Lal Jain (2015 AIR SCW 3105) (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.

50. This aspect needs to eb clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy and another it has been reiterated by stating:-

> ***"...we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."***

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for General Damages in case of death. It is as follows:-

> ***"3. General Damages (in case of death):***
>
> ***The following General Damages shall be payable in addition to compensation outlined above:-***
>
> ***(i)Funeral expenses- Rs.2,000/-.***
> ***(ii) Loss of Consortium, if beneficiary is the spouse- Rs.5,000/-***
> ***(iii) Loss of Estate - Rs. 2,500/-***

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that 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 principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self-employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and nonviolation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the opposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the

comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

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."

8. While applying ratio of aforesaid law laid down by the Hon'ble Apex Court in Pranay Sethi's case, an amount awarded under various heads i.e. funeral expenses, loss of love and affection and loss of consortium, needs to be re-assessed, accordingly, amount awarded qua funeral expenses and loss of consortium is modified to Rs. 15,000 and Rs. 40,000 instead of Rs. 25,000/- and Rs. 1 lac, as awarded by the learned MACT below. It is quite apparent from the aforesaid law laid down by the Hon'ble Apex Court that no amount can be awarded under the head of loss of love and affection and as such, award made qua the same vide impugned order is quashed and set aside. However, this Court while exercising power under Order XLI, Rule 33, of CPC, wherein appellate Court enjoys the power to pass any decree and make any order, which ought to have been passed or made as the case may be, deems it fit to grant an amount of Rs. 15,000/- on account of loss of estate. In view of the modifications made herein above, now the respondents-claimants shall be entitled to following amount:-

Compensation for dependency:	**Rs. 36,73, 440/- (as determined by the court below)**
Funeral Expenses:	**Rs. 15,000/-**
Transportation charges:	**Rs. 25,000/-**
Loss of consortium:	**Rs. 40,000/-**
Loss of estate:	**Rs. 15,000/-**

9. Though, this Court after having perused law relied upon by the learned counsel representing the appellant in Laxmidhar Nayak 's case supra, in support of his contention that court below has fallen in grave error while awarding 8% rate of interest to the claimants, has no hesitation to conclude that there is no thumb rule/law that interest on the compensation/awarded amount cannot be @8%. However, in the given facts and circumstances of the case, this Court deems it fit to modify rate of interest awarded by the court below from 8% to 7.5%, meaning thereby, appellant-company shall be liable to pay compensation as determined herein above, along with up-to-date interest @7.5% from the date of filing of the petition till the realization of the amount by the appellant-company.

10. Consequently, in view of the detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned award passed by the learned MACT below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications if any.

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

Subhash .....Petitioner.
Versus
State of HP .....Respondent

Cr. Revision No. 4 of 2010
Date of Decision: 20.3.2018.

Code of Criminal Procedure, 1973- Section 397- Appellant was apprehended with 600 boxes of country made liquor of make "Sirmaur No.1"- he was sentenced to undergo simple imprisonment for one year and to pay fine of Rs. 5000/- under Section 61 (1) (a) of Punjab Excise Act by Learned Trial Court – only 6 pouches were sent for chemical analysis out of the allegedly recovered liquor – Held- that the recovery allegedly effected by the police stands vitiated as it is not proved that boxes were containing liquor except 6 pouches sent for chemical analysis- prosecution failed to prove that accused was carrying liquor beyond permissible limit- Judgments passed by the Courts below quashed and set aside- accused acquitted. (Para-10 to 12)

Cases referred:
Surender Singh. V. State of H.P.", Latest HLJ 2013 (2) 865
State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919

For the petitioner: Mr. Deepak Kaushal, Advocate,
For the respondent: Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General, for the State.
Mr. Vivek Sharma, Advocate, for co-accused Mukul Kumar and Sadanand.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Section 397 of Cr.PC, is directed against the judgment dated 11.11.2009, passed by the learned Sessions Judge, Sirmaur District at Nahan, H.P., in criminal appeal No. 5-Cr.A/10 of 2005, affirming judgment of conviction dated 21.4.2005, recorded by the learned Additional Chief Judicial Magistrate Rajgarh, District Sirmaur, H.P., in Cr. Case No. 3/2 of 2002, whereby the learned court below while holding the

accused guilty of having committed offences punishable under Section 61 (1) (a) of Punjab Excise Act, as applicable to the State of HP, sentenced the accused to undergo simple imprisonment for a period of one year and to pay fine of Rs. 5000/- and in default of payment of fine, to further undergo simple imprisonment for three months.

2. In nutshell case of the prosecution is that on 13.4.2001, flying squad headed by Kuldeep Kumar Thakur, Excise and Taxation Inspector, apprehended a truck bearing No. HP-18-4524, being driven by the petitioner-accused and recovered 600 boxes of country made liquor of make "Sirmaur No.1". Since driver was unable to produce valid licence/permit to possess/retain the aforesaid boxes, he was taken into custody alongwith 600 boxes of country made liquor. Though petitioner accused produced permit with regard to 325 boxes of country made liquor but entire bulk of 600 boxes containing country made liquor was taken into custody by the police. Subsequently, on the complaint of Exercise and Taxation Inspector, FIR bearing No. 23/2001 under Section 61 of the Act ibid, came to be registered against the accused. Police after having taken into possession 600 boxes of liquor, drew samples only out of six boxes of 750 ml pouches of country made liquor make Sirmaur No.1 and sealed the same with seal impression "T". Remaining boxes i.e. 519 of 750 ml. and 75 boxes of 375 ml. were released on sapurdari to Shri Palash Ram, ETI Sarahan. Subsequently, on 14.4.2001, one Bhim Singh & Co. Solan along with Sada Nand Chauhan, moved an application to the police for release of liquor allegedly recovered by the police from the vehicle being driven by the petitioner-accused, however fact remains that the police rejected the application filed by the above named persons and as such, they moved an application before the Court concerned, who vide order dated 19.7.2001, ordered the Excise officer to release the liquor after imposing fine. Since above named persons had moved an application to get their liquor released by producing permit No.4/2001 and Pass No. 208201, they were also challaned under Section 61 (1) of Act *ibid* and Sections 467, 468, 471 and 120-B IPC.

3. After completion of investigation, police presented challan in the competent Court of law i.e. Additional Chief Judicial Magistrate, Rajgarh, District Sirmaur, HP, who on being satisfied that prima-facie case exists against the accused, charged Subhash Chand and Mukul Kumar under Section 61 (1) (a) of the Act ibid whereas accused Sadanand Chauhan and Bhim Singh came to be charged under Section 61 (1) (a) of the Act *ibid* and Sections 467, 468, 471 and 120-B of IPC, to which they pleaded not guilty and claimed trial.

4. Subsequently on the basis of evidence led on record by the prosecution, learned trial Court convicted the accused Subhash Chand and Mukul Kumar under Section 61 (1) (a) of the Act ibid and acquitted co-accused Sadaand and Bhim Singh extending benefit of doubt under Section 61 (1) (a) of the Act *ibid* and Sections 467 468, 471 and 120-B of IPC.

5. Being aggrieved and dis-satisfied with the aforesaid judgment of conviction recorded by the learned trial Court, present accused alongwith co-accused Mukul Kumar preferred an appeal before the learned Sessions Judge, Sirmaur District at Nahan. Learned Sessions Judge vide judgment dated 11.11.2009, while partly accepting the appeal preferred on behalf of Mukul Kumar, acquitted him of the charges framed against him under Section 61 (1) (a) of the Act ibid, whereas the court below held present petitioner-accused guilty of having committed offence punishable under Section 61 (1) (a) of Punjab Excise Act. In the aforesaid background, present petitioner-accused has approached this Court in the instant proceedings, seeking therein his acquittal after setting aside judgment of conviction recorded by the learned Sessions Judge, at Nahan.

6. During pendency of the present appeal, this Court also issued notices to such of those co-accused in the case, who came to be acquitted by the courts below, who are represented by Mr. Vivek Sharma, Advocate.

7. Mr. Deepak Kaushal, learned counsel representing the petitioner-accused while referring to the impugned judgment of conviction recorded by the learned Sessions Judge, vehemently contended that same is not sustainable in the eye of law as the same is not based upon proper appreciation of evidence available on record and as such, same deserves to be

quashed and set-aside. While placing reliance upon judgment passed by this Court in Criminal Appeal No. 7 of 2018, titled ***State of HP v. Jagtar Singh***, decided on 9.3.2018, learned counsel contended that since only six pouches of country liquor make Sirmaur No. 1 were drawn as samples and sent to the SFSL, recovery, if any, can be said to be of 6 pouches only and as such, judgment of conviction recorded by the court below being contrary to the law laid down by this Court, is not sustainable and as such, same deserves to be quashed and set-aside.

8. Mr. Dinesh Thakur, learned Additional Advocate General representing the State contended that there is no illegality and infirmity in the judgment of conviction recorded by the learned Sessions Judge, rather same is based upon proper appreciation of evidence and as such, there is no scope of interference, whatsoever for this Court and as such, same deserves to be upheld. Learned Additional Advocate General further contended that true it is that only six pouches of country liquor make Sirmaur No.1 were drawn as sample for sending the same to the SFSL, but those were sufficient to conclude on record that 600 boxes allegedly recovered from the vehicle being driven by the petitioner accused were containing liquor. Mr. Thakur further contended that there is no dispute that 600 boxes recovered from the truck being driven by the petitioner accused, were containing pouches of country liquor make "Sirmaur No. 1". While referring to the evidence adduced on record by the prosecution, learned Additional Advocate General, contended that prosecution proved its case beyond reasonable doubt that on the date of alleged occurrence, petitioner-accused was illegally transporting 600 boxes of liquor without there being any permit and as such, he has been rightly held guilty of having committed offence punishable under Section 61 (1) (a) of Punjab Excise Act, by the Court below.

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

10. After having carefully perused the evidence led on record by the prosecution, this Court is not persuaded to agree with the contention of the learned counsel for the petitioner-accused that there is no evidence at all on record adduced by the prosecution to connect the petitioner-accused with the recovery of 600 boxes of liquor from the truck being driven by him because admittedly prosecution by way of leading cogent and convincing evidence has successfully proved on record that on the date of alleged incident, it was the accused, who was carrying /transporting 600 boxes of liquor without there being any permit. However, this Court finds considerable force in the second argument of learned counsel representing the petitioner accused that recovery, if any, of just 6 pouches out of 600 boxes of liquor can be said to have been effected because undisputedly, only six pouches out of 600 boxes were sent for chemical analysis. This Court has no hesitation to conclude that prosecution has failed to prove its case beyond reasonable doubt that 600 boxes allegedly recovered from the truck allegedly being driven by the accused contained liquor. As has been taken note herein above, six pouches containing 750 ml liquor were sent for chemical analysis, which were found to be liquor by the chemical analyst, but there is nothing on record to show that remaining bottles contained in 600 boxes allegedly recovered from accused also contained country liquor more than permissible limit without having any licence. Needless to say, it was incumbent upon the prosecution to prove that respondent was in actual and conscious possession of illicit liquor in excess of permissible limit and as such, no conviction could be recorded by the court below merely on the strength of the report submitted by chemical analyst qua six pouches of liquor. In view of aforesaid omission on the part of the investigating agency, entire recovery allegedly effected by the police stands vitiated on account of the fact that only six pouches out of the total alleged recovery from the accused were sent for chemical analysis and as such, recovery of only six pouches of liquor is proved. At this stage, reliance is placed upon judgment passed by this 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."

11. Reliance is also placed on the judgment passed by this Court in ***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."

12. Consequently, in view of the aforesaid discussion as well as law referred hereinabove**,** present petition is allowed and judgments passed by the Courts below are quashed and set-aside and petitioner-accused is acquitted of the offence punishable under Section 61 (1) (a) of the Act ibid. Bail bonds furnished by the petitioner are discharged. Interim order is vacated. Fine amount, if any deposited by the petitioner, be refunded to him. Pending applications, if any, are also disposed of.

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

Kangru Ram .....Petitioner
Versus
Sriram .....Respondent

CMPMO No. 261 of 2017
Reserved on 17.03.2018
Decided on: 21.03.2018

Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 26 Rule 9 readwith 151- The appointment of a Local Commissioner sought by the plaintiff before the Learned Trial Court on the basis that the dispute related to a boundary – As per the respondent, plaintiff was trying to create evidence in his favour- the Learned Trial Court had dismissed the application – **Held-** since the dispute related to the possession of "Khatti" (a source of drinking water), one each was alleged to have come into possession of each of the parties – **Further Held-** It was definitely a boundary dispute, though, filed late - The Learned Trial Court ought to have appointed a Local Commissioner – Petition disposed of in the aforesaid terms. (Para-13 to 15)

Cases referred:
Haryana Waqf Board vs. Shanti Sarup and others, (2008) 8 SCC 671
Bali Ram vs. Mela Ram and another, 2002 (3) SLC 131
Prithi Singh vs. Bakshi Ram and another, Latest HLJ 2006 (HP) 5
Liaquat Ali vs. Amir Mohammad and others, Latest HLJ 2016 (HP) 83

For the petitioner: Mr. K.D. Sood, Sr. Advocate with Mr. Het Ram Thakur, Advocate.
For the respondent: Mr. Surinder Saklani, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India, is maintained by the petitioner/plaintiff (hereinafter to be called as "the plaintiff"), for quashing the order dated 19.05.2017, passed by learned Civil Judge (Jr. Div.), Court No. 4, Hamirpur, H.P., in CMA No. 375 of 2013, Civil Suit No. 120 of 2012, whereby an application, under Order 26, Rule 9, read with Section 151 CPC, for appointment of the Local Commissioner, was dismissed.

2. Briefly stating facts giving rise to the present petition are that the plaintiff filed an application before the leaned Court below, under Order 26, Rule 9, read with Section 151 CPC, wherein he alleged that the respondent/defendant is adjoining owner, having Khasra No. 208 and he dug the suit land and raised construction in the shape of steps and also blocked the drain/*challa* of the plaintiff. It has been further averred in the application that since main dispute *inter se* the parties is boundary dispute, the appointment of Local Commissioner is necessary as it will enable the Court to give specific findings. Lastly, the plaintiff prayed that the present application may be allowed and Local Commissioner to demarcate the suit land and to report the nature and extent of encroachment, may be appointed.

3. In reply to the application, the respondent/defendant has averred that this application is not maintainable, as the plaintiff has not produced any evidence and now moved the application. Further the application of the plaintiff cannot be allowed, as the same will amount to create evidence in favour of the plaintiff. Lastly, the respondent/defendant prayed for dismissal of the application with costs.

4. Learned Court below vide its order dated 19.05.2017, dismissed the application, so filed by the plaintiff, hence the present petition.

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

6. Learned Senior Counsel appearing on behalf of the petitioner has argued that the application, under Order 26, Rule 9, read with Section 151 CPC, was required to be allowed in order to decide the real controversy *inter se* the parties, as it is a boundary dispute and it cannot be decided without there being report of the Local Commissioner. He has further argued that as per the law laid down by Hon'ble Supreme Court and this Hon'ble Court, when there is a boundary dispute, the Local Commissioner is required to be appointed to resolve that dispute. In support of his contentions, learned Senior Counsel has placed reliance upon the following judicial pronouncements:

1. ***2008 (8) SCC 671, titled as Haryana Waqf Board vs. Shanti Sarup and others.***

2. ***2002 (3) SLC 131, titled as Bali Ram vs. Mela Ram and another.***

3. ***Latest HLJ 2006 (HP) 5, titled as Prithi Singh vs. Sakshi Ram and another.***

7. A Division Bench of Hon'ble Supreme Court in ***Haryana Waqf Board vs. Shanti Sarup and others***, (2008) 8 SCC 671, have held as under:

> ***5. The appellate court found that the trial court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorised possession in respect of the suit land by them as per Para 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because the land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial Court was wrongly rejected.***
>
> ***6. It is also not in dispute that even before the appellate court, the appellant Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land.***
>
> ***7. For that reasons aforesaid, we are of the view that the High Court ought to have considered this aspect of the matter and then decided the second appeal on merits. Accordingly, we set aside the judgment and decree passed in the second appeal and the second appeal is restored to its original file.***
>
> ***8. The High Court is requested to decide the second appeal in the light of the observations made hereinabove within six months from the date of supply of a copy of this order to it. The appeal is thus allowed. There will be no order as to costs"***

8. A co-ordinate Bench of this High Court in ***Bali Ram vs. Mela Ram and another***, 2002 (3) SLC 131, has held as under*:*

> ***"13. Rule 9 of Order 26 of the Code of Civil Procedure (hereinafter 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 circumstance 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."

9. A co-ordinate Bench of this High Court in ***Prithi Singh vs. Bakshi Ram and another***, Latest HLJ 2006 (HP) 5, has held as under*:*

"7 As referred to above, the dispute between the parties was in fact a boundary dispute. It could be solved only by demarcation, inasmuch as the land claimed by the plaintiff to be owned and possessed by him as different from the land claimed by the defendants to be owned and possessed by them and both the lands were adjoining each other. In such a situation, the only course open for the trial Court was to have appointed a Local Commissioner to visit the spot after issuing notice to both the parties and to demarcate the suit land in accordance with law. Instead of ordering the appointment of the Local Commissioner to demarcate the suit land, the learned trial Court proceeded to dismiss the application of the plaintiff under Order 26 Rule 9 CPC by taking the plea that the object of local investigation was not to collect evidence on behalf of the parties. In my opinion, appointment of a Local Commissioner to demarcate the suit land, in a case which involves boundary dispute would not amount to collecting on behalf of either party. On the other hand, as referred to above, this would be the only course open to the trial Court to settle the dispute between the parties by appointing a Local Commissioner to visit the spot and to submit his report after demarcation in accordance with law."

10. Learned Senior Counsel has also placed reliance upon a Procedure in "***Hadd-Shikni cases***", as prescribed in Volume (I), H.P. High Court Rules and Orders, which is as under:

"**1.** ***In "Hadd-Shikni" suits and other suits of boundary disputes of land failing within the jurisdiction of a Civil Court it is generally desirable that enquiry be made on the spot. This can usually be done in the following ways:-***

(a) by suggesting that one party or the other should apply to the Revenue Officer to fix the limits under Section 101 (1) of the Punjab Land Revenue Act. Time for such purpose should be granted under Order XVII, Rule 3, of the Code of Civil Procedure,

(b) by appointing a local commissioner, and

(C) by the Court itself making a local enquiry."

11. On the other hand, learned counsel for the respondent has argued that trial in the present case is pending since long and the petitioner has not filed the application in question earlier and now when he comes to know about the fate of his case, the present application has been filed by him. In support of his contentions, learned counsel for the respondent has placed reliance upon the judgment of a Co-ordinate Bench of this Hon'ble High Court, ***Latest HLJ 2016***

(HP) 831, titled as ***Liaquat Ali vs. Amir Mohammad and others***. The relevant extracts of the judgment are reproduced hereinbelow:

> ***"5. What is the measurement of the suit passage and whether the same has been obstructed or encroached upon are matters which were required to be proved by the petitioner by leading cogent and convincing evidence to this effect and, therefore, recourse to the appointment of Local commissioner for demarcating the suit land at this stage is impermissible as both the parties have led their evidence. Obviously the application now preferred by the petitioner is mischievous as the petitioner wants the court to collect evidence for him through the Local commissioner."***

12. To appreciate the arguments of learned counsel for the parties, this Court has gone through the record in detail.

13. In the present case the land is adjoining and case of the parties is that when partition took place one *Khatti* alongwith the land came to the possession of one party and one *khatti* alongwith land came to the possession of other party. Now the *khatti* of the plaintiff has been polluted due to the construction and foul discharge of water (A word "*Khatti*" means source of water for drinking purpose, which comes from the small hillock, adjoining the back side of the house).

14. This is definitely a boundary dispute *inter se* the parties and in these circumstances, report of the Local Commissioner is very material and *res integra* to decide the dispute between the parties. It has come on record that the plaintiff has approached to the Revenue Authorities for demarcation. It has also come on record that earlier the demarcation was not possible due to wrong Karukans. In these circumstance, this Court finds that the application though not moved at the earliest and as argued by the learned Senior Counsel for the plaintiff, it was maintained late, as the plaintiff first of all wants to establish by leading evidence with respect to the boundary and boundary dispute.

15. This Court after going through the records and law, cited by the learned Senior Counsel for the plaintiff/petitioner, finds that present is a fit case where the learned Court below should have appointed a Local Commissioner to give a demarcation report with regard to the land and structures of the parties, however the learned Court below has not exercised the jurisdiction vested in it.

16. Now coming to the law relied upon by the learned counsel for the respondent/defendant in ***Liaquat Ali vs. Amir Mohammad and others*** case. This Court finds that the facts of the case in hand are totally different from the case cited by the learned counsel for the respondent, as in above cited case, there existed a passage at the first instance and whether passage is there or not, is not a boundary dispute, so this judgment is not applicable to the facts of the present case.

17. The net result of the above discussion is that the learned Court below was required to exercise its jurisdiction by appointing a Local Commissioner to demarcate the land as per the procedure and it cannot be said that if the Local Commissioner is appointed, the same will create evidence in favour of the plaintiff. Accordingly, the present petition is allowed and order dated 19.05.2017, dismissing the application of the petitioner/plaintiff, under Order 26, Rule 9, read with Section 151 CPC, is set aside and it is ordered that learned Court below will appoint a Local Commissioner by allowing application of the petitioner/plaintiff. Parties through their counsel are directed to appear before the learned Court below on **2nd April, 2018**.

18. In view of the aforesaid terms, the petition, so also pending application(s), if any, shall stand(s) disposed of.

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

Oriental Insurance Company Ltd. .....Appellant.
Versus
Smt. Ram Kali & ors. .....Respondents.

FAO No. 247 of 2012.
Date of decision: March 21, 2018.

Motor Vehicles Act, 1988- Section 149 and 166- Insurance Company challenged its liability to indeminify the owner/insured when deceased/driver was not having valid driving licence- **Held-** that in view of judgment of Hon'ble Apex Court in **Mukund Dewangan** versus **Oriental Insurance Company Limited,** (2017) 14 Supreme Court Cases 663 if driver of the vehicle has effective driving licence to ply a light motor vehicle and uses such type of vehicle as transport vehicle, then he has no requirement to obtain separate endorsement to drive transport vehicle- There is no merit in the petition- petition dismissed. (Para-4)

Case referred:
Mukund Dewangan versus Oriental Insurance Company Limited, (2017) 14 Supreme Court Cases 663

For the appellant Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jeevan Kumar, Advocate.
For the respondents Nemo.

The following judgment of the Court was delivered:

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

Judgment dated 31.1.2012 passed by learned Civil Judge, Rajgarh exercising the powers under Workman's Compensation Act is under challenge in the present appeal, on the grounds, inter-alia, that the deceased workman Om Parkash was not holding a valid and effective driving license to drive the offending vehicle i.e. Mahindra Pick-up, a goods carrier at the time of accident.

2. The appeal was admitted on the following substantial question of law:-

"Whether the Insurance Company is liable to indemnify the owner/insured when the deceased driver was not having a valid and effective licence to drive the alleged offending vehicle?'

3. No doubt, as per the abstract of register of driving licence Ext.RW1/B, the Registering and Licensing Authority, Rajgarh has issued a driving licence to deceased Om Parkash for driving light motor vehicle and motor cycle/scooter only on 25.3.2006. The same was valid up to 24.3.2011. The accident having taken place on 20.2.2009 was well within the validity period of the licence issued to the deceased.

4. As a matter of fact, in view of the recent judgment of the Apex Court in ***Mukund Dewangan*** versus ***Oriental Insurance Company Limited,*** (2017) 14 Supreme Court Cases 663, a light motor vehicle even if transport vehicle continues to be the same as it was even if used as transport vehicle and the licence issued for driving light motor vehicle is good enough to drive the same. No separate endorsement qua driving transport vehicle is required. The Apex Court has held so after taking into consideration the amendment in the

Motor Vehicles Act vide Act No. 54 of 1994 which is applicable w.e.f. 14.11.1994. The relevant portion of this judgment reads as follow:

> "58. "Transport vehicle" has been defined in section 2(47) of the Act, to mean a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle. Public service vehicle has been defined in section 2(35) to mean any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward and includes a maxicab, a motor cab, contract carriage, and stage carriage. Goods carriage which is also a transport vehicle is defined in section 2(14) to mean a motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods. It was rightly submitted that a person holding licence to drive light motor vehicle registered for private use, who is driving a similar vehicle which is registered or insured, for the purpose of carrying passengers for hire or reward, would not require an endorsement as to drive a transport vehicle, as the same is not contemplated by the provisions of the Act. It was also rightly contended that there are several vehicles which can be used for private use as well as for carrying passengers for hire or reward. When a driver is authorised to drive a vehicle, he can drive it irrespective of the fact whether it is used for a private purpose or for purpose of hire or reward or for carrying the goods in the said vehicle. It is what is intended by the provision of the Act, and the Amendment Act 54 of 1994.
>
> 59. Section 10 of the Act requires a driver to hold a licence with respect to the class of vehicles and not with respect to the type of vehicles. In one class of vehicles, there may be different kinds of vehicles. If they fall in the same class of vehicles, no separate endorsement is required to drive such vehicles. As light motor vehicle includes transport vehicle also, a holder of light motor vehicle licence can drive all the vehicles of the class including transport vehicles. It was pre-amended position as well the post-amended position of Form 4 as amended on 28.3.2001. Any other interpretation would be repugnant to the definition of "light motor vehicle" in section 2(21) and the provisions of section 10(2)(d), Rule 8 of the Rules of 1989, other provisions and also the forms which are in tune with the provisions. Even otherwise the forms never intended to exclude transport vehicles from the category of 'light motor vehicles' and for light motor vehicle, the validity period of such licence hold good and apply for the transport vehicle of such class also and the expression in Section 10(2)(e) of the Act 'Transport Vehicle' would include medium goods vehicle, medium passenger motor vehicle, heavy goods vehicle, heavy passenger motor vehicle which earlier found place in section 10(2)(e) to (h) and our conclusion is fortified by the syllabus and rules which we have discussed.
>
> 60. Thus we answer the questions which are referred to us thus:
>
> 60.1. "Light motor vehicle" as defined in section 2(21) of the Act would include a transport vehicle as per the weight prescribed in section 2(21) read with section 2(15) and 2(48). Such transport vehicles are not excluded from the definition of the light motor vehicle by virtue of Amendment Act No.54/1994.

60.2. A transport vehicle and omnibus, the gross vehicle weight of either of which does not exceed 7500 kg. would be a light motor vehicle and also motor car or tractor or a road roller, 'unladen weight' of which does not exceed 7500 kg. and holder of a driving licence to drive class of "light motor vehicle" as provided in section 10(2)(d) is competent to drive a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kg. or a motor car or tractor or road-roller, the "unladen weight" of which does not exceed 7500 kg. That is to say, no separate endorsement on the licence is required to drive a transport vehicle of light motor vehicle class as enumerated above. A licence issued under section 10(2)(d) continues to be valid after Amendment Act 54 of 1994 and 28.3.2001 in the form.

60.3. The effect of the amendment made by virtue of Act No.54/1994 w.e.f. 14.11.1994 while substituting clauses (e) to (h) of section 10(2) which contained "medium goods vehicle" in section 10(2)(e), medium passenger motor vehicle in section 10(2)(f), heavy goods vehicle in section 10(2)(g) and "heavy passenger motor vehicle" in section 10(2)(h) with expression 'transport vehicle' as substituted in section 10(2)(e) related only to the aforesaid substituted classes only. It does not exclude transport vehicle, from the purview of section 10(2)(d) and section 2(41) of the Act i.e. light motor vehicle.

60.4. The effect of amendment of Form 4 by insertion of "transport vehicle" is related only to the categories which were substituted in the year 1994 and the procedure to obtain driving licence for transport vehicle of class of "light motor vehicle" continues to be the same as it was and has not been changed and there is no requirement to obtain separate endorsement to drive transport vehicle, and if a driver is holding licence to drive light motor vehicle, he can drive transport vehicle of such class without any endorsement to that effect."

5. Therefore, in view of the law now laid down by the Apex Court, the present is a case where no substantial question of law much less to speak the substantial question of law as formulated arise for adjudication by this Court in the present appeal. The appeal, as such, is dismissed.

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

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

Harnam Singh ...Appellant

Versus

The Land Acquisition Collector Kol Dam and another ...Respondents

RFAs No. 522 to 527 & 537 of 2012
Decided on: 22.03.2018

Land Acquisition Act, 1984- Section 4- Petitioners filed reference petitions for enhancement of compensation- petition dismissed by the Trial Court- **Held**- that for determining the market value of the acquired land, purpose of acquisition is relevant and not nature and classification of the land- Hence, the rate awarded on the basis of classification is incorrect- Further, held that since these appeals have arisen from common award passed by the Collector, so owners are entitled to

compensation of acquired land @ Rs. 4,69,955/- per bigha alongwith all consequential benefits – petition disposed of. (Para-3 and 9)

Cases referred:

H.P. Housing Board versus Ram Lal, 2003 (3) Shim. LC (64)
Union of India versus Harinder Pal Singh, 2005 (12) SCC 564
Gulabi versus State of H.P., 1998 (1) Shim.LC 41
Executive Engineer and another versus Dilla Ram, Latest HLJ (2008) 2 HP 1007
Viluben Jhalejar Contractor (Dead) by LRs versus State of Gujarat, (2005) 4 SCC 789
Himmat Singh and others versus State of Madhya Pradesh and another, (2013) 16 SCC 392
Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others versus State of Karnataka and another, (2015) 10 SCC 469
NTPC Ltd., Kol Dam, Barmana, Bilaspur versus Ram Rakhi & another, I L R 2017 (I) HP 56

For the appellant(s): Mr. Anil Kumar God, Advocate.
For the respondents: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondent No. 1.
Mr. K.B. Khajuria, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(oral)*

In all these appeals, land owners have assailed dismissal of their reference petitions preferred by them, for enhancement of compensation, being aggrieved and dis-satisfied with award No. 5 announced on 22nd January, 2003, passed under Section 11 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') by Land Acquisition Collector, Kol Dam, Sundernagar, District Mandi, Himachal Pradesh (hereinafter referred to as 'Collector') wherein the rate of compensation on the basis of classification of land had been awarded as under:

(i) Barani (Majrua) *₹ 4,69,955/- per bigha*
(ii) Khadyater etc. (Gair-majrua) *₹ 1,04,416/- per bigha*

2. Section 25 of the Act provides that the Court cannot award the compensation lesser than the compensation awarded by the Land Acquisition Collector under Section 11 of the Act.

3. It is well settled that at the time of determining market value of land for acquisition, the purpose for which the land is acquired is relevant and not nature and classification of land and where nature and classification of the land has no relevance for purpose of acquisition, the market value of the land is to be determined as a single unit irrespective of nature and classification of the land. In such a case, uniform rate to all kinds of land under acquisition as a single unit irrespective or their nature and classification is to be awarded. *{See H.P. Housing Board versus Ram Lal, 2003 (3) Shim. LC (64); Union of India versus Harinder Pal Singh, 2005 (12) SCC 564; Gulabi versus State of H.P., 1998 (1) Shim.LC 41; and Executive Engineer and another versus Dilla Ram, Latest HLJ (2008) 2 HP 1007.}*

4. Further, it is also settled that when the purpose of acquisition is common and no developmental activity is required to be carried out, compensation is to be awarded at uniform rate. *{See Viluben Jhalejar Contractor (Dead) by LRs versus State of Gujarat, (2005) 4 SCC 789; Himmat Singh and others versus State of Madhya Pradesh and another, (2013) 16 SCC 392; and Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others versus State of Karnataka and another, (2015) 10 SCC 469}.*

5. It is undisputed that highest rate awarded by the Collector was ₹ 4,69,955/- per bigha.

6. It is brought to the notice of this Court that in **RFA No. 41 of 2012,** titled as **NTPC Ltd., Kol Dam, Barmana, Bilaspur versus Ram Rakhi & another,** arising out of the same award, i.e. award No. 5 of 2003, a co-ordinate Bench of this Court, vide its judgment, dated 11th January, 2017, has awarded rate of the land acquired at the highest rate awarded by the Collector. Further, that the same has been accepted by the parties and has attained finality. I am in agreement with the findings returned by the co-ordinate Bench in the said appeal.

7. While going through the judgment in **Ram Rakhi's case (supra),** it is noticed that date of award No. 5 of 2003 has been recorded as 15th January, 2003 whereas in present appeals, award No. 5 of 2003 has been referred by learned District Judge as dated 22nd January, 2003. Therefore, record of the said appeal, i.e. RFA No. 41 of 2012, was requisitioned from the Registry wherein record of learned District Judge is also available. From perusal of the said record, it is found that though, the Collector had proposed to announce award No. 5 on 15th January, 2003 subject to approval of the Secretary (Power) to the Government of Himachal Pradesh, however, the same was announced in Village Harnora in presence of the land owners on 22nd January, 2003.

8. On comparison of record of RFA No. 41 of 2012 and the record of the learned District Judge attached therewith with that of the present appeals, it is clear that present appeals, pertaining to the land of the same village, i.e. Village Harnora, are also arising out of the common award No. 5, dated 22nd January, 2003, passed by the Collector whereby entire land was acquired for one and the same public purpose, i.e. construction of Kol Dam. It is also undisputed that time of acquisition as well as location of the land in present case is not only proximate but identical with case decided in RFA No. 41 of 2012 and, therefore, present appeals are squarely covered by judgment in RFA No. 41 of 2012.

9. In view of the aforesaid facts and circumstances, judgment, dated 11th January, 2017, passed in **RFA No. 41 of 2012,** titled as **NTPC Ltd., Kol Dam, Barmana, Bilaspur versus Ram Rakhi & another,** is *mutatis mutandis* applicable in present appeals and rate of acquired land, as determined in the said case is also applicable to the land owners in the present appeals. Therefore, land owners are held entitled to compensation of acquired land at the rate of ₹ 4,69,955/- per bigha alongwith all consequential statutory benefits including interest and solatium under the Act.

10. All these appeals are allowed in aforesaid terms. Respondents are directed to calculate the amount and deposit the same in the Registry of this Court within three months from today.

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

Kusum Sood and another ....Appellants/Defendants.

Versus

M/s Kapoor Palace (Pvt.) Limited and others ... ..Respondents/Plaintiff.

RFA No.113 of 2006.
Judgment reserved on : 14.03.2018.
Date of decision: 22nd March, 2018.

Code of Civil Procedure, 1908- Section 96- ***Himachal Pradesh Tenancy and Land Reforms Act*****, 1972- Section 118- First Appeal-** Principle and jurisdiction of the First Appellate Court reiterated that the findings on both facts and laws could be gone into by the First Appellate

Court- First appeal held to be valuable right of the parties, unless restricted by law- the whole case is therein open for re-hearing both on questions of facts and laws. (Para-9)

Code of Civil Procedure, 1908- Section 96- *Himachal Pradesh Tenancy and Land Reforms Act*, 1972- Section 118- First Appeal- What is "Perverse"- Ratio laid down in Arulvelu and another vs. State Represented by the Public Prosecutor and another (2009) 10 SCC 206 reiterated. (Para-11 to 13)

Code of Civil Procedure, 1908- Section 96- *Himachal Pradesh Tenancy and Land Reforms Act*, 1972- Section 118- First Appeal- The plaintiff which was a private limited company had not placed on record the resolution passed by the Board of Director authorizing the plaintiff to file the suit – A copy of resolution so filed pertained to a date after the institution of the suit- The so called authorized Director was also different then who was authorized to do so – The special power of attorney issued to the Director also issued after the filing of the suit – **Held-** that plaintiff was not duly authorized and competent to file the suit. (Para-14 to 18)

Code of Civil Procedure, 1908- Section 96- *Himachal Pradesh Tenancy and Land Reforms Act*, 1972- Section 118- First Appeal- A non-agriculturist is permitted to purchase the land within the limits of municipal corporation, municipal committee or a notified area committee only up to the extent of 500 Sq. meters for a dwelling house 300 Sq. meters for a shop or a commercial establishments and in case of industrial units such area as is certified by the Department of Industry- Section 5 of the Amendment Act, 1987 also reiterates the said position- Further held- that even if the land is purchased vide separate sale deeds, but it is excess of 300 Sq. meters in case of a commercial establishment – the permission of the State Government is necessary. (Para-27 to 33)

Code of Civil Procedure, 1908- Section 96- *Himachal Pradesh Tenancy and Land Reforms Act*, 1972- Section 118- First Appeal- Bonafide purchaser- Mutation attested in favour of the plaintiff showing that the suit land had been sold as per sale deeds and defendants knew about the mutation- **Held-** that obviously the plea of bonafide purchaser set up by the defendants was false and not available to them. (Para-39 to 40)

Cases referred:

Shasidhar and others versus Ashwini Uma Mathad and another, (2015) 11 SCC 269

Arulvelu and another vs. State Represented by the Public Prosecutor and another (2009) 10 SCC 206

Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud and others, I L R 2015 (III) HP 771

Damodar Lal vs.Sohan Devi and others (2016) 3 SCC 78

Manzoor Ahmed Magray versus Ghulam Hassan Aram and others, (1999) 7 SCC 703,

M/s Murudeshwara Ceramics Ltd. and another versus State of Karnataka and others, AIR 2001 SC 3017

Rahul Bhargava versus Vinod Kohli and others, 2008 (1) Shim. LC 385

For the Appellants :	Mr.B.C.Negi, Senior Advocate with Mr.Suneet Goel, Advocate.
For the Respondents :	Mr.G.D.Verma, Senior Advocate with Mr.B.C.Verma, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This regular first appeal under Section 96 of the Code of Civil Procedure is directed against the judgment and decree passed by the learned District Judge, Kullu, H.P. on 30.11.2005 in Civil Suit No.20/2002, whereby the suit filed by the respondent No.1/plaintiff

(hereinafter referred to as the plaintiff) came to be decreed and the appellants/defendants (hereinafter referred to as the defendants) were restrained from causing any interference with the ownership and possession of the plaintiff over the suit land or from raising any sort of construction over the same.

2. Brief facts of the case are that the plaintiff claimed a decree for declaration to the effect that it be declared owner in possession of the land measuring 1-16-0 bighas out of the land comprised in Khata Khatauni No. 207min/372min, Khasra No.2992/840, measuring 2-2-0 bighas, as described in jamabandi for the year 1992-93, situated in Phati Nasogi, Kothi and Tehsil Manali, District Kullu, H.P. (hereinafter referred to as the suit land) and sale deeds No. 245 and 246 dated 23.10.2001 executed by defendants No.3 and 4 in favour of defendants No.1 and 2 are void ab initio and ineffective qua the rights of ownership of plaintiff over the suit land. Further, a decree for permanent prohibitory injunction restraining the defendants from causing any sort interference with the possession of the plaintiff over the suit land and from raising any construction over the same and the plaintiff in the alternative claimed a decree for possession of the suit land.

3. It was averred that the plaintiff is a private limited company having Dutt Pal Kapoor, Jitender Kapoor, Smt. Surekha Kapoor and Ashok Kapoor as its Directors which has been duly registered under the Companies Act with the Registrar of Companies and the said company had authorized its Director Jitender Kapoor to file the suit. The plaintiff by virtue of sale deed No.740 dated 25.05.1987, sale deed No.756 dated 28.05.1987 and sale deed No. 822 dated 30.05.1987 purchased the suit land from Shri Jindu Ram and Smt. Revti Devi, as a result of which, the plaintiff is owner in possession of the suit land and on the strength of said sale deeds, the suit land was mutated in favour of the plaintiff vide mutation Nos. 2483, 2484 and 2485. It was further averred that plaintiff after purchasing the suit land raised boundary wall and was taking steps to get approval for the construction of a hotel on the suit land, but in the month of November, 2001, the plaintiff came to know that defendants No.1 and 2 started raising height of boundary wall raised by the plaintiff around the suit land and when the plaintiff enquired from them about the said illegal acts, they disclosed that they had purchased the suit land from defendants No.3 and 4 and were not aware that plaintiff is owner in possession of the suit land. The plaintiff disclosed to defendants No.1 and 2 that defendants No.3 and 4 had already sold the suit land to the plaintiff in the year 1987, therefore, they could not have sold the same to defendants No.1 and 2 nor defendants No.1 and 2 could have acquired any title in the suit land, but they did not pay any heed to the request of the plaintiff. The plaintiff checked and enquired about the revenue entries and found that the defendants in connivance with the revenue officials have tampered with the revenue record and got mutation Nos. 2483, 2484 and 2485 rejected in the mutation register and entries thereof deleted in connivance with the revenue officials and got the fictitious sale deeds of the suit land executed in their favour and mutations Nos. 3628 and 3629 dated 27.10.2001 sanctioned and attested in their favour. It was also averred that the defendants No.3 and 4 had no title in the suit land and to execute the sale deeds of the suit land in favour of defendants No.1 and 2, hence, the sale deeds No.245 and 246 dated 23.10.2001 executed in favour of defendants No.1 and 2 by defendants No.3 and 4 are illegal and void ab initio and thus does not create any right in their favour. The plaintiff further averred that the defendants have no right, title or interest over the suit land, but they started causing interference with the ownership and possession of the plaintiff over the suit land, hence the suit.

4. Defendants No.1 and 2 resisted and contested the suit filed by the plaintiff by filing joint written statement wherein they took preliminary objections to the effect that the suit has not been properly and legally instituted because Jitender Kapoor had no right or authority to institute the suit. The suit has not been properly valued for the purpose of court fee and jurisdiction. They also took preliminary objections qua estoppel, maintainability, limitation, suppression of material facts, cause of action and that the jurisdiction of the Civil Court is barred to entertain and try the suit in view of the provisions contained under Section 118 of the H.P. Tenancy and Land Reforms Act. On merits, defendants No.1 and 2 termed the averments

made in the plaint as wrong and incorrect. It was averred that the sale deeds as set up by the plaintiff are forged, fictitious and otherwise void ab initio in view of the provisions contained in Section 118 of the H.P. Tenancy and Land Reforms Act, 1972, therefore, the alleged sale deeds do not confer any right, title or interest upon the plaintiff. The possession of the suit land was never delivered to the plaintiff nor the plaintiff ever possessed or occupied the suit land, as a result of which, mutations entered in favour of the plaintiff were rejected. It was further averred that defendant No.2 vide sale deed No.246 dated 23.10.2001 purchased 3/7th share measuring 0-18-0 bigha out of the land comprised in Khasra No. 2992/840 measuring 22-2-0 bigha from defendant No.3 through his general power of attorney i.e. defendant No.4 for a sale consideration of Rs.4,00,000/-. Further, defendant No.1 by virtue of sale deed No. 245 dated 23.10.2001 purchased 3/7 share out of the land comprised in Khasra No.2992/840 measuring 0-18-0 bighas from defendant No.3 through his general power of attorney defendant No.4 for a consideration of Rs.4,00,000/- and on the basis of aforesaid sale deeds, defendants No.1 and 2 were delivered possession of 1-16-0 bighas of land and as such they came in possession of the so purchased land and on the basis of the sale deeds, mutation Nos. 3629 and 3628 dated 27.10.2002 have been sanctioned and attested in favour of defendants No.1 and 2. It was also averred that besides making payment of sale consideration of Rs.8,00,000/-, defendants No.1 and 2 also bore expenses of stamps and registration fee for the execution of said sale deeds. After purchase of the said land, defendants No.1 and 2 constructed stone and brick boundary wall around the suit land and barbed wire on the top of boundary wall has also been laid and they constructed three structures of steel angle iron and besides this they have laid the slab of R.C.C. pillars over the suit land which are being used by them for storage of lubricant of petrol pump and for other purposes. Defendants No.1 and 2 further averred that the process of construction took sufficient time which was in the notice and knowledge of plaintiff and its Directors, but they never raised any objection, hence, they are estopped by their acts and conduct from raising any objection or filing the suit. It was also averred that before purchasing the suit land, defendants No.1 and 2 made local investigation and had also searched revenue records and made investigation regarding ownership and possession of defendant No.3, who was recorded as owner in actual possession of the suit land and after satisfying themselves regarding the possession of defendants No.3 and 4, they finalized the purchase of suit land, hence, defendants No.1 and 2 are bonafide purchasers for valuable consideration. In case the sale deeds set up by the plaintiff are held to be valid, in that eventuality, defendants No.1 and 2 are in open, continuous, peaceful and uninterrupted possession of suit land with effect from 25.05.1987, 28.05.1987 and 30.05.1987 from the date of alleged sale deeds to the complete ouster of plaintiff and had never allowed the plaintiff or any body else to occupy the suit land and dispossess them therefrom by denying the title of the plaintiff, as a result of which, defendants No.1 and 2 have acquired title in the suit land by way of adverse possession and right, title and interest of plaintiff, if any, had already been extinguished in favour of defendants No.1 and 2, who have become owners of the suit land by way of adverse possession. Lastly, it was further averred that the alleged sale deeds in favour of the plaintiff are in contravention of provisions contained in Section 118 of the H.P. Tenancy and Land Reforms Act, hence, the plaintiff is not entitled to a decree of possession in its favour and thus prayed for the dismissal of the suit.

5. Defendants No.3 and 4 resisted and contested the suit filed by the plaintiff by filing joint written statement wherein they took preliminary objections qua limitation, maintainability, valuation and suppression of material facts. On merits, locus standi of Jitender Kapoor to institute the suit on behalf of plaintiff is disputed. They termed the averments made in the plaint as wrong and incorrect. It was pleaded that plaintiff intended to purchase the suit land and sale deeds were scribed by the plaintiff and signatures of defendant No.4 were obtained on the same, but when the same were produced before the Sub Registrar, he asked the plaintiff to produce permission of H.P. Government for purchase of suit land because plaintiff being non-agriculturist and outsider, was not competent to purchase the land in H.P. without prior permission of the H.P. Government under Section 118 of the H.P. Tenancy and Land Reforms Act. But, the said permission was not available with the plaintiff, as a result of which, sale deeds were

not registered and as the sale transaction was not complete, no possession was delivered to the plaintiff by defendants No.3 and 4. Later on, plaintiff approached defendants No.3 and 4 and represented that as the Sub Registrar had refused to register the sale deeds without the permission from the H.P. Government, which is likely to take sufficient time and even the plaintiff was not sure if the permission would be granted by the H.P. Government in its favour and as such defendants No.3 and 4 returned the sale consideration to the plaintiff. Since, bargain between the parties was not finalized and sale was not complete, defendants No.3 and 4 had not delivered possession of the suit land to the plaintiff and they remained owners in possession of the suit land. It was also averred that the plaintiff in connivance with the revenue officials and Sub Registrar illegally got the sale deeds registered without permission, notice and knowledge of defendants No.3 and 4 in violation of the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act and got mutations attested and sanctioned behind the back of defendants No.3 and 4 on the basis of the void sale deeds, but later on said mutations were set aside by the revenue Officer and plaintiff never possessed or occupied the suit land. It was disputed that the plaintiff purchased the suit land and was put in possession or raised any boundary wall around the suit land and took steps for the approval of construction of hotel. Defendants No.3 and 4 admitted that they sold the suit land in favour of defendants No.1 and 2 on the strength of which defendants No.1 and 2 are the owners in possession of the suit land, hence question of dispossessing the plaintiff from the suit land does not arise and thus they prayed for the dismissal of the suit.

6. The plaintiff filed replication to the written statements filed on behalf of the defendants and thereby reaffirmed and reasserted the averments made in the plaint and controverted the contrary averments made in the written statements.

7. On the pleadings of the parties, the following issues were framed by the Court below on 16.04.2003:-

"1. Whether the plaintiff is owner in possession of the suit land as alleged? OPP.

2. If issue No.1 is decided in favour of the plaintiff, whether the plaintiff is entitled for the relief of injunction, as prayed for? OPP.

3. Whether Mr.Jitender Kapoor has got no locus standi to file the present suit and the suit is not maintainable as alleged? OPP.

4. Whether the suit is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD.

5. Whether the suit is beyond pecuniary jurisdiction of this Court, if so, its effect? OPD.

6. Whether the plaintiff is estopped to file the suit due to own act and conduct? OPD.

7. Whether the suit is not within time, as alleged? OPD.

8. Whether the defendants No.1 and 2 are bonafide purchasers, as alleged, if so, its effect? OPD.

9. Relief."

8. After recording evidence and evaluating the same, the learned trial Court on 30.11.2005 decreed the suit filed by the plaintiff and it is against this judgment and decree that the present appeal came to be filed by the defendants.

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

9. Admittedly, this is a first appeal and the jurisdiction of this Court while hearing the same is very wide like the learned trial Court and it is open to the defendants to attack all findings on fact and/or on law in the first appeal and would have to be decided on the basis of following exposition of law as propounded by the Hon'ble Supreme Court in ***Shasidhar***

and others *versus* ***Ashwini Uma Mathad and another***, ***(2015) 11 SCC 269***, wherein it was observed as under:-

> "10. *The powers of the first appellate Court, while deciding the first appeal under Section 96 read with Order XLI Rule 31 of the Code, are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra.*
>
> *11. As far back in 1969, the learned Judge - V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first appellate Court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under: (SCC OnLine Ker paras 1-3)*
>
> > *"1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.*
> >
> > *2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.*
> >
> > *3.Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation."*
> >
> > *(Emphasis supplied)*
>
> *12. This Court in a number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate Court under Section 96 of the Code. We consider it apposite to refer to some of the decisions.*
>
> *13. In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)*
>
> > *"15.....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."*
>
> *The above view has been followed by a three-Judge Bench decision of this Court in Madhukar & Ors. v. Sangram & Ors.,(2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.*

14. In H.K.N. Swami v. Irshad Basith,(2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3)

> *"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."*

15. Again in Jagannath v. Arulappa & Anr., (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court observed as follows: (SCC p.303, para 2)

> *"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion....."*

16. Again in B.V Nagesh & Anr. vs. H.V. Sreenivasa Murthy, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words:(SCC pp. 530-31, paras 3-5)

> *"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:*
>
> *(a) the points for determination;*
>
> *(b) the decision thereon;*
>
> *(c) the reasons for the decision; and*
>
> *(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.*
>
> *4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p. 758, para 5.)*
>
> *5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we*

set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

17. The aforementioned cases were relied upon by this Court while reiterating the same principle in State Bank of India & Anr. vs. Emmsons International Ltd. & Anr., (2011) 12 SCC 174. This Court has recently taken the same view on similar facts arising in Vinod Kumar vs. Gangadhar, 2014(12) Scale 171."

10. Adverting to the facts, it would be noticed that issues No.1, 2, 6 and 8 were clubbed by the learned trial Court and issues No.1 and 2 were answered in the affirmative, whereas, issues No.6 and 8 were answered in the negative. Strong exception is taken to the aforesaid findings on the ground that the same are factually and legally incorrect and are perverse and, therefore, deserve to be set aside.

11. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

"*26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.*

27. The expression "perverse" has been defined by various dictionaries in the following manner:

1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition

PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.

2. Longman Dictionary of Contemporary English - International Edition

PERVERSE: Deliberately departing from what is normal and reasonable.

3. The New Oxford Dictionary of English - 1998 Edition

PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.

4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)

PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.

5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition

PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8

"8…We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the

order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable 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, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

30. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

12. What is 'perverse' has further been considered by this Court in ***RSA No.436 of 2000***, titled ***'Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others***, decided on 28.05.2015 in the following manner:-

"25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

13. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.* ***Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)

> *"11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."*

10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)

> *"10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."*

11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The

defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

> *"34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:*
>
> ***'103. Power of High Court to determine issues of fact.-** In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—*
>
> > *(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or*
> >
> > *(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."*
>
> *The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."*

14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi

Administration, (1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)

> *"30. 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. 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. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"*
>
> *This Court has also dealt with other aspects of perversity."*

14. Adverting to the facts, it would be noticed that the learned District Judge has held the suit to be properly instituted by holding that Jitender Kapoor had an authority to file the suit on behalf of the plaintiff. However, it would be noticed that the learned trial Court ignored the fact that the plaintiff was a Private Limited Company and could have, therefore, acted only through resolution duly passed in accordance with law.

15. No doubt, resolution Ex.PW2/A and power of attorney Ex.PW2/B have been produced on record, however, neither the original records of resolution nor the original power of attorney was produced by the plaintiff. This was despite the specific objection taken at the time when PW-2 Datt Pal Kapoor was being examined. The defendants had specifically objected to the production of the aforesaid documents in the statement of PW-2 and it was specifically observed by the learned trial Court at that time that both these objections will be considered and decided at the time of arguments. However, the learned trial Court did not even bother to consider much less decide these objections at the time of disposal of the suit. Now, in case, the resolution Ex.PW2/A is seen, it would be evident that the same is a copy of resolution alleged to have been passed in the meeting of Board of Directors held on 10.09.2003, whereas, the suit admittedly was instituted nearly a year prior to that i.e. on 23.09.2002.

16. That apart, in case the contents of the resolution are perused, authority was sought to be granted to Shri Dutt Pal Kapoor and Shri Ashok Kapoor, Directors, of the Company for further pursuing "*action against person involved in fraud or illegal sale of company's land measuring approx. 36 biswas situated behind Sood Petrol Pump, Manali (District Kullu)."*

17. In this background, if the plaint is perused, it would be noticed that the same had been filed by Jitender Kapoor and not by anyone of the so-called authorized Directors of the Company. Unfortunately, the learned trial Court has ignored all these material aspects which go to the root of the case.

18. Further, in case, the special power of attorney Ex.PW2/A, that has been placed on record, is perused, it would be noticed that the same was executed only on 08.01.2004 that too before the Notary Public, whereas, as already observed earlier, the suit had been instituted on 23.09.2002.

19. Above all, the learned trial Court has gravely erred in ignoring the fact that the records of the company which would otherwise constitute primary evidence have not been produced before the Court. There is practically no legal evidence on record to show that the plaintiff is a Company incorporated under the Companies Act, certificate of incorporation and

memorandum of association showing that the company could invest funds in land or undertake business for running a hotel, resolution authorizing the Directors or persons in this behalf, to purchase the land was neither pleaded nor proved on record.

20. Further, no evidence was led by the plaintiff to prove that the suit land had been purchased by the plaintiff for valuable consideration as neither the method nor the mode of payment neither pleaded nor proved. Even, the books of accounts of the Company which are statutorily required to be maintained had not been produced in evidence and, therefore, not proved.

21. Once, this is the factual position, obviously the learned trial Court has erred in holding that the genuineness, authenticity, validity, due execution and registration of the sale deeds have not been disputed on behalf of the defendants.

22. Intriguingly, all the aforesaid findings have been arrived at only on the basis of the statement of the registration Clerk, Office of Sub Registrar, Kullu, who had produced the records of the sale deeds. However, sale deeds were not the primary evidence and at best were secondary evidence for which specific permission had to be sought for and obtained from the Court. Even if, this aspect of the matter is ignored for the time being, even then, it would be noticed that while being cross examined this witness had categorically stated that no permission from the State Government side in favour of the plaintiff to purchase the land was available there on the record and there was no document/evidence attached with the summoned record to prove that the plaintiff was paying revenue to the Government of Himachal Pradesh. In her further cross examination by defendants No.3 and 4, it was categorically admitted by this witness that there was no resolution of the plaintiff-company to purchase the suit land in the records so summoned. Further, it was admitted that there was no certificate of registration of the company.

23. Above all, the plaintiff has led no evidence whereby it could be established that they were ever put in possession of the suit land after execution of the alleged sale deeds. Rather, PW-2 has candidly admitted the possession of the defendants over the suit land.

24. It would also be noticed that the learned trial Court negated the contention of the defendants that the plaintiff was not entitled to purchase the suit land in view of the specific bar contained in Section 118 of the H.P. Tenancy and Land Reforms Act (for short the 'Act'). Without even caring to go through the principal Act, the learned trial Court relied on Section 5 of the H.P. Tenancy and Land Reforms (Amendment), Act, 1987 which reads thus:-

> *"Section :5: Savings:- Notwithstanding anything contained in this Act, any transfer of land, situated within the territorial jurisdiction of a municipal corporation, municipal committee of a notified area committee, for any of the purposed, i.e. for the construction of a dwelling house, a shop or a commercial establishment or office or industrial unit, made before the day which the Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987, is published in the official Gazette after its assent, shall be deemed always to have been made in accordance with the law as if sub-section(2) of Section 118 of the Principal Act had not been amended by Section 4 of this Act."*

25. Now, in case the Act as was promulgated and notified on 15th February, 1974 is seen, it would be noticed that Section 118 thereof originally read as under:-

> Transfer of "***118.*** *(1) Save as provided in this Chapter, no transfer (including land to sales in execution of a decree of a Civil Court or for recovery of non- agri-arrears of land revenue) by way of sale, gift, exchange, lease or culturists mortgage with possession shall be valid in favour of a person who barred is not an agriculturist.*
>
> *(2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of any land by an agriculturist in favour of,-*
>
> *(a) landless labourers;or*
>
> *(b)landless persons belonging to scheduled castes and scheduled tribes; or*

(c) village artisans; or

(d) landless persons carrying on an allied pursuit; or

(e) State Government; or

(f) Co-operative Societies and new Banks constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970."

The term "agriculturist" was defined in Section 2(2) in the following terms:-

"(2) "agriculturist" means a person who cultivates land personally in an estate situated in Himachal Pradesh;"

26. A plain reading of the aforesaid provisions leave no manner of doubt that there could be no valid transfer in favour of a person, who was not an agriculturist even through a decree of a Civil Court, or a proceeding for recovery of arrears of land revenue, by way of sale gift, exchange, lease or mortgage with possession unless such transfer was protected under sub-section (2) of Section 118.

27. The principal Act came to be amended for the first time vide H.P. Tenancy and Land Reforms (Amendment) Act, 1976 (Act No.15 of 1976) whereby, for the first time, a non-agriculturist was permitted to purchase land within the limits of Municipal Corporation, Municipal Committees, Notified Area Committees, up to extent of 500 square meters for a dwelling house and 300 square meters for a shop, commercial establishment and in case of industrial units such area as was certified by the Department of Industries of the State Government. It is apt to reproduce the amendment carried out in the second proviso of Section 118 of the principal Act which reads thus:-

"21. In second proviso of Section 118 of the principal Act,

(a) in clause (f) of sub-section (2) for the words brackets and figures "new banks" constituted under the banking Companies (Acquisition And transfer of undertakings) Act, 1970" the word "bank" shall be substituted;

(c) after clause (f) the following clause shall be added namely:-

(1) a non-agriculturist with in the limits of municipal corporation, municipal committees notified area committees for any one of the purpose i.e., for the construction of a 'dwelling' house a shop or commercial establishment of office or industrial unit subject to condition that transfer to land for such purpose shall not exceed:-

(i) in case of dwelling house 500 square meters;

(ii) in case of a shop commercial establishment or office-300 square meters;

(iii) in case of an industrial units such areas as may be certified by the department of industries of the State of the Government;

(iv) a non-agriculturist with permission of the State of the Government for the purpose to be prescribed."

28. The principal Act thereafter came to be amended subsequently vide H.P. Tenancy and Land Reforms (Amendment) Act, 1987 (Act No.6 of 1988) wherein again the provisions of Section 118 were completely substituted in the following manner:-

*"**4. Substitution of section 118.**- In the principal Act, for section 118, the following section shall be substituted, namely:-*

"118(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 sales in execution of a decree of a civil Court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease; mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.

(2) Nothing in Sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of-

(a) a landless labourer; or

(b) a landless person belonging to a scheduled caste or a scheduled tribe; or

c) a village artisan; or

(d) a landless person carrying on an allied pursuit; or

(e) the State Government; or

(f) a co-operative society or a bank; or

(g) a person who has become non-agriculturist on account of the acquisition of his land for any public purpose under the land Acquisition Act, 1894; or

(h) a non-agriculturist who purchases or intends to purchase land for the construction of a house or shop, or purchases a built up house or shop from the Himachal Pradesh State Housing Board established under the live Himachal Pradesh Housing Board Act, 1972 or from the Development Authority constituted under the Himachal Pradesh Town and Country Planning Act, 1977 or from any other statutory corporation set up under any State or Central/ enactment; or

(i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed;

Provided that a person who is a non-agriculturist but purchases land with the permission of the State Government under Clause (i) of this sub-section shall, irrespective of such permission, continue to be a non-agriculturist for the purposes of this Act:

Provided further that a non-agriculturist in whose case permission to purchase land is granted by the State Government, shall put the land to such use for which the permission has been granted, within a period of two years or a further such period, not exceeding one year, as may be granted by the State Government to be counted from the day on which the deed covering the sale of the land is registered and if he fails to do so, the land so purchased by him shall vest in the State Government free from all encumbrances.

(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 shall register any document pertaining to a transfer of land, which is in contravention to Sub-section (1) and such transfer shall be void abinitio and the land involved in such transfer, if made in contravention of Sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Government free from all encumbrances:

Provided that the Registrar or the Sub-Registrar may register any transfer-

(i) where the lease is made in relation to a part or whole of a building; or

(ii) where the mortgage is made for procuring the loans for construction or improvements over the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognized by the State Government.

(4) It shall be lawful for the State Government to make use of the land which is vested or may be vested in it under Sub-section (2) or Sub-section (3) for such purposes as it may deem fit to do so.

Explanation--For the purpose of this Section, the expression "land" shall include

(i) land, the classification of which has changed or has been caused to be changed to "Gair-mumkin", "Gair-mumkin Makan" or any other Gair-mumkin land by whatever name called, during the past five year countable from the date of entry in the revenue records to this effect:

(ii) land recorded as "Gair-mumkin", "Gair-mumkin Makan" or any other Gairmumkin land, by whatever name called in the revenue records, except constructed area which is not subservient to agriculture; and

(iii) land which is a site of a building in a town or a village and is occupied or let out not for agricultural purposes or purposes subservient to agriculture.

5. Savings.--Notwithstanding anything contained in this Act, any transfer of land, situate within the territorial jurisdiction of a municipal corporation, municipal committee or a notified area committee, for any of the purposes, i.e. for the construction of a dwelling house, a shop or a commercial establishment or office or industrial unit, made before : the day on which the Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987, is published in the Official Gazette after its assent, shall be deemed always to have been made in accordance with the law as if Sub-section (2) of Section 118 of the principal Act had not been amended by Section 4 of this Act."

29. It was in this Act that the "savings" were introduced vide Section 5 as has been reproduced hereinabove. In this background, the reliance placed by the learned trial Court on Section 5 of the Amendment 1987 is totally misplaced as the transfer in question was not at all protected vide aforesaid section. Rather, it is evidently clear that it was in the amendment carried out, for the first time, in the year 1976 that the non-agriculturist was permitted to purchase the land up to 500 square meters for construction of a residential house and up to 300 square meters for construction of a shop or commercial establishment. Whereas, in the instant case, admittedly, the land had been purchased to raise/construct a hotel, as has been categorically stated by PW-2 Dutt Pal Kapoor, in the last lines of his examination-in-chief.

30. That apart, it would be noticed that the suit land was purchased vide three separate sale deeds i.e. exhibits P-1 to P-3 and in each of the sale deeds the land sold is 12 biswas (1 biswa=40.46 sq.meter, 12 biswas =480 sq. meters) which is in excess of 300 square meters and, therefore, could not have been purchased by the plaintiff without seeking an express permission of the State Government (Section 118, sub-section (2)(i) (supra). Thus, the contrary findings recorded by the learned trial Court are perverse and, are therefore, liable to be set aside.

31. However, learned counsel for the plaintiff would argue that prohibition on transfer of land under Section 118 is not absolute as his client even now can seek permission of the State Government and would place strong reliance upon the judgments of the Hon'ble Supreme Court in ***Manzoor Ahmed Magray*** *versus* ***Ghulam Hassan Aram and others, (1999) 7 SCC 703***, ***M/s Murudeshwara Ceramics Ltd. and another*** *versus* ***State of Karnataka and others, AIR 2001 SC 3017*** and a judgment rendered by a learned Single Judge of our own High Court in ***Rahul Bhargava*** *versus* ***Vinod Kohli and others, 2008 (1) Shim. LC 385.***

32. I have minutely gone through the aforesaid judgments and find that none of them are applicable to the facts situation as obtaining in the instant case.

33. In ***Manzoor Ahmed Magray's case*** (supra), the Hon'ble Supreme Court while dealing with a somewhat similar provision where there was a prohibition on transfer of orchard held that this provision was not absolute and the question of obtaining previous permission as contemplated in the Act would arise at the time of execution of the sale deed on the basis of decree for specific performance and Section 3 of the Act therein did not bar the maintainability of the suit and such permission could be obtained by filing proper application after the decree had been passed and, therefore, it could not be stated that the decree for specific performance was not required to be passed.

34. In ***M/s Murudeshwara Ceramics Ltd.'s case*** (supra), the Hon'ble Supreme Court was seized of a matter wherein again transfer of land could not be effected without seeking exemption from the State Government and it was held that such exemption could be granted subsequent to the sale.

35. In ***Rahul Bhargava's case*** (supra), the facts before the Court were that plaintiff entered into an agreement for sale with the defendants, but the defendants refused to execute the sale deed and, therefore, a suit for specific performance was filed. Since, the plaintiff was not an agriculturist, he sought for and granted permission to purchase the land which was valid for 180 days, but the said permission expired during the pendency of the litigation. It was in this background that this Court held that the permission to purchase the land could again be obtained and accordingly decreed the suit.

36. As observed above, none of the aforesaid cases deal with the facts situation obtaining in this case because admittedly the plaintiff herein neither at the time of the alleged purchase nor thereafter at the time of filing of the suit or for that matter even till date has not applied for permission for purchase of the land in accordance with law which clearly proves that the plaintiff had got these three sale deeds registered in his favour in violation of the law. Thus, the contrary findings rendered by the learned trial Court cannot withstand judicial scrutiny and are thus liable to be set aside.

37. As regards the findings on issue No.8 regarding the question whether defendants No.1 and 2 are bonafide purchasers for consideration the learned trial Court has held that there is no evidence on record to hold and conclude that defendants No.1 and 2 are bonafide purchasers. Such findings are based upon correct appreciation of pleadings as also evidence available on record and, therefore, warrant no interference.

38. It would be noticed that in the suit filed by the plaintiff, specific averments had been made in para-2 thereof to the effect that the sale deeds were duly registered by the Sub Registrar and thereafter mutations Nos. 2483, 2484 and 2485 were also attested in favour of the plaintiff on 03.09.1987. Now, in case the written statement qua these averments is perused, it would be noticed that the same have been answered in the following manner:-

> *"it is further submitted that the mutations No.2493, 2484 and 2485, got entered by the plaintiff on the basis of the forged and fictitious sale deeds, were dismissed by the concerned Revenue Officer, vide orders dated 19.7.88"*

39. Thus, it is admitted by the defendants that on the basis of the sale deeds exhibits P-1 to P-3, mutations No.2483, 2484 and 2485 had been attested in favour of the plaintiff and this fact is not denied by the defendants and the only plea put forth by them was that these mutations were dismissed by the concerned Revenue Officer vide his order dated 19.07.1988. Admittedly, the alleged order dated 19.07.1988 has not been produced on record by the defendants and, therefore, an adverse inference is liable to be drawn against the defendants.

40. That apart, once the defendants were aware of the aforesaid mutations, then obviously, they knew that the plaintiff had already purchased the suit land and, therefore, admittedly, being the subsequent purchasers, their plea of being bonafide purchasers for consideration is false and is rather not available to them.

41. Now adverting to the findings qua issue No.6 with regard to the plea of estoppel raised by the defendants, the learned trial Court is absolutely correct in coming to the conclusion that there is no evidence available on record to hold that the plaintiffs are estopped from filing the present suit by their own act and conduct. That apart, the learned trial Court has observed that the defendants on the one hand were raising a plea based on title while, on the other hand, were claiming ownership on the basis of the adverse possession which was not available to them as these were mutually destructive pleas.

42. In view of the aforesaid discussion, though this Court has no difficulty in affirming the findings rendered by the learned Court on issues No.6 and 8, however, in view of the detailed discussion as aforesaid, this Court has no difficulty in concluding that the findings recorded by the learned trial Court on issues No.1 and 2 are grossly perverse and thus are liable to be set aside.

43. Now, adverting to the findings on issue No.3 regarding Mr. Jitender Kapoor, having no locus standi to file the present suit, the said question has been answered in favour of the plaintiff. However, such findings again cannot withstand judicial scrutiny and are liable to be set aside for the reasons already stated in paragraphs 14 to 20 (supra). The findings on remaining issues i.e. issues No.4, 5 and 7 have not been assailed or challenged by any of the parties and, therefore, such findings call for no interference.

44. Even though, the findings recorded by the learned trial Court on issues No.1 and 2 are perverse and are liable to be set aside, yet no relief can be granted to the defendants as even they have failed to prove that they are bonafide purchasers and have further failed to prove that their possession with efflux of time has ripened into adverse possession. It is duly proved on record that the so-called purchase made by the plaintiff was in violation of provisions of Section 118 of the Act. Therefore, in terms of sub-section (3D) of Section 118, the suit land along with structure, buildings or other attachments, if any, are liable to be vested in the State Government free from all encumbrances and it shall be lawful to the State Government to make use of the land so vested in it. Ordered accordingly. The State Government is directed to take possession of the land within 7 days and thereafter use the same for such purposes as it may deem fit to do so.

45. Consequently, the appeal is disposed of in the aforesaid manner, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of. Copy 'dasti'.

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

Smt. Kanta Devi and Ors. .....Appellants.

Versus

Smt Manju and Ors. .....Respondents.

RSA No. 531 of 2007
Date of Decision: 23.3.2018.

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs alleged that defendant No.2 in connivance with defendantNo.1 executed the sale deed of the land of the plaintiff playing fraud upon them by incorporating unauthorized term having power of executing sale in the power of attorney- **Held-** that in case of fraud, undue influence or coercion the pleadings must disclose full particulars of the same- general allegations are insufficient for making the Court to take notice of such averment in the pleadings- Further held that when there is concurrent findings of the fact and the law of the two courts below, such findings cannot be interfered with unless same are found to be perverse- no merit in the petition and same is dismissed. (Para-22, 23 and 27)

Cases referred:
Kripa Ram and Ors. v. Smt. Maina, 2002 (2) Shim.L.C. 213
Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264

For the appellants: Mr. Sanjay Sharma, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal is directed against the judgment and decree dated 5.7.2007, passed by the learned District Judge, Shimla, in CA No. 40-S/13 of 2006, affirming the judgment and decree dated 8.3.2006, passed by the learned Civil Judge (Junior Division), Court

No.3, Shimla, District Shimla, H.P., in CS No. 111/1 of 1999, whereby suit for declaration and permanent prohibitory injunction having been filed by the plaintiffs-appellants ***(herein after referred to as "the plaintiffs")***, came to be dismissed.

2. In nutshell facts of the case, as emerge from the record are that plaintiffs filed suit in the Court of learned Civil Judge, claiming that they are owner in possession of the suit land as described in the impugned judgment and decree passed by the court below and defendants who have no right, title and interest of any kind in the suit land, and as such, they may be restrained from alienating, encumbering changing or in any manner deal with the suit land/property.

3. Plaintiffs averred in the plaint that they are illiterate and simpleton persons and as such, defendant No.2 namely Gurdyal Singh, resident of village Tundal, Tehsil Kandaghat, District Solan, H.P. taking undue advantage of their illiteracy and innocence, approached them on 8.12.1998 with a proposal for sale of land to the extent of 8-18 bighas out of their share and in this regard, got executed an agreement. Plaintiffs further alleged that no consideration was paid by defendant No. 2 to plaintiffs' No. 2 and 3. Subsequently, defendant No. 2 approached all the plaintiffs with the representation that since suit land is joint between the plaintiffs and one Shri Ramanand S/o Gajya, plaintiffs are required to execute general power of attorney in his favour to facilitate partition of the land inter-se plaintiffs and above named person namely Ramanand. Plaintiffs believing aforesaid representation/version put forth by defendant No.2 to be true, executed general power of attorney(s) in his favour on 5.4.1999 and 3.10.1998, which were subsequently registered in the office of Sub Registrar, Shimla. Plaintiffs claimed that contents of General Power of attorney were never read over or explained to them and defendant No.2 took active interest in execution of General Power of Attorney and he without their knowledge and consent, malafidely got incorporated in the General Power of Attorney that defendant No. 2 shall have the right to sell the land. Plaintiff further claimed that they had never consented to such proposal but defendant No. 2 by misrepresenting the true facts exercised undue influence over them and got the GPA executed. Plaintiffs further claimed that intention of defendant No.2 was only to grab the land of the plaintiffs and accordingly, he got the sale deed executed of the entire share of the plaintiffs on 5.4.1999 in favour of defendant No.1. Plaintiffs also stated that they were taken to the office of Tehsildar, Kandaghat by defendant No. 2 for registration of GPA though they are residents of District Shimla. In nutshell, plaintiffs alleged that defendant No.2 in connivance with defendantNo.1 in order to deprive them from their property, executed the sale deed of the share of the plaintiff to the extent of 17-16 bighas for the meager sale consideration of Rs. 75,000/-, which was also not paid by defendant No. 2 to the plaintiffs.

4. The defendants refuted the aforesaid allegations put forth in the plaint by filing the written statement, wherein they raised preliminary objections with regard to the proper valuation and jurisdiction. Defendant No.1 further claimed that she is an owner of the suit land as it was sold to her by defendant No.2 as an attorney of the plaintiffs. She further claimed that at the time of the execution of the sale deed, possession was also handed over to her on 12.4.1999. Defendant further claimed that she was not aware of the agreement dated December, 1998. Defendant No.1 specifically denied that power of attorney was got executed by defendant No.2 for the partition of the suit land. She further stated that plaintiffs No. 2 and 3 expressing their interest to sell the land on 1.4.1999, agreed in presence of defendant No. 2, to sell the same to the extent of 9bighas 18 biswas for a consideration of Rs. 3,00,000/-. She also stated that plaintiffs No. 2 and 3 made her to believe/understand that defendant No. 2 is their power of attorney, which fact was otherwise confirmed by defendant No.2. As per defendant No.1, substantial amount of consideration was paid by her to defendant No.2 in the presence of plaintiff and consequent thereupon, all the plaintiffs agreed to sell the suit land measuring 17-16 bighas for a total consideration of Rs. 4,51,000/-. She further stated before the court below that she was made to understand that plaintiff No. 1 had also executed power of attorney in favour of defendant No.2, who subsequently approached her for registration of sale deed. Plaintiffs also agreed to pay the registration fee of the sale deed. Defendant No.1 further claimed that plaintiffs are in the habit of cheating people and in past, they had also executed an agreement with some

person from Punjab, but after having received the amount of consideration, declined to execute the sale deed. Defendants specifically denied that sale deed was executed between the parties for a sum of Rs. 75,000/- but in fact an amount of Rs. 451000 was paid to defendant No.2 at the time of execution of sale deed. Plaintiffs by way of replication re-asserted/re-affirmed the claim put forth in the plaint, however, denied the averments contained in the written statement.

5. On the basis of aforesaid pleadings, learned court below framed following issues:-

"1.Whether the plaintiffs are entitled for the decree of declaration, as alleged? OPP

2. Whether the sale deed dated 12.4.21999 executed in favour of the defendant No.1 by the defendant No.2 is illegal and wrong? OPP

3. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed? OPP

4. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction ? OPD

5. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD

6. Whether the plaintiffs have not approached the court with clean hands? OPD

7. Whether the plaintiffs are estopped from filing the present suit due to their own act, conduct, deed and promises? OPD

8. Whether the suit in the present form is not maintainable? OPD

9. Relief."

6. Subsequently, learned trial Court on the basis of evidence led on record by the respective parties, dismissed the aforesaid suit filed by the plaintiffs. Plaintiffs, being aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court filed an appeal under Section 96 of CPC in the court of learned District Judge, Shimla, which also came to be dismissed vide judgment dated 5.7.2007. In the aforesaid background, plaintiffs have approached this Court in the instant proceedings, laying therein challenge to the impugned judgments and decrees passed by the courts below.

7. This Court vide order dated 18.12.2008, admitted the instant appeal on the following substantial questions of law No. 1, 3, 4 and 5.

"1. Whether the learned District Judge and learned Trial Court failed to take into consideration the fact that the sale deed which was executed within a period of only seven days from the execution of the General Power of Attorney is shrouded with suspicision and has been wrongly relied upon?

3. Whether the learned Courts below vitiated the entire trial by holding main ingredient of the case i.e. defendant No.2, ex-parte, who misrepresented the facts and exercised undue influence over the appellants and finally succeed in his illegal designs?

4. Whether the learned Courts below further failed to take into consideration the fact that at the time of execution of sale deed the consideration amount was paid to the Defendants No.2 by the defendant No.1 not the appellants?

5. Whether the learned Courts below have mis-construed, mis-appreciated and misunderstood the oral as well as documentary evidence?

8. I have heard the learned counsel for the parties as well as gone through the record of the case.

9. Since this Court had an occasion to peruse the pleadings as well as evidence, be it ocular or documentary adduced on record by the respective parties, during the proceedings of the case, this Court in not persuaded to agree with the contention put forth by the learned counsel for the plaintiffs that courts below have misread, mis-construed and mis-appreciated the evidence led on record by the defendants, especially statements of DWs No.2, 3 and 4, rather this Court having carefully examined entire record finds no illegality and infirmity in the judgments and decree passed by the courts below, which certainly appear to be based upon proper appreciation of evidence led on record. Otherwise also questions of law detailed herein above are not question of law much less substantial questions of law, rather same are question of fact which have been duly and properly examined by the courts below.

10. In nutshell, case of the plaintiffs is that they at no point of time had executed general power of attorney authorizing defendant No.2 to execute sale deed in favour of defendant No.1, but unfortunately, plaintiffs have not been able to prove their case by leading cogent and convincing evidence.

11. Smt. Kanta Devi, one of the plaintiff while examining herself as PW3 stated that since their uncle Ramanand was co-sharer, defendant No. 2 approached them that he will get the land partitioned and in this regard, they are required to execute the power of attorney in his favour. She further stated that she had not executed power of attorney in favour of defendant No.2 to sell the land. She further stated that defendant No. 2 had not prepared any document at Kandhaghat nor she had put any signatures on any document there. However, in her cross-examination, PW3 categorically stated that she 2-3 days' prior to the execution of the general power of attorney, they had called defendant No.2, who in turn had taken her thumb impression in her house on the blank papers. She further admitted that she had agreed to sell the land measuring 17-16 bighas, however earlier it was 9-18 bighas. She further denied that sale consideration of the land measuring 17-16 bighas was settled for Rs. 4,51,000/-.

12. Smt. Banti Devi, plaintiff No. 2 while examining herself as PW4 claimed that they are in possession of more than 17 bighas of land at Bharari Shimla and their uncle is also co-sharer with them in this very land. It has also come in her statement that defendant No.2 came with her and plaintiff No. 3 for purchase of 8 bighas of land about six years ago and in this regard, agreement Ext.PW4/A was executed with defendant No.2. It has also come in her statement that she and plaintiff No. 3 had executed power of attorney with defendant No. 2 for partition of the land. This witness further deposed before the court below that when defendant No. 2 had obtained their signatures on Ext.PW2/A, it was blank. It has also come in the statement of this witness that they had gone to register the general power of attorney in the office of Tehsildar, but at that time, they were told by PW2 that same is annexed with partition proceedings but in her cross examination, this witness stated that they had gone to the office of the Sub-Registrar, Kandaghat, for execution of the general power of attorney. She denied that Tehsildar had read over the contents of general power of attorney and thereafter, they admitting the same to be correct put their signatures on it. In her cross-examination, she categorically admitted that when they put their signatures on Ext.PW2/A, it was already written. Interestingly, this witness in her cross examination admitted that they had told husband of defendant No. 1 that defendant No. 2 namely Gurdyal Singh, was their power of attorney. Apart from above, this witness also admitted in her cross examination that they had told husband of DW1 that defendant No. 2 shall be the power of attorney of plaintiff No. 1 also.

13. If the statements made by these material plaintiff witnesses are read in conjunction juxtaposing each other, it can be safely inferred that plaintiffs were in touch with defendant No.1 for the sale of suit land and in this regard, they had authorized defendant No.2 as GPA. Though these witnesses have made an endeavor to prove on record that signatures, if any, made by them on the papers were for the purposes of preparation of GPA to effect partition between them and their uncle Ramanand, but as has been noticed herein above, it has come in the cross-examination of these witnesses that they had repeatedly informed husband of DW1 that defendant No. 2 was their power of attorney. If the argument having been made by the learned

counsel representing the plaintiffs that plaintiffs had executed general power of attorney in faovur of defendant No. 2 for effecting partition, is accepted, it is not understood that how husband of defendant No.1 came in picture. It has specifically come in the statement of PW4 Smt. Banti Devi that defendant No.2 had come to her for purchase of 8 bighas of land about six years ago. In this regard, agreement Ext.PW4/A was also executed.

14. After having carefully perused statements of these plaintiff witnesses, one thing is quite apparent from record that plaintiffs namely Kanta Devi and Banti Devi, had executed general power of attorney in favour of defendant No.2, who subsequently, sold the land to defendant No.1.

15. Leaving everything aside, this Court finds from the record that the stance put forth by the learned counsel representing the plaintiffs during his submissions is altogether contrary to the stand taken in the written statement because admittedly there is no allegation of fraud or collusiveness alleged by the plaintiffs in their plaint.

16. Entire reading of plaint nowhere suggests that plaintiffs leveled allegations, if any, against defendant No. 2 of forgery, rather their consistent stand is that they had put their signatures on the documents Ext.PW2/A, executing general power of attorney in favour of defendant No.2, to represent them in partition proceedings.

17. On the other hand, defendant examined one Shri Dhani Ram Verma, as DW1, who remained posted as Tehsildar at Kandhaghat from year 1996 to 1999, during which period, he was exercising powers of Sub-Registrar. He categorically stated before the court below that on 13.10.1998, Basanti Devi and Geeta Devi, plaintiffs produced before him power of attorney for registration and they were identified by one Med Ram, Ex-Pardhan of Gram Panchayat Kandhaghat. He further stated that he had read over the contents of the general power of attorney to plaintiffs namely Basanti Devi and Geeta whereafter they put their signatures in circle "A" in his presence. He further stated that Ext.PW2/B was produced before him by Smt. Kanta Devi for registration, which was executed in favour of defendant No.2 namely Gurdyal Singh. This defendant witness further stated that Smt. Kanta Devi was identified by one Shri Krishan Dutt.

18. Cross examination conducted on this witness nowhere suggests that plaintiffs were able to extract anything contrary to what he stated in his examination-in-chief, rather it can be safely stated that the plaintiffs were unable to shatter his testimony.

19. DW2 namely Bal Krishan, also stated that Gurdyal Singh is his neighbour and deal was finalized for sale of the land to the tune of Rs. 4,51,000/. He further stated that Devinder Thakur had paid a sum of Rs. 2,75,000/- as advance to defendant No.2 Shri Gurdyal Singh. He further stated that he had also met Smt. Kanta Devi when she executed power of attorney to sell the land in favour of DW2 Gurdyal Sigh. This witness also stated that Smt. Kanta Devi had put her signatures on the power of attorney and the Tehsildar had read over the contents of the same to Smt. Kanta Devi. It has also come in his statement that at the time of the registration of the sale deed, Devinder Thakur, had paid sum of Rs. 75,000/- to Gurdyal Singh and sum of Rs. 2,75,000/- was also paid on 12.10.1998, in his presence. In his cross-examination, this witness further admitted that Gurdyal Singh was not the owner of the suit land and Smt. Manju (Defendant No. 1) had a direct talk for the purchase of land with Gurdyal Singh. Interestingly, it has also come in the statement of this witness that another witness Jagdish Datt Sharma was called by the Gurdyal Singh, who on his asking also put his signatures on the sale deed. He further stated that sale deed was not prepared on the day when Ext.PW2/B was prepared. He stated that he and Jagdish had come to Shimla on the asking of Gurdyal Singh and the Tehsildar read over the contents of the sale deed to him and no amount was paid at the time of the registration of the sale deed and the sale deed was executed for a sum of Rs. 75,000/- and this amount was paid by husband of defendant No.1 two days prior to the registration of the sale deed. He categorically stated in cross examination that deal was settled for a total consideration of Rs. 4,50,000/- in his presence.

20. Smt. Manju Bhardwaj, defendant No.1 while examining herself as DW3 deposed that a talk with regard to the sale of suit land had taken place between her husband and Gurdyal Singh, as Gurdyal Singh was the General Power of Attorney of plaintiffs No. 2 and 3. She stated that sale deed was executed on 12.4.1999 in her presence and in presence of all three sisters (plaintiffs). In her cross examination, she admitted that a sum of Rs. 1,00,000/- was paid to Gurdyal Singh on 5.4.1999, but she was unable to state who scribed the sale deed Ext. PW1/A.

21. DW4 Devinder Kumar, also corroborated the version put forth by PW3 that he had prior acquaintance with DW 2 Gurdyal Singh, who had come to him in the first week of October, 1998 with a proposal to sell the land. He further stated that after having seen the land, he asked DW2 to come alongwith owner of the land.

22. Having closely perused/analyzed aforesaid versions put forth by the defendant witnesses, it can be safely concluded that defendant No.2 Gurdyal Singh approached the plaintiffs with a proposal to sell the land at Chail owned and possessed by the plaintiffs. As has been noticed above, it has clearly come in evidence that plaintiffs were present at the time of execution of sale deed. DW1 Dhani Ram who was Tehsildar at that relevant time, has categorically stated that power of attorney Ext.PW2/A, whereby defendant No.2 was authorized to sell the land, was presented to him by the plaintiffs and he had read over the contents of the same to them. It stands duly proved on record that power of attorney Ext.PW2.A was registered by DW1 in accordance with law and at that time, plaintiff never made any attempt to lodge protest with regard to the averments contained in the same, rather they believing them to be correct put/appended their signatures. Plaintiffs have not led any evidence suggestive of the fact that defendant No. 2 procured General Power of Attorney Ext.PW2/A fraudulently using undue influence upon the plaintiffs, rather intention of plaintiffs to sell the land through defendant No. 2 is quite apparent from the statement made by the plaintiffs themselves. It is not understood that if defendant No. 2 fraudulently executed PW2/A General Power of Attorney, what prevented the plaintiffs from lodging any complaint against him in the police or in the competent court of law.

23. It has been repeatedly held by the Hon'ble Apex Court as well as this Court that in case of fraud, undue influence or coercion, the pleadings of the parties must disclose full particulars and the case can only be decided on the particulars and there can be no departure from them in evidence. But as has been noticed in the case at hand, there are no pleadings with regard to fraud, undue influence, if any, exercised by the defendants, made in the plaint. General allegations are insufficient even to amount to an averment of fraud of which any court, ought to take notice.

24. Reliance is placed on Judgment passed by this Court in ***Shri Kripa Ram and Ors. v. Smt. Maina, 2002 (2) Shim.L.C. 213***, relevant paras whereof are reproduced herein below:-

> ***10. Section 60 of the Registration Act specifically provides that certificate endorsed on the document, registered by the Registrar, shall not only be admissible in evidence for the purpose of proving that document has duly been registered in the manner provided under the Act but also that the facts mentioned in the document referred to in Section 59 have taken place as mentioned herein.***
>
> ***It is now well settled that presumption of due execution of a document arises from the endorsement of the Sub Registrar under Section 60 of the Act. As far back as in 1928 Privy Council in Sennimalai Goundan and another v. Sellappa Goundan and others, AIR 1929 Privy Council 81, interpreting the provisions of Section 60(2) read with Section 115 of the Evidence Act held that where a person admits execution before the Registrar after the document has been explained to him, it cannot subsequently be accepted that he was ignorant of the nature of transaction. In that case, the plaintiff alleged that his father and brothers, with an intention of defrauding the plaintiff of his legitimate***

share in the family properties, entered into a fraudulent collusive partition. The trial Court found that plaintiff's case was proved and he decreed the suit. In appeal, it was held that the plainti9ff failed to make out the alleged fraud and allowed the appeal. The decree of the trial Court was set aside. The Subordinate Judge had found that the partition was unequal because the land allotted to the plaintiff was less than allotted to other brothers. It was found that contemporaneously with the partition, some land that fell into the share of plaintiff Karuppa were conveyed to his second wife Nachakkal by a registered sale deed. Nachakkal gave evidence that the transaction was bogus, as she never paid the consideration for the sale through she admitted execution of the sale deed before the Registrar. Her story that she was ignorant of the nature of the transaction, it was held, cannot be accepted as she had admitted the execution of the sale deed before the Registrar.

11. A Division Bench of this Court Kanwarani Madna Vati and Anr. V. Raghunath Singh and others, AIR 1976 HP 41, interpreting the provisions of Section 62 of the Registration Act, held that here is a resumption of correctness of the document if its execution is admitted before the Registrar. The Division Bench in para-20 observed:

> ***"Under Section 60(2) of the Registration Act the certificate given by the registering officer shall be admissible for the purpose of proving that the document has been duly registered in the manner provided by this Act and that the facts mentioned in Section 59 have occurred as therein mentioned. Therefore, there is a presumption, which attaches to the correctness of the endorsements made on the document by the registering officer. These endorsements show the presentation of the document personally by Smt. Madna Vati for registration. She was identified by Kr. Jowala Singh and her signatures were also obtained by the registering officer on both the endorsements, i.e., the endorsement of presentation and that of admitting the contents of the documents and the receipt of the consideration by her. In order to rebut this it was necessary for the defendant No.2 to have produced the Sub Registrar. She did not produce him in the witness box. Therefore, the presumption of correctness shall become conclusive." (Emphasis supplied).***

12. In the present case as noticed earlier, there is endorsement of the Sub Registrar to the 3effect that the contents were read over and explained to the vendor-plaintiff Mania Devi and, therefore, the presumption is that Sub-Registrar (DW3) himself is categorical in his evidence that the contents of the sale deed were read over to Maina Devi. He duly proved the endorsements. Therefore, in the circumstances, learned first appellate Court was not right while reversing the findings of the trial Court on the grounds that the contents of the sale deed were not read over or explained to the plaintiff."

25. In view of the detailed discussion made herein above, this Court sees no force in the argument of learned counsel representing the plaintiff that courts below have not read the evidence in its right perspective while determining the controversy at hand, rather this Court is of the view that courts below have dealt with each and every aspect of the matter meticulously and as such, there is no scope of interference whatsoever by this Court. Substantial questions of law are answered accordingly.

26. At this stage, Mr. Neeraj Gupta, Advocate, representing the defendants contended that this court has very limited jurisdiction to re-appreciate the evidence in the instant proceedings, especially in view of the concurrent findings recorded by the courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264,*** relevant para whereof reads as under:-

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***

27. It is quite apparent from the aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned courts below cannot be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by the learned courts below, rather same are based upon correct appreciation of evidence and as such, same deserves to be upheld.

28. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appear to be based on correct appreciation of oral as well as documentary evidence. Hence, the appeal fails and dismissed accordingly. There shall be no order as to costs.

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

Pushpender Kumar ....Petitioner.

Versus

State of H.P. and others ....Respondents

CWP No. 6288 of 2012

Date of Decision 24th March, 2018

Constitution of India, 1950- Article 226- Pensionary benefits of the father of the petitioner were withheld- Petitioner sought release of the said benefits along with interest @ 15% per annum- pensionary benefits not released due to penalty of recovery of Rs. 2,51,914/- imposed by the Conservator of Forests- Penalty was, however, waived on representation of the father of the petitioner- Father of the petitioner had, however, died during the pendency of the representation- the amount due has already been released- **Held-** that petitioner would have been entitled for interest had his father being exonerated from charge levelled against him as per Rules 9 and 68 of

the CCS (Pension) Rules but it is not so in the present case - Hence, no merits in the petition- petition dismissed. (Para-6 and 7)

Cases referred:

S.K.Dua vs. State of Haryana and another, 2008)3 SCC 44

D.D.Tewari (dead) through LRs vs. Uttar Haryana Bijli Vitran Nigam Ltd. and others, (2014)8 SCC 894

For the Petitioner:	Shri Rajiv Rai, Advocate.
For the Respondents:	Shri Shiv Pal Manhans, Additional Advocate General with Mr.R.R.Rahi, Deputy Advocate General for respondents No.1 to 3 and Mr.V.B.Verma, Central Government Counsel, for respondent No.4.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

Petitioner, son of a deceased retired employee Shri Jagdishanand, has filed present writ petition seeking direction to respondents to release GPF amount of his father and also for the release of entire retiral benefits along with interest at the rate of 15% per annum from the date of superannuation of his father till the date of realisation of amount, which were due after his superannuation but not released for department proceedings.

2. Respondents have contested the petition stating that Jagdishanand, father of the petitioner, had retired as Deputy Ranger of Forest from the department on 31.12.1990, but his pensionary benefits were not released due to penalty of recovery of Rs.2,51,914/- imposed upon him by Conservator of Forests, Rampur against which the delinquent employee had filed an appeal, during the pendency of which, he had expired on 29.12.2003. It is also contended that part of retiral benefits i.e. GPF, GIS had already been released to the father of petitioner during May 1991 and August 1992 and in support of this contention copies of relevant pages of cash book have also been placed on record as Annexures R-1 and R-2. It is further stated that retiral benefits i.e. DCRG, leave encashment and pension etc. have also been released. Letter dated 8.7.1991 is also placed on record as Annexure R-3 to establish that pension has also been released by Accountant General H.P. vide PPO No. 22589/HP. Copy of office order dated 27.3.1997 (Annexure R-IV) issued by the Conservator of Forest Rampur Forest Circle has been placed on record whereby amount of DCRG and leave encashment of deceased Jagdishanand was forfeited and withheld with further direction to take steps for recovery of balance amount out of penalty Rs.2,51,914/-.

3. During pendency of appeal/representation of deceased employee against order dated 27.3.1997 he had expired on 29.12.2003. Thereafter present petition was preferred on 17.07.2012.

4. As evident from communication dated 1.11.2012, (Annexure R-6) after death of father of petitioner and filing of present petition, representation of father of petitioner was considered by the Government and approval for waiving off the penalty in favour of deceased employee was communicated by the Additional Secretary (Forest) to the Government of H.P. vide letter dated 25.10.2012. This comunication was also sent to the DFO Kinnaur by the office of Chief Conservator of Forest for information with direction to release of all pending dues of the retired official to the legal heirs of retired official immediately. Thereafter vide communication dated 3.11.2012 (Annexure R-7) petitioner was informed in this regard by the Divisional Forest Officer Kinnaur with further information that GIS amounting to

Rs.105/- and GPF amounting to Rs.30,000/- stood released to the retiree during the months of May 1991 and August 1992. Along with this letter (Annexure R-7), cheques No. 145770 and 145771 dated 3.11.2012 amounting to Rs.28380/- and 19210/- against the payment of amount of DCRG and leave encashment of deceased employee late Shri Jagdishanand was also transmitted in favour of the petitioner.

5. In the aforesaid circumstances, as on date, there is nothing due to be paid to the petitioner on account of retiral benefits of late Shri Jagdishanand. However, it is contended by learned counsel for the petitioner that interest on delayed payment of DCRG and leave encashment has not been paid and as evident from communication dated 1.11.2012 (Annexure R-6) the employee i.e. deceased father of the petitioner was exonerated from charge levelled against him, petitioner is entitled for interest upon payment made in the year 2012 from the date of retirement of his father till date of payment.

6. Rule 9 of CCS (Pension) Rules empowers the Government to withhold the pension or gratuity or both either in full or in part or withdrawing the pension in full or part, either permanently or for a specified period or to order a recovery from pension or gratuity of the whole or part of any pecuniary loss caused to the Government by the servant, if, in any departmental or judicial proceedings, for grave misconduct or negligence on the part of employee during the period of his service including service rendered upon re-employment after retirement.

7. Rule 68 of the CCS (Pension) Rules provides interest on delayed payment of gratuity, in case the delay in payment is attributtable to the administrative lapses and delay in payment is not caused on account of failure on the part of the Government servant to comply with the procedure laid down by the Government for processing his pension papers. It is clarified by the Government vide O.M. No.1(4)/Pen.Unit/82, dated 10th January, 1983 that in order to mitigate the hardship to the Government servants who, on conclusion of proceedings, are fully exonerated, it has been decided that interest on delayed payment of retirement gratuity may also be allowed in their cases and in such cases, the grautuity will be deemed to have fallen due on the date following the date of retirement for the purpose of payment of interest on delayed payment of gratuity. However, it is further clarified that the benefit of these instructions would not be available to such of the Government Servants who die during pendency of judicial/disciplinary proceedings against them and against whom the proceedings are consequently dropped.

8. In present case, communication dated 1.11.2012 (Annexure R-6) clearly indicates that it is undisputed in the present case that after disciplinary proceedings, recovery was imposed upon deceased father of the petitioner and he died during pendency of his representation/appeal against the said order. Thereafter Government of H.P. had approved for waiving off the penalty of recovery in favour of the deceased and thereafter on the basis of said waiving off the penalty, deceased employee was exonerated from the charges levelled against him. Therefore, in present case, it is not an exoneration simplicitor but it is pursuant to the waiver of recovery and therefore, delinquent in present case can not be said to have been fully exonerated. Here, exoneration is in consequence of waiver of recovery of penalty. Hence keeping in view the provisions of Rule 9 read with Section 68 of CCS (Pension) Rules read with O.M. No. 1(4)/Pen.Unit/82, dated 10.1.1983 and O.M.No.7(1) PU/79, dated 11.7.1979, petitioner is not entitled for any interest for delayed payment of DCRG and leave encashment.

9. Learned counsel for the petitioner, in support of his contention, has relied upon the pronoucement of the Apex Court reported in ***(2008)3 SCC 44 titled S.K.Dua vs. State of Haryana and another and (2014)8 SCC 894 titled D.D.Tewari (dead) through LRs vs. Uttar Haryana Bijli Vitran Nigam Ltd. and others.***

10. In ***S.K.Dua's*** case, disciplinary proceedings were finally dropped and all retiral benefits were extended to the employee after four years and in those circumstances, it was held that employee was entitled to the interest of such benefits and in those circumstances, prima facie finding that grievances voiced by the appellant appeared to be well founded, he was held entitled to the intererst on retiral benefits. Whereas in present case, proceedings had not been dropped and father of the petitioner has been exonerated for waiver of penalty imposed upon him by the Government after his death.

11. In ***D.D.Tiwari's case*** retiral benefits of the employee were withheld on the ground that some amount was due to the employer but no disciplinary proceedings were pending against employee on the date of his retirement and it was found by the Court that erroneously witholding of gratuity amount for which employee was legally entitled entailed the penalty on delayed payment and for that reason, employer was also held liable to make payment of penalty amount on delayed payment of gratuity under the provisions of Payment of Gratuity Act, 1972. Facts of present case are entirely different to the case in ***D.D.Tiwari's case.***

12. In view of above, present petition being devoid of any merit is dismissed.

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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

Tharban Lal ...Respondent.

Cr. Appeal No.248 of 2009
Reserved on: 27.02.2018
Decided on: 26.03.2018

N.D.P.S. Act, 1985- Section 20- Accused apprehended by the police party on the basis of suspicion of carrying contraband- His bag was searched without associating any independent witnesses- Charas weighing 800 grams was recovered- **Held-** that non-association of independent witness is not fatal in every case, evidence of the official witnesses can be believed- No honest effort was, however, made to find independent witness in the present case – the same is fatal for the prosecution case specially when there are contradictions in the versions of the official witnesses- non-production of seals by official witnesses with which contraband was sealed and re-sealed has also significant bearing on the fate of the prosecution case, especially in view of non-association of independent witnesses- Further held- that presumption of culpable mental state as contemplated in Section 35 of the N.D.P.S. Act shall come into effect only, once prosecution had successfully proved the recovery of contraband from the possession of the accused beyond reasonable doubt- no case for interference in the judgment of acquittal recorded by the Trial Court is made out- Appeal is accordingly dismissed. (Para-9, 22 and 27)

Cases referred:

State of Haryana versus Mai Ram, son of Mam Chand, (2008) 8 Supreme Court Cases 292
State of Punjab versus Nirmal Singh, (2009) 12 Supreme Court Cases 205
State of Punjab versus Leela, (2009) 12 Supreme Court Cases 300
State of Punjab versus Surjit Singh and another, (2009) 13 Supreme Court Cases 472
Kulwinder Singh and another versus State of Punjab, (2015) 6 Supreme Court Cases 674
Karamjit Singh versus State (Delhi Administration), 2003 Cri.L.J. 2021

Ram Lal and another versus State of H.P., Latest HLJ 2005 (HP) (DB)143
Ian Roylance Stillman versus State of Himachal Pradesh, 2002 (2) Shim. L.C. 16
State represented by Inspector of Police, Chennai versus N.S. Gnaneswaran, (2013) 3 Supreme Court Cases 594
Noor Aga versus State of Punjab and another, (2008) 16 SCC 417
State of Punjab versus Baldev Singh, (1999) 6 SCC 172
Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321
Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439

For the appellant: Mr. M.A. Khan, Mr. S.C. Sharma, Narinder Guleria and Mr. Nand Lal thakur, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.
For the respondent: Mr. Anup Chitkara and Ms. Sheetal Vyas, Advocates.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

This appeal has been preferred by the State of Himachal Pradesh against acquittal of respondent-Tharban Lal vide judgment, dated 29th October, 2008, passed by the learned Special Judge, Kullu, in Sessions Trial No. 52/06 arising out of case FIR No. 248/2005 registered at Police Station Manali under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. Prosecution case, in brief, is that on 19th November, 2005, at about 2.45 p.m., PW-3 SI Lal Singh, alongwith HC Gangvir Singh (not examined), HHC Nand Lal (not examined), PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar, departed Police Post Patlikuhl for patrolling and detection of crime relating to excise and narcotics after recording DDR No. 10 Ex. PW-3/B. At about 4.50 p.m., near 15-miles bridge, in the jungle, police party noticed a person coming from upper side having a rucksack on his shoulder, who, on seeing the police party, took u-turn and started running towards jungle, whereupon the police party, on suspicion of some contraband being carried by the said person, overpowered him. On inquiry, he disclosed his identity as respondent. Thereafter, PW-2 Constable Sanjay Kumar was sent by PW-3 SI Lal Singh in search of independent witnesses, who did not find any independent witness and came back on the spot, whereafter PW-3 SI Lal Singh associated PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar as witnesses in search and seizure procedure.

3. After compliance of Section 50 of NDPS Act, vide memo Ex. PW-1/A, whereupon respondent opted to be searched by the police party present on the spot, the Investigating Officer, i.e. PW-3 SI Lal Singh, gave his personal search to respondent vide memo Ex. PW-1/B and thereafter, conducted search of bag carried by the respondent. During search, charas was recovered from the bag, which, on weighment, was found to be 800 grams. After separating two samples of 25 grams each from the recovered contraband, samples as well as remaining bulk of charas were sealed in separate parcels with seal 'T'. NCB Form, copy whereof is Ex. PW-1/D, was prepared in triplicate after taking sample seal impressions of seal 'T' on separate piece of cloth Ex. PW-1/C and on the the NCB Form. The seal was handed over to PW-2 Constable Sanjay Kumar and three parcels were taken into possession vide memo Ex. PW-1/E. Thereafter, rukka Ex. PW-2/A was prepared and sent to Police Station Manali by PW-3 SI Lal Singh through PW-2 Constable Sanjay Kumar for registration of FIR. After registration of FIR No. 248/2005 Ex. PW-8/A, the case file was brought back by PW-2 Constable Sanjay Kumar to the spot. Statements of witnesses were recorded and spot map Ex. PW-3/A was prepared. Respondent was arrested vide memo Ex. PW-1/F and his mother, as indicated in endorsement on memo Ex. PW-1/F encircled in red at point 'A', was informed about the arrest of respondent.

4. As per prosecution case, case property was produced before PW-8 SHO Jagdish Chand, who re-sealed the parcels with seal 'L', took sample seal impression on a separate piece of cloth Ex. PW-8/C, and filled columns No. 9 to 11 in NCB Form in triplicate and deposited the entire case property in malkhana with PW-5 HC Hari Singh. On 1st December, 2005, PW-5 HC Hari Singh, through PW-7 HHC Bir Singh, sent the sample parcels of charas alongwith documents to CTL Kandaghat vide RC No. 150/05, copy whereof is Ex. PW-5/B. After depositing the case property, PW-7 HHC Bir Singh handed over the receipt Ex. PW-5/C to PW-5 HC Hari Singh. After receiving the report of Chemical Examiner Ex. PA, PW-8 SHO Jagdish Chand prepared the challan and presented the same in the Court.

5. During trial, prosecution has examined eight witnesses to prove its case. After recording his statement under Section 313 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), respondent has chosen not to lead any evidence in his defence. On conclusion of trial, the respondent stands acquitted. Hence, the appeal.

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

7. PW-1 HC Deepak Kumar, PW-2 Constable Sanjay Kumar and PW-3 SI Lal Singh are the only spot witnesses. There is no independent witness associated by the police in present case and the prosecution is relying upon testimonies of official witnesses only.

8. There is no dispute with regard to case law cited by learned Additional Advocate General in pronouncements of the apex Court in cases titled **State of Haryana versus Mai Ram, son of Mam Chand,** reported in **(2008) 8 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.

9. It is settled position that prosecution case is not to be rejected outrightly on the sole ground that there are no independent witnesses as the official witnesses are also independent witnesses unless proved to be inimical towards the accused like any other witnesses, however, keeping in view the fact that they are highly interested in success of the prosecution case being part of prosecution agency, their statements, in absence of independent witnesses, are to be scrutinized with greater care and caution as the question of personal liberty of a person is involved in a criminal trial.

10. It is also contended by learned Additional Advocate General that mere non-association of independent witnesses does not render the recovery of contraband illegal; there is no law for corroboration of evidence of official witnesses by independent witnesses; presumption is that every person acts honestly and the veracity of official witnesses is not to be suspected without any good ground and non-examination/ non-association of independent witnesses is not always fatal for prosecution. In support of his contention, learned Additional Advocate General has relied upon **Kulwinder Singh's case (supra); Karamjit Singh versus State (Delhi Administration),** reported in **2003 Cri.L.J. 2021; Ram Lal and another versus State of H.P.,** reported in **Latest HLJ 2005 (HP) (DB)143;** and **Ian Roylance Stillman versus State of Himachal Pradesh,** reported in **2002 (2) Shim. L.C. 16.** Undisputed ratio of law cited by learned Additional Advocate General is of no help to prosecution in present case as it is also settled law of land that provisions to associate independent witnesses are not ornamental in

nature but are mandatory so as to ensure fair trial in a criminal case. Exemption from associating independent witnesses is an exception for reasonable grounds based upon peculiar facts and circumstances of a particular case. No doubt, the Courts, after believing the official prosecution witnesses only, convict the accused, but, it does not exempt the prosecution from associating the independent witnesses wherever, in normal circumstances, it is possible to associate independent witnesses.

11. According to PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar, PW-3 SI Lal Singh had deputed PW-2 Constable Sanjay Kumar to locate some local/ independent witnesses, however, PW-3 SI Lal Singh has not uttered even a single word in this regard. In his deposition, PW-3 SI Lal Singh has stated that on suspicion that respondent might be carrying some incriminating article with him, he (PW-3) apprised the respondent about his legal right of being searched either in presence of Magistrate or Gazetted Officer or in the presence of police present on the spot and on consent of respondent to be searched in the presence of police present on the spot, he prepared the consent memo, gave the personal search to respondent and conducted the search of bag being carried by the respondent. Statement of PW-3 SI Lal Singh, with respect to efforts made to locate independent witnesses, is contrary to the statements of PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar.

12. PW-3 SI Lal Singh has not assigned any reason for not making any effort to associate the independent witnesses. Even PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar have also not indicated any reasonable explanation for non-availability of independent witnesses. There is evidence on record that shops, residences and National Highway were at a distance from 50 meters to 500 meters from the spot. In the month of November, at 5.00 p.m., it is impossible to believe that no one was available either in shops or in residences or National Highway situated on the spot. Even, it is admitted by prosecution witnesses that 15-miles bridge connects number of villages from National Highway and it is a busy road. It is not a case of prosecution that persons approached by PW-2 Constable Sanjay Kumar were not willing to join the investigation, but the only statement which has come on record is that independent witnesses were not available.

13. All the three witnesses, in their cross-examination, have admitted that within a distance ranging from 25 meters to 300 meters, there were shops, residences and fish hatchery farm and that the shops and residences were visible from the bridge. It is claimed in the statements of PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar that respondent was spotted at a distance of about 150-200 meters from 15-miles bridge and it is admitted by them that there were shops and residences situated at a distance ranging from 250 to 500 meters from the bridge. The recovery of contraband is claimed to have taken place at about 5.00 p.m. and at that time, there was every possibility of availability of independent witnesses especially in view of the admissions of these official witnesses in their cross-examination about existence of shops and residences near the spot of recovery.

14. Therefore, here is not a case where the prosecution has been able to prove that either no independent witness was possible to be associated with all out honest efforts made by the police or the independent witnesses contacted by the police were not willing and ready to join the investigation.

15. It is case of the prosecution that respondent was noticed by the police party coming on the road, who, on seeing police party, took a u-turn and started running towards the jungle. PW-3 SI Lal Singh, in his examination-in-chief, has claimed to have laid a Nakka on the spot and in his cross-examination, he has categorically stated that at the time of laying Nakka, police party was hiding and concealing its presence on the spot. His version is self-contradictory. In case, police party was hiding itself, then version of prosecution, that respondent took u-turn on noticing the police party, is false, which raises a serious doubt on the genesis of prosecution case.

16. PW-3 SI Lal Singh, in the Court, has deposed that after sending PW-2 Constable Sanjay Kumar with Rukka to the police station, he recorded statements of witnesses, prepared spot map and before return of PW-2 Constable Sanjay Kumar with the case file from the Police Station after recording FIR, he informed the respondent about grounds of his arrest vide memo Ex. PW-1/F and also informed his mother by means of a wireless message. Whereas, in special report Ex. PW-6/A, PW-3 SI Lal Singh has stated contrary to the same by recording that statement of PW-2 Constable Sanjay Kumar under Section 161 CrPC was recorded on 15-miles bridge, where PW-2 Constable Sanjay Kumar met PW-3 SI Lal Singh with case file on return from the Police Station and respondent was arrested at 8.05 p.m. at 15-miles bridge and information of his arrest was given. The sequence of events mentioned by him in special report Ex. PW-6/A is contrary to what he has deposed in the Court.

17. PW-1 HC Deepak Kumar, in his statement, has stated that after taking possession of the recovered contraband, respondent was informed about ground of arrest and was arrested vide memo Ex. PW-1/F and his mother was informed, as desired by him, thereafter, rukka was prepared and handed over to PW-2 Constable Sanjay Kumar. Whereas, according to PW-2 Constable Sanjay Kumar and PW-3 SI Lal Singh and also as per contents of rukka Ex. PW-2/A, the rukka was prepared after seizure of the contraband, but prior to arrest of respondent-accused.

18. Further, PW-1 HC Deepak Kumar has stated that he did not remember as to what was recovered from the possession of respondent during his personal search conducted by the Investigating Officer before the arrest. However, he claimed preparation of memo of personal search Ex. PW-1/G at the time of arrest whereas PW-3 SI Lal Singh is silent about preparation of the memo of personal search of respondent and in the cross-examination, he has categorically stated that no other memo, except stated by him in his examination-in-chief, was prepared by him.

19. As per prosecution case, the Investigating Officer had given his personal search to respondent, but, PW-2 Constable Sanjay Kumar is completely silent about the same and has stated that after preparation of consent memo Ex. PW-1/A, PW-3 SI Lal Singh took the search of the bag. In cross-examination, he has not deposed about preparation of memo of search of Investigating Officer Ex. PW-1/B and has categorically stated that no other memo, except which were referred by him in his examination-in-chief, was prepared by the Investigating Officer.

20. PW-1 HC Deepak Kumar has deposed that during patrolling, they stopped at 15-miles bridge for some time and also went towards Naggar bridge. He has not stated about patrolling at Pangan road. On the other hand, PW-2 Constable Sanjay Kumar has stated that they also patrolled at Pangan road, but, remained silent about patrolling towards Naggar bridge. PW-3 SI Lal Singh has categorically stated that they did not go towards the road leading to Naggar bridge and he has also evaded to reply specifically about the names of other places where they carried out patrolling. He has also denied to have remembered as to whether any Nakka was laid on 15-miles bridge or they had checked any vehicle there.

21. In view of the discrepancies, contradictions and infirmities noticed hereinabove, testimonies of official witnesses, examined in present case, cannot be made basis to convict the respondent as from the evidence on record and in the given facts and circumstances of present case, the version of prosecution appears to be concocted.

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 Lal,** that non-production of original seal in the Court is not fatal to the prosecution case unless it is established on record that such non-production has caused serious prejudice to the accused. But, in present case, there were no independent witnesses associated by the police and the seal,

after seizure, was handed over to PW-2 Constable Sanjay Kumar, who was none else but a police official serving in the same Police Station. Another seal, after re-sealing, was also kept by PW-8 SHO Jagdish Chand with him. For the contradictions, discrepancies and non-association of independent witnesses; as discussed above, it was necessary for the prosecution to at least produce the original seal(s) in the Court so as to corroborate the version of official witnesses in absence of independent witnesses in the given circumstances of the present case.

23. According to prosecution story, after recovery to 800 grams of charas from respondent, two samples of 25 grams each were taken out from the bulk and sealed in separate parcels and one sample was sent for chemical analysis. At the time of leading evidence in the Court, only bulk parcel Ex. P-1 and sample parcel Ex. P-2 were produced in the Court whereas sample parcel sent for chemical examination was never produced in the Court so as to connect the remaining bulk charas Ex. P-1 and the sample parcel Ex. P-2 with the sample parcel sent for chemical examination. In absence of physical production of the sample sent for chemical examination, it cannot be said that the prosecution has been able to connect the Chemical Examiner's report Ex. PA with the remaining bulk parcel Ex. P-1 or another sample parcel Ex. P-2. The physical evidence of a case of this nature, being property of the Court, should have been produced in the Court and non-production thereof definitely warrant drawing of negative inference within the meaning of Section 114 (g) of the Evidence Act *{See Noor Aga versus State of Punjab and another, (2008) 16 SCC 417}*

24. A stamp has been affixed on Chemical Examiner's report Ex. PA stating therein that seal/seals on the sample parcel were tallied with the specimen impression of seal/seals and were found to be the same, intact and unbroken, but, perusal of record indicates that no sample of re-sealing seal 'L' is on record nor the statements of witnesses, including PW-8 SHO Jagdish Chand, depict that such sample seal was ever taken. In absence of creditworthy evidence of official witnesses, it is also an additional ground for doubting the fairness of the procedure adopted by the prosecution during investigation.

25. In present case, for unreliable evidence of official witnesses, non-production of sample parcel sent for chemical examination is also fatal to the prosecution case for want of production of missing link between the parcels produced in the Court and chemical Examiner's report Ex. PA.

26. As deposition of spot official witnesses has not been found to be trustworthy and confidence inspiring, testimonies of remaining witnesses, other than spot official witnesses, who were associated for completion of investigation, are not necessary to be discussed.

27. No doubt, Section 35 of NDPS Act provides presumption of culpable mental state of an accused for commission of offence by him, for possession of narcotic drugs, including charas, on his failure to account the said possession satisfactorily, however, said presumptions will come into play only after prosecution has successfully proved the recovery of contraband from the possession of the accused beyond reasonable doubt. Section 54 of NDPS Act places the burden of proof on the accused as regards possession of contraband to account for the same satisfactorily. Sections 35 and 54 of the NDPS Act, no doubt, raise presumptions with regard to the culpable mental state on the part of accused and also places the burden of proof on this behalf on the accused, but, presumption would operate only in the event the pre-requisite circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and legal burden would be shifted to the accused only when it stands satisfied. *{See Noor Aga versus State of Punjab and another, (2008) 16 SCC 417}*

28. In present case, for discrepancies and contradictions in statements of spot official witnesses with respect to sequence of events, missing narration of certain events claimed to have happened by the prosecution and also about the manner in which the events alleged to have taken place, the veracity of prosecution story is under suspicion. Thus, evidence on record is not sufficient to attract the provisions of Sections 35 and 54 of NDPS Act in present case.

29. It is also 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. It must be kept in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. {*See State of Punjab versus Baldev Singh, (1999) 6 SCC 172; Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321; Noor Aga versus State of Punjab and another, (2008) 16 SCC 417; and Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439*}

30. In view of above discussion, the evidence led by the prosecution cannot be considered to be cogent, reliable, trustworthy and confidence inspiring so as to be relied upon to convict the respondent for the offence charged.

31. Respondent is also having advantage of being acquitted by the trial Court fortifying the presumption of innocence in his favour which stands unrebutted and for want of pointing out any cogent, reliable, convincing and trustworthy evidence against the respondent, it cannot be said that acquittal of respondent has resulted into travesty of justice or has caused miscarriage of justice. Therefore, no case for interference is made out. Accordingly, the appeal is dismissed. Bail bonds furnished by the respondent and his surety are discharged. Case property be dealt with as directed by the trial Court in impugned judgment. Record be sent back.

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

Raj Kumar ....Petitioner.

Versus

Bhakra Beas Management Board and others ....Respondents.

CWP No.: 10554 of 2012
Date of Decision: 28.03.2018

Constitution of India, 1950- Article 226- Petitioner appointed against the post of Khansama on temporary basis was given salary in the pay scale of Rs. Rs.750-1410/-, whereas, other Khansama appointed on the same post on temporary basis was allowed pay scale of Rs. 830-1600/-- **Held-** that there is no justification of giving pay on lower scale to the petitioner, when on perusal of the appointment letters of both the persons, there is no difference in the conditions of the two appointments- Further held that such discrimination is violative of Article 14 of the Constitution- Respondent/Board is directed to pay salary to the petitioner in the higher scale – further directed to pay the arrears inthree months- petition disposed of as allowed. (Para-5 and 6)

For the petitioner: Mr. Varun Rana, Advocate.

For the respondents: Mr. Naresh Kumar Sood, Senior Advocate, with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

There is a very short issue involved in the present petition. Vide Annexure P-1, dated 14.05.1997, the petitioner was offered appointment on temporary basis as a Khansama by the respondent-Board in the pay scale of Rs.750-1410/- with initial start of Rs.770/-. Vide Annexure P-2, one Sh. Gajraj Singh was also appointed as Khansama purely on temporary basis by the said Board, on the same terms and conditions, on which the petitioner was so appointed, except that the appointment of Gajraj Singh was in the pay scale of Rs.830-1600/-. According to the petitioner, when both he and Gajraj Singh stood appointed against the

post of Khansama, purely on temporary basis, then there could not have been any discrimination *intra* both of them, as far as grant of pay scale is concerned. It is in these circumstances that the present petition has been filed by the petitioner, praying for the following reliefs:

> *"(i) Direct the respondents to remove the anomaly/disparity in pay scale of the petitioner and grant the petitioner pay scale of Rs.830-1600/- from the date of his appointment i.e. 16.05.1997.*
>
> *(ii) Direct the respondents to calculate the arrears of salary due to the petitioner which was not granted to him due to lesser pay scale and pay the same in lump sum.*
>
> *(iii) Direct the respondents to pay interest @9% p.a. on the due amount from 16.05.1997.*
>
> *(iv) Direct the respondents to grant all consequential benefits to the petitioner.*
>
> *(v) Direct the respondents to pay the costs of litigation.*
>
> *(vi) Or any other orders or directions which this Hon'ble Court may deem fit be passed in the interest of justice."*

2. By way of reply so filed by the respondent-Board, the claim of the petitioner has been refuted.

3. When this case was heard on 20.09.2017, this Court passed the following order:

> "*Learned counsel for the petitioner submits that the petitioner shall be satisfied in case he is granted parity in the pay scale at least from the month of May, 1997 with other incumbents, who were appointed as Khansamas on temporary basis in the same month in the pay scale of Rs.830-1600/-.*
>
> *A perusal of Annexure P-1 demonstrates that the petitioner was offered a temporary post of Khansama in Beas Sutlej Link Project under the respondent-Board in the pay scale of Rs.750/- with initial start of Rs.770-1410/-. On the other hand, Annexure P-2 demonstrates that one Sh. Gajraj Singh was also offered a temporary post of Khansama in Beas Sutlej Link Project under the respondent-Board, but in the pay scale of Rs.830-1600/-. This communication is dated 20th May, 1997. Why this discrepancy is there in the pay scales of two Khansamas, who have been temporarily engaged in the year 1997 by the respondent-Board, in my considered view, has not been satisfactorily explained in the reply so filed by the respondent-Board. Documents on record also demonstrate that intra department communications exist to the effect that there was discrepancy in the pay scale of petitioner vis-à-vis similarly situated persons and higher authorities were requested to look into the matter. In these circumstances, before this Court proceeds with the case on merit, let respondent-Board file an affidavit explaining as to why the persons who were offered appointment on temporary post of Khansama in the month of May, 1997 were offered different pay scales. Let the needful be done within a period of four weeks.*
>
> *List on **8th November, 2017.**"*

4. In compliance to the said order, an affidavit has been filed by the Additional Superintending Engineer, BRSC & PD Division, BBMB, Sundernagar, District Mandi, wherein the act of the respondents has been justified on that ground that though the initial appointment of the petitioner as well as Gajraj Singh on temporary basis was as a Khansama, but subsequently, Special Secretary, BBMB decided that petitioner be appointed in the pay scale of Rs.750-1410/- under the Category of Helper-Cook, whereas Gajraj Singh be appointed in the pay scale of Rs.830-1600/- as a Cook. Relevant para of the affidavit is quoted hereinbelow:

> *"2. That in compliance to the aforementioned direction, the deponent submits that the anomaly which the petitioner is raising before this Hon'ble Court by way of*

present writ petition, on the representation of the petitioner and that too during the pendency of the present writ petition, the matter/issue of the petitioner was taken up for consideration by the Chief Engineer, BSL Project, BBMB, Sundernagar, District Mandi (H.P.) with the Special Secretary, BBMB, Madhya Marg, Chandigarh and vide communication bearing number 4557-58/R&R/4139/R-4, dated 10/05/2017. The Special Secretary has decided the same while conveying that the petitioner was appointed in the pay Scale of Rupees 750-1410 with IS 770 revised to Rupees 2720-4775 (w.e.f. 01/01/1996) under the category of "Helper-Cook", whereas Gajraj Singh had been appointed in the scale of Rupees 830-1600 revised to Rupees 2930-5300 under the category of "Cook". True copy of the communication dated 10/05/2017 is attached herewith as ***Annexure R-A*** *for the perusal of the Hon'ble Court."*

5. Having heard learned counsel for the parties and having perused the pleadings, this Court is of the considered view that there is an apparent discrimination meted out to the petitioner by the respondents. It is not in dispute that the appointment of the petitioner, though on temporary basis was against the post of Khansama. It is also not in dispute that the appointment of Sh. Gajraj Singh was also against the post of Khansama and on temporary basis. Whereas the petitioner was appointed as such on 14.07.1997, Sh. Gajraj Singh was appointed as such on 10.05.1997. A perusal of the appointment letters Annexure P-1 and P-2 demonstrates that there is no difference whatsoever in the terms and conditions of the appointments of such two persons except pay scale. Justification which has been given in the affidavit so filed by the respondent-Board, can not be accepted, when admittedly in the appointment letters, the terms and conditions of appointment of both Gajraj Singh and the petitioner are the same.

6. Article 14 of the Constitution of India prohibits discrimination. Though classification is permitted, however, to satisfy the test of reasonability, the same should satisfy the following twin test:

"(a) classification ought to be based on intelligible differentia; and

(b) intelligible differentia must have some nexus with the object to be achieved."

7. In the present case, both the petitioner as well as Sh. Gajraj Singh were appointed as Khansamas. Thus, there is no intelligible differentia between these two persons. Therefore, the act of the respondents of granting different pay scales to said persons, in my considered view, is violative of Article 14 of the Constitution of India.

8. This Court is not oblivious of the fact that Gajraj Singh was appointed later in time, but then, as a model employer, it was expected from it to have had brought the pay of the petitioner at par with Gajraj Singh after the appointment of later on higher pay scale. By not doing so, respondent-Board has discriminated between similarly situated persons, thus violating Article 14 of the Constitution of India.

9. Accordingly, this petition is allowed and the act of respondents of discriminating the petitioner vis-à-vis similarly situated persons in matter of pay scale is held to be bad. Respondents are directed to pay to the petitioner the pay scale of Rs.830-1600/- as revised from time to time against the post of Khansama from the date of filing of the petition with all consequential benefits. It is clarified that in case the arrears are paid to the petitioner by the respondent-Board within a period of three months from today, then no interest shall be payable on the same, however, in case arrears are not paid within the said period, then the arrears shall also carry simple interest @6% per annum.

Petition stands disposed of, so also pending miscellaneous applications, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Cr. Appeals No. 252 & 253 of 2017
Reserved on: 15.03.2018
Decided on: 29.03.2018

Cr. Appeal No. 252 of 2017:

Rahul Kumar .....Appellant.
Versus
The State of H.P. .....Respondent.

Cr. Appeal No. 253 of 2017:

Raj Kaur @ Rano .....Appellant.
Versus
The State of H.P. .....Respondent.

N.D.P.S. Act, 1985- Section 20- Accused persons were convicted by the Learned Trial Court as they were found carrying 1.500 grams charas in the vehicle during the night in the routine checking of the vehicle- Independent witnesses were not associated by the prosecution- **Held-** that non-association of independent witness is not fatal to the prosecution case- obligation to take public witness is not absolute- it may not be possible to find independent witness at odd hours of night on highway in the chance recovery- the learned Trial Court properly appreciated the evidence and rightly convicted the accused persons- no merits in the appeal- appeal dismissed. (Para-18 to 22)

Cases referred:

Ajmer Singh vs. State of Haryana, (2010) 3 Supreme Court Cases 746
Deep vs. State of H.P., 2016(1) Criminal Court Cases 625 (H.P.) (DB)

For the appellant(s): Mr. B.L. Soni, Advocate.
For respondent: Mr. Vinod Thakur, Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. J.S.Guleria and Mr. Bhupinder Thakur, Deputy Advocates General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeals have been preferred by the appellants/accused/convicts (hereinafter referred to as "the accused") laying challenge to judgment, dated 04.02.2017, passed by learned Special Judge, Hamirpur, H.P., in Sessions Trial No. 20 of 2015, whereby the accused persons were convicted for the offence punishable under Section 20(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "the ND&PS Act").

2. The factual matrix, as per the prosecution story, may succinctly be summarized as under:

On 24.04.2015, at about 10:45 p.m., a police party was on routine Highway patrol duty and a *nakka* was laid on Super Highway at a distance of 100 meters from Police Post Jahu. The police party started checking the vehicles and around 11:24 p.m. a white Santro Car, having registration No. PB10AJ-9504, which was coming from Bhambla side and going towards, Bhota, was signaled to stop for checking. There were two occupants in the vehicle. Accused Rahul Kumar was driving the vehicle and accused Raj Kaur @ Rano was sitting on the front passenger seat. On asking, the accused persons could not show the documents of the vehicle, so the vehicle was impounded by the police under Section 207 of the Motor Vehicles Act, 1988, vide

infringement report No. 0371735, dated 24.04.2015. Police personnel conducted search of the vehicle in presence of the accused persons and the official witnesses. The search yielded to recovery of a light blue colour carry bag, which was kept in the dicky, near the speaker. The bag was checked and the same was found stuffed with a black colour substance, which on burning and smelling was found to be *charas.* The *charas* was in the form of small sticks and pancakes. An electronic scale was brought from Police Post Jahu and on weighment *charas* was found to be 1.5 kgs. The police completed sealing formalities and NCB form, in triplicate, was filled in. Facsimile seal was taken at serial No. 8 of NCB-1 form, in triplicate, and the seal was handed over to Constable Dinesh Kumar for safe custody. The sealed parcel, containing carry bag and contraband, was taken into possession in presence of official witnesses, viz., Constable Dinesh Kumar and Constable Daler Singh. Photographs, from the digital camera, were also clicked. After completion of search, recovery and seizure formalities, *rukka* was sent to Police Station Bhoraj, through HHG Satish Kumar, for registration of FIR, whereupon FIR was registered against both the accused. SHO, Police Station Bhoranj was requested to depute a Lady Constable for further proceedings. SHO deputed Lady Constable Santosh Kumari and she was sent to the spot. The accused persons were arrested and spot map was prepared. The statements of the witnesses were also recorded. Subsequently, police personnel alongwith the accused persons went to Police Station, Bhoranj, and the accused persons were handed over to SHO, Mukesh Kumar. SHO conducted resealing proceedings and sample seal was taken on a separate piece of cloth. SHO also filled the relevant columns of NCB-1 form, in triplicate. Parcel, containing contraband, was handed over to HC Subhash Chand for safe custody. Resealing certificate was also issued and an entry was made in Daily Station diary, vide GD Entry No. 9(A) dated 25.04.2015. Entries were also made, qua the deposit of the sealed parcel, in *Malkhana* Register No. 19 at serial No. 43/674. On 27.04.2015, the case property alongwith relevant documents were sent to Forensic Science Laboratory, Junga, for chemical analysis. Report, under Section 57 of the ND&PS Act, through Constable Daler Singh, was sent to SDPO, Barsar, by ASI Vijay Kumar, qua which an entry was made at serial No. 4, dated 27.04.2015, in the Special Reports Register. Investigation qua the vehicle, in which the accused persons were transporting the contraband, was done and it was found to be owned by accused Tarsem Singh. Chemical analysis report revealed the presence of canabiniods, including the presence of tetrahyrocannabinol and the microscopic examination indicated the presence of characteristic cystolithic hairs. *Charas* was found to be present in the exhibit and the quantity of purified resin, as found in the exhibit, stated to be *'charas'* is 23.63% w/w/, thus the exhibit was found to be extract of 'cannabis' and sample of *'charas'.* After completion of the investigation, *challan* was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as fifteen witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty and claimed to be tried.

4. The learned Trial Court, vide impugned judgment dated 04.02.2017, convicted the accused persons Rahul Kumar and Raj Kaur @ Rano for the offence punishable under Section 20(ii)(c) of the ND&PS Act and sentenced them to undergo rigorous imprisonment for a term of twelve years each and to pay a fine of Rs.1,00,000/- (rupees one lac) and in default of payment of fine, they were further ordered to undergo simple imprisonment for a term of six months, hence the present appeal preferred by the accused persons Rahul Kumar and Raj Kaur @ Rano.

5. The learned counsel for the appellants has argued that the appellants are innocent and have been falsely implicated in this case. He has argued that no recovery was effected from the conscious and exclusive possession of the appellants. He has argued that as per the prosecution story the alleged material was recovered from the dicky of the car and it was seized by the police. The appellants were neither having knowledge about the contraband nor the contraband was recovered from them, so they be acquitted after setting aside the judgment of the learned Trial Court, which is passed on the basis of surmises and conjectures and the prosecution has failed to prove the case against the accused. He has further argued that the learned Trial Court without appreciating the fact that the prosecution has failed to prove the guilt

of the accused persons beyond the shadow of reasonable doubt convicted the accused persons. The prosecution also did not examine any independent witness. Conversely, the learned Additional Advocate General has argued that the contraband was recovered from the conscious and exclusive possession of the appellants and the judgment of conviction and sentence passed by the learned Trial Court is as per law. Thus, the appeal be dismissed.

6. In rebuttal, the learned Counsel for the appellants has argued that as no independent witness has been examined by the prosecution and the appellants did not have knowledge of contraband, so they be given benefit of doubt and be acquitted and the appeal be allowed.

7. In order to appreciate the rival contentions of the parties we have gone through the record carefully.

8. Before discussing the prosecution evidence in depth few vital aspects of the prosecution case needs discussion. On 24.04.2015, at about 11:00 p.m., police personnel had set up a *nakka* on Super Highway near Jahu. At about 11:24 p.m. they intercepted a white Santro Car, having registration No. PB-10AJ-9504, and the accused persons Rahul Kumar and Raj Kaur @ Rano were its occupants. The accused persons, on being asked, could not produce the documents of the vehicle and when the vehicle was searched 1.5 kgs of *charas* was recovered from the dicky of the vehicle. In the wake of the above circumstances, as portrayed by the prosecution, it was a chance recovery during midnight on a highway. In the present case, admittedly no independent witnesses were examined, but as the recovery was effected during odd hours of night and that too on a highway, there were bleak chances of procuring independent witnesses. Therefore, in the case in hand only official prosecution witnesses have been examined and now their evidence is to be analyzed on the touchstones of truthfulness and veracity. It is settled law of criminal jurisprudence that conviction can be based on the testimony of official witnesses and it is not necessary that in each and every case, public persons must be joined in investigation.

9. There are two pillars to the edifice of the prosecution story. First, the statements of the official prosecution witnesses and second is the documentary evidence, which have come on record. The members of the patrol duty, on the relevant night, were HC Anupam Sharma, Constable Dinesh Kumar, Constable Daler Singh, HHG Sudesh Kumar, HHG Satish Kumar and HHG Ranbir Singh. Out of these persons, Constable Dinesh Kumar (PW-1), Constable Daler Singh (PW-2), HHG Satish Kumar (PW-3) and HC Anupam Sharma (PW-14) were examined by the prosecution.

10. PW-1, Constable Dinesh Kumar, deposed that on 24.04.2015, during the period from 11:00 p.m. to 02:00 a.m., he alongwith HC Anupam Sharma, Constable Daler Singh, HHG Satish Kumar, HHG Sudesh Kumar and HHG Ranbir Singh laid a *nakka* on Super Highway, near Police Post Jahu. At about 11:24 a.m., they intercepted a white car, having registration No. PB-10AJ-9504, which was signaled to stop. There were two occupants in the vehicle and one was a lady. They, on being asked, did not produce documents of the vehicle, so the vehicle was impounded under Section 207 of the M.V. Act. The driver divulged his name as Rahul Kumar, resident of House No. 347, Ward No. 25, Muhalla Patti Muhabat Ki, P.S. South City, Tehsil and District Moga, Punjab, and the lady disclosed her name as Raj Kaur @ Rano, resident of Muhalla Sadan Bali Wasti, P.S. South City, Moga, district Moga, Punjab. He has further deposed that a blue colour carry bag was recovered from the dicky, near the speaker and on checking the same, it contained some substance, which was in the shape of sticks and chapatti. On smelling the substance was found to be *charas.* Constable Daler Singh brought digital scale from Police Post, Jahu and the *charas* alongwith the carry bag was weighed and found to be 1.5 kgs. As per the version of this witness, *charas* alongwith the carry bag was sealed in a cloth parcel by affixing nine seals of impression 'K'. NCB form, in triplicate, was prepared and the seal impression was taken separately on NCB form. Impressions of seal 'K' were separately taken on a piece of cloth, which is Ex. PW-1/A, which bears his signatures and the signatures of HC Anupam Sharma and also the signatures of the accused persons. He has further deposed that seal after its use was

handed over to him and HC Anupam Sharma prepared *rukka,* which was sent through HHG Satish Kumar, to Police Station Bhoranj for registration of a case. Photographs were also taken and site plan was prepared. On 25.04.2015, at about 04:00 a.m., HHG Satish Kumar came on the spot alongwith the case file and Lady Constable Santosh Kumari. His statement was recorded, the accused persons were arrested and taken to Police Station. This witness, in his cross-examination, has deposed that prior to checking the vehicle of the accused persons, 4-5 vehicles were checked, but they did not *challan* any of them. He denied that at a distance of 200-250 meters from the *nakka* there is *abadi.* He admitted that the I.O. did not made any effort to associate any independent witness. As per this witness, personal search of both the accused persons were conducted after the recovery of the *charas.*

11. PW-2, Constable Daler Singh, reiterated the version, as deposed by PW-1, Constable Dinesh Kumar. He deposed that he was asked by I.O. to bring digital scale from Police Post, Jahu, so he brought the same. As per this witness, *charas* alongwith the carry bag was weighed and found to be 1.5 kgs. This witness, in his cross-examination, has admitted that about 300 meters from the spot there is one under construction electricity sub station, green valley school and *abadi.* As per this witness, I.O. tried to associate independent witnesses, but no one was present there. PW-3, HHG Satish Kumar, also reiterated the versions, as deposed by PW-1 and PW-2, so there is no variance noticed in his deposition. This witness, in his cross-examination, has deposed that he is not aware about the proceedings undertaken by the Investigating Officer after the vehicle was *challaned* under the Motor Vehicles Act. He feigned his ignorance that who had prepared the parcel, Ex. P-1, and in what manner. As per this witness, at a distance of 70 meters there is electric sub-station, Green Valley School and other *abadi* surrounding the Police Post. However, the Investigating Officer did not make any effort to associate any independent witness. When he returned from Police Station, Bhoranj, alongwith the case file, all the police personnel were on the spot.

12. Another important witness in the case in hand is PW-14, HC Anupam Sharma (Investigating Officer). As per the deposition of PW-14, on 24.04.2015, around 10:45 p.m., he alongwith Constable Dinesh Kumar, Constables Daler Singh, HHG Sudesh Kumar, HHG Satish Kumar and HHG Ranbir Singh, was on routine Highway patrol duty towards Jahu etc. He has further deposed that qua patrol duty *Rapat* No. 24, *Rajnamcha* dated 24.04.2015, which is, Ex.PW-6/A, has been entered. *Nakka* was laid about 100 meters from Police Post Jahu and in between 11:00 p.m. to 2:00 a.m. They checked vehicles during this period and about 11:24 p.m. a white Santro car, having registration No. PB-10AJ-9504 was intercepted, which was coming from Bhambla and going towards Bhota. The vehicle was stopped and it was being driven by a male and a female was also sitting in the vehicle. He asked for the documents of the vehicle, but the driver failed to produce the same, so the vehicle was impounded under Section 207 of the M.V. Act and to this effect infringement report and *challan* are Ex. PW-14/A-1 and Ex. PW-14/A-2, respectively. He has further deposed that male divulged his name as Rahul Kumar son of Balwinder Singh, resident of Ward No. 25, House No. 347, Patti Muhabatan Ki, P.S. City Moga, District Moga and female disclosed her name Raj Kaur @ Rano, daughter of Jasbir Singh, resident of Near Science College, Jeevan Basti, Jagroan, District Ludhiana (accused No. 1 and 2, respectively). He asked the accused persons to take their belongings from the vehicle, but they responded that there is nothing in the vehicle. He searched the dicky of the vehicle and found a carry bag, which was kept near the sound speaker. The bag was checked and found containing black colour substance, which was in the form of small sticks and *chapaties*. On smelling and burning the recovered stuff was found to be *charas,* so he sent Constable Daler Singh (PW-2) to Police Post, Jahu for bringing digital weighing scale. On weighment the contraband was found to be 1.5 kgs. As per this witness, the vehicle was searched on the spot in presence of police personnel and the accused persons. He, after putting the recovered contraband in a cloth parcel, sealed the same by affixing nine seals of impression 'K'. NCB-1 form, in triplicate, Ex. PW-14/B, was filled in and facsimile seal impression 'K' was taken on NCB-1 form, in triplicate. Sample seal was separately kept in a cloth, which is Ex. PW-1/A, and after its use, it was handed over to Constable Dinesh Kumar (PW-1). Sealed parcel alongwith relevant documents was taken into

possession and vehicle was also seized vide common recovery and seizure memo, Ex. PW-1/B, in presence of Constables Dinesh Kumar (PW-1) and Daler Singh (PW-2). During the proceedings, photographs, Ex. PW-12/A-1 to Ex. PW-12/A-13 were also clicked. *Rukka,* Ex. PW-14/C, was sent through HHG Satish Kumar (PW-3) to Police Station, Bhoranj, for registration of FIR and consequent thereto FIR, Ex. PW-9/A, was registered. He telephonically requested SHO, P.S. Bhoranj for deputing a Lady Constable. He prepared the spot map, Ex. PW-14/D, and recorded the statements of the official witnesses, except the statement of HHG Satish Kumar. When Lady Constable Santosh Kumari (PW-4) reached around 03:30 a.m. the accused persons were arrested vide arrest memos, Ex. PW-14/E and Ex. PW-4/A. At about 04:00 a.m. HHG Satish Kumar (PW-3) returned on the spot and his statement was also recorded. Subsequently, he alongwith the accused persons, case property and police personnel proceeded to Police Station, Bhoranj, in a private vehicle. Constable Dinesh Kumar (PW-1) drove the vehicle of the accused persons to Police Station, Bhoranj and they reached there at 05:10 a.m. The accused persons, case property and other relevant documents were presented before SHO Inspector Mukesh Kumar, Police Station, Bhoranj. SHO handed over to him resealing certificate, which is Ex. PW-9/C. He also carried the personal search of the accused persons in Police Station, Bhoranj. After taking remand of the accused persons, case file was handed over to ASI Vijay Kumar, Incharge Police Post, Jahu, for further investigation.

13. PW-14 has further deposed that on 13.07.2015 the case file was again handed over to him by ASI Vijay Kumar for ascertaining and tracing the owner of the vehicle. Thus, on 14.07.2015, he made a communication with District Transport Officer, Ludhiana, vide letter, Ex. PW-14/F, and the vehicle was found registered in the name of Tarsem Singh son of Gurdev Singh, resident of 1453/14, Janta Nagar, Gill Road, Ludhiana. He visited the address and met one Kulwant Singh, son of Sarsa Singh, who divulged that he has purchased House No. 1453/14 from previous owner Gurdev Singh. He recorded the statement of Kulwant Singh (PW-5). He also obtained a report from Manjeet Kaur, Councilor, Ward No. 66, Ludhiana, and also recorded her statement. Then, he returned and handed over the case file to SHO, Police Station Bhoranj. As per this witness, he could not associate independent witnesses at the time of search and recovery, due to odd hours. This witness, in his cross-examination, has deposed that on the spot also personal search of the accused persons was carried out to ascertain whether they are carrying any weapon or not. Prior to the arrest of the accused persons, their search was carried out. He again stated that personal search was carried out after the arrest of the accused persons. As per the testimony of this witness, personal search of the accused was not carried out in his presence and he also feigned his ignorance that any copy of arrest memo was supplied to the accused persons or not. He did not make any effort to associate any independent witness, as the *charas* was recovered per chance, so he did not find it incumbent to associate independent witnesses.

14. PW-4, Lady Constable Santosh Kumari, deposed that on 25.04.2015, at about 02:15 a.m., she was informed by MHC, Police Station Bhoranj that accused persons have been nabbed near Police Post, Jahu, on the highway. She reached on the spot at 03:30 p.m. and was associated in the investigation. In her presence personal search of accused Raj Kaur was conducted, qua which personal search memo was prepared. Vide memo, Ex. PW-4/A, which bears her signatures, accused Raj Kaur was apprised the grounds of arrest by the Investigating Officer and her father was informed about the arrest. Statements of the witnesses were recorded in her presence. Thereafter, accused persons were taken to Police Station, Bhoranj. This witness, in her cross-examination, has deposed that she visited the spot in her personal vehicle, which was being driven by her *devar.* She did not go to Police Post, Jahu on that day. PW-6, Shri Kulwant Singh, deposed that he had purchased House No. 1453 in the year 2007 from Shri Gurdev Singh and Tarsem Singh (accused) is son of Gurdev Singh. He has further deposed that after selling his house he went to Barnala and later he returned to Ludhiana. PW-6, Constable Ashwani Kumar, deposed that copy of *Rapat* No. 24, *Rojnamcha,* dated 24.04.2015, is correct, as per original record, which is Ex. PW-6/A and he has prepared the same.

15. PW-7, HHC Mahinder Singh, brought the original record to the Court, which pertained to GD entry No. 3(A), dated 25.04.2015, copy of which is Ex. PW-7/A-1, copy of GD

entry No. 8(A), dated 25.04.2015, copy whereof is Ex. PW-7/A-2, copy of GD entry No. 9(A), dated 25.04.2015, Ex. PW-7/A-3 and copy of GD entry No. 11(A), dated 27.04.2015, Ex. PW-7/A-4. As per this witness, aforesaid documents are correct as per the original record. PW-8, HHC Sanjay Kumar, deposed that on 27.04.2015, MHC Subhash, Police Station Bhoranj, vide RC No. 83/15, handed over him a sealed parcel, which was bearing nine seals of impression 'K' and three seals bearing impression 'A' alongwith docket, copy of FIR, copy of seizure memo, NCB forms, in triplicate, and sample seals "K" and "A". He safely deposited the case property on the same day at SFSL, Junga and receipt was handed over to MHC. PW-9, Inspector Mukesh Kumar, the then SHO Police Station, Bhoranj, deposed that on 25.04.2015, at about 3:10 a.m., HHG Satish Kumar (PW-3) came to police station with *rukka,* whereupon FIR, Ex. PW-9/A, was registered. Thereafter, the case file was given to HHG Satish Kumar. On the same day, at about 05:10 a.m., HC Anupam (PW-14) came to the police station alongwith the accused persons and the case property. The case property was a sealed parcel, having nine seals of impression 'K', containing 1.5 kgs of *charas.* NCB form, in triplicate, alongwith sample seal having impression 'K' was also presented before him. He resealed the parcel by affixing three seals of impression 'A' and facsimile seal was taken on a separate piece of cloth, which is Ex. PW-9/B. He also filled in the relevant columns of NCB form and the case property was handed over to MHC for safe custody. He issued resealing certificate, which is Ex. PW-9/C.

16. PW-10, HC Subhash Chand, deposed that on 25.04.2015, Inspector Mukesh Kumar (PW-9) and HC Anupam Sharma (PW-14) deposited with him a sealed parcel, bearing nine seals of impression 'K' and three seals of impression 'A', containing 1.5 kgs of *charas,* NCB-1 form, in triplicate, sample seals 'K' and 'A' and vehicle No PB-10AJ-9504 alongwith its key. He made apt entries qua the aforesaid case property at Sr. No. 43/674 in *malkhana* register No. 19, copy whereof is Ex. PW-10/A. He has further deposed that on 27.04.2015, vide RC No. 83/15, Ex. PW-10/B, the case property, except the vehicle, alongwith copy of seizure memo and copy of FIR was sent to SFSL, Junga, through LHC Sanjay Kumar (PW-8). After deposit of the case property, receipt was handed over to him. He also updated column No. 12 in NCB-1 form, in triplicate. He has further deposed that on 16.05.2015 the case property alongwith the FSL report, Ex. PX, was received and to this effect an entry is on Ex. PW-10/A. PW-11, HC Karam Singh, Reader to SDPO, Barsar, deposed that on 26.04.2015, at about 02:15 p.m., Constable Daler Singh (PW-2) came with Special Report, which was sent by Incharge, Police Post, Jahu. SDPO, Barsar, received the same and it was handed over to him for making entry in the special Reports Register. The Special Report is Ex. PW-2/A and requisite entry was made at Sr. No. 4, dated 27.04.2015, copy whereof is Ex.PW-11/A. PW-12, Shri Virender Kumar, Photographer, deposed that on 31.05.2015, ASI Vijay Kumar (PW-13), gave him a digital camera alongwith the memory card for developing photographs. He got developed photographs, Ex. PW-12/A-1 to Ex. PW-12/A-13 and certificate under Section 65-B of the Evidence Act, is Ex. PW-12/B.

17. PW-13, ASI Vijay Kumar, deposed that on 26.04.2015, investigation was handed over to him by SHO, Police Station, Bhoranj. He prepared special report, Ex. PW-13/A, and sent the same to SDPO, Barasr, through Constable Daler Singh (PW-2). He also recorded the statements of the official witnesses and after receipt of FSL report, Ex. PX, prepared *challan* and presented the same in the Court. PW-15, Shri Surinder Bhandari, Junior Assistant, DTO Ludhiana, Punjab, brought the registration record of vehicle having registration No. PB-10AJ-9504. The vehicle was registered in the name of Tarsem Singh son of Shri Gurdev Singh, resident of 1453/14, Janta Nagar, Gill Road, Ludhiana. DTO report, in this regard, is Ex. PW-14/G.

18. After exhaustively discussing and analyzing the evidence, which has come on record, undisputedly, the present case is of a chance recovery and the recovery was effected during odd hours of night, so the possibility of associating independent witnesses at that time was subtle. In ***Ajmer Singh vs. State of Haryana, (2010) 3 Supreme Court Cases 746,*** the Hon'ble Supreme Court, vide para 20, has held as under:

> ***"20. 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."

Thus, the non-association of independent witnesses by the police cannot at all be said to be fatal to the prosecution case. Now, the statements of official prosecution witnesses and other link witnesses need examination on the touchstone of credibility and veracity.

19. As per the testimony of PW-1, Constable Dinesh Kumar, on 24.04.2015, he alongwith HC Anupam (PW-14), Constable Daler Singh (PW-2), HHG Satish Kumar (PW-3), HHG Sudesh Kumar and HHG Ranbir Singh had laid a routine *nakka* near Police Post, Jahu, on Super Highway from 11:00 p.m. to 02:00 a.m. (25.02.2015). They, at about 11:24 p.m., stopped a white car, having registration No. PB-10AJ-9504, which was coming from Bhambla side. There were two occupants in the vehicle, a male (driver) and a female. On being asked, the driver could not produce documents of the vehicle, thus vehicle was impounded under section 207 of M.V. Act. Driver disclosed his name as Rahul Kumar son of Shri Balwinder Singh, Ward No. 25, House No. 347, Muhalla Patti Muhabat Ki, Police Station south City, Tehsil and District Moga (Punjab) and the lady disclosed her name as Raj Kaur @ Rano daughter of Jasbir Singh, resident of Muhalla Sadan Bali Wasti, Police Station South City, Moga, district Moga (Punjab). The vehicle was searched and a blue colour carry bag was recovered from the dicky, which was kept near the speaker. The bag was checked in presence of the accused persons and found containing some substance, which was in the shape of sticks and *chapatti*. The substance, on smelling and tasting was found to be *charas*. Thereafter, Constable Daler Singh (PW-1) was sent to Police Post, Jahu, and he brought digital scale. The contraband, on weighment, alongwith the carry bag was found to be 1.5 kgs. The recovered contraband alongwith the carry bag was sealed in a cloth parcel and sealed with nine seals having impression 'K' and NCB form, in triplicate, was prepared. PW-1 has further deposed that sample seal was taken on a separate piece of cloth, which is Ex. PW-1/A, which bears his and the signatures of Constable Daler Singh (PW-2), HC Anupam Sharma (PW-14) and that of the accused persons. Seal after its use was handed over to him for safe custody. Investigating Officer, HC Anupam Sharma (PW-14) prepared *rukka* and sent the same to Police Station, Bhoranj, through HHG Satish Kumar (PW-3) for registration of a case. Photographs were also clicked and Investigating Officer prepared the site plan. As per the version of PW-1 at about 04:00 a.m. on 25.04.2015 HHG Satish Kumar (PW-3) returned to the spot with a case file and Lady constable Santosh Kumari. The accused persons were arrested and apprised the grounds of arrest. Subsequently, the accused persons alongwith the case property were taken to Police Station Bhoranj. Thus, the testimony of PW-1 fully inspires confidence and there is nothing to disbelieve his testimony.

20. PW-2, Constable Daler Singh, deposed that on 24.04.2015, he alongwith HC Anupam (PW-14), Cosntable Dinesh Kumar (PW-1), HHG Sudesh Kumar and HHG Ranbir Singh laid a *nakka* near Police Post, Jahu, on Super Highway from 11:00 p.m. to 02:00 a.m. (25.02.2015). He has reiterated the version of PW-1 by deposing that at about 11:24 p.m. a white car, having registration No. PB-10AJ-9504, came from Bhambla side and was signaled to stop. There were two occupants in the car, viz., driver (male) and a female. They could not produce the documents of the vehicle, so the vehicle was impounded under the M.V. Act. The driver disclosed his name as Rahul son of Shri Balwinder Singh, Ward No. 25, House No. 347, Muhalla Patti Muhabat Kee, Police Station South City, Tehsil and District Moga (Punjab) and the lady disclosed her name as Raj Kaur @ Rano daughter of Jasbir Singh, resident of Muhalla Sadan Bali Wasti, Police Station South City, Moga, District Moga (Punjab). Search of the vehicle was conducted by the Investigating Officer and a blue carry bag was recovered, which was kept in the dicky near the speaker. In presence of the accused persons, the bag was checked and found containing some substance in the shape of sticks and *chapatti*. The recovered substance, on

smelling by Investigating Officer, was found to be *charas.* Investigating Officer sent him to Police Post, Jahu, and he brought digital scale. The contraband was weighed alongwith the carry bag and found to be 1.5 kgs. He has further deposed that carry bag was sealed in a cloth parcel with nine seals of impression 'K' and NCB form, in triplicate, was prepared. Seal impression 'K' was also taken on the NCB form and sample seal was taken separately on a piece of cloth, Ex. PW-1/A, which bears his and the signatures of Constable Dinesh Kumar (PW-1), HC Anupam Sharma (PW-14) as well as the accused persons. Seal, after its use, was handed over to Constable Dinesh Kumar (PW-1). Investigating Officer (PW-14) prepared *rukka,* which was sent to Police Station Bhoranj, through HHG Satish Kumar (PW-3), for registration of a case. Investigating Officer also clicked photographs and prepared the site plan. At about 04:00 a.m. on 25.04.2015 HHG Satish Kumar returned to the spot with a case file and Lady Constable Santosh Kumari. He has further deposed that accused persons were arrested and apprised the ground of their arrest. Subsequently, the accused persons alongwith the case property were taken to Police Station, Bhoranj. PW-2 has identified parcel, Ex. P-1, carry bag, Ex. P-2 and *charas,* Ex. P3, in the Court, which were allegedly recovered from the accused on the spot. He has further deposed that on 26.04.2015 he was given Special Report, Ex. PW-2/A, by the Investigating Officer, which he handed over to SDPO, Barsar and his statement in this respect was recorded by the Investigating Officer on 31.05.2015.

21. PW-3, HHG Satish Kumar, has also reiterated the versions, of PW-1 and PW-2, so now only the statement of PW-14, Investigating Officer Anupam Sharma, needs to be looked into. The statement of this witness has already been examined at length in earlier part of this judgment. We find nothing in the statement of PW-14 to disbelieve his version, rather his statement is fully corroborated by other official prosecution witnesses.

22. After exhaustively discussing the evidence, which has come on record, we find that the present case is of chance recovery, thus the provisions of Section 50 of the ND&PS Act are not attracted. The learned counsel for the appellants has placed reliance on a judgment of this Court rendered in ***Deep vs. State of H.P., 2016(1) Criminal Court Cases 625 (H.P.) (DB),*** wherein it has been held that the purpose of joining independent witnesses at the time of arrest, search and sealing process is to inspire confidence that all codal formalities were completed on the spot at the time of arrest, and sealing process, in the absence of same no reliance can be placed on the search and seizure. Relevant paras of the judgment (supra) are reproduced hereunder:

> ***"25. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D & P.S., Act, since the mandatory provisions have not been complied with and the manner in which the case property was taken out and re-deposited, coupled with the fact that no independent witnesses, though available were associated.***
>
> ***26. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 4/5.1.2011, rendered by the learned P.O. Fast Track Court, Mandi, H.P., in Sessions Trial No. 16 of 2009, is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case."***

However, keeping in view the fact that in the case in hand it is of chance recovery, that too during the odd hours of night on a highway and also keeping in view the ratio laid by Hon'ble Supreme Court in ***Ajmer Singh vs. State of Haryana (2010) 3 Supreme Court Cases 746,*** as discussed above, the independent witnesses cannot be found at all places and at all times, thus the obligation to associate public witnesses during search, sealing process and arrest of the accused is not absolute. We, in wake of the facts that it was a chance recovery effected during odd hours

of night and in the course of routine traffic checking, are satisfied that search, recovery of contraband, sealing of contraband and arrest etc. are not vitiated for the reason that independent witnesses were not associated. We also, after taking due care and caution in evaluating the evidence of official prosecution witnesses, find that the evidence, which has come on record, inspires confidence and thus believable.

23. In view of what has been discussed hereinabove, the appeals are without merits, as the statements of the prosecution witnesses, which have been exhaustively discussed hereinabove, inspire confidence. The non-joining of independent witnesses, which were not available during odd hours of night, cannot be said to be fatal to the prosecution case, as the recovery was effected during late hours of night, public witnesses could not be expected there. The statements of the official prosecution witnesses inspire confidence and the other relevant material, which has come on record, proves the case of the prosecution beyond the shadow of reasonable doubt. The evidence of the official prosecution witnesses and other material, which has come on record, unambiguously establish that the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt. Thus, as the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt, we find no infirmity in the judgment of conviction passed by the learned Trial Court. The appeals are without merits, deserve dismissal and are accordingly dismissed.

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

****

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

State of H.P. and others ...Appellants

Versus

Dinesh Chauhan and others. ...Respondents.

R.F.A. No. 5 of 2005.
Reserved on : 19.3.2018
Date of decision: 29.03.2018.

Constitution of India, 1950- Article 226- Deceased/Sandhya Devi admitted in the district Hospital Solan as emergency case as she was bleeding and labour pain had started on 25.4.1996 - she died on 26.4.1996- it is alleged that death has taken place due to negligent behaviour of defendants No.4 and 5, medical officers as they did not attend upon her properly – **Held-** that complainant has to clearly make out a case of negligence whenever a medical practitioner is charged with or proceeded against criminally- the plaintiff has failed to bring any evidence establishing willful negligence on the part of the Doctors concerned – Medical Practitioner is not liable to be held negligent, simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another – there is no merit in the petition, hence, same is dismissed. (Para-34 to 39)

Cases referred:

Arulvelu and another vs. State Represented by the Public Prosecutor and another (2009) 10 SCC 206

Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud and others, I L R 2015 (III) HP 771

Damodar Lal vs.Sohan Devi and others (2016) 3 SCC 78

Shasidhar and others versus Ashwini Uma Mathad and another, (2015) 11 SCC 269,

Prafulla Ranjan Sarkar vs. Hindusthan Building Society Ltd., AIR 1960 Calcutta 214

Martin F. D'SOUZA vs. Mohd. Ishfaq (2009) 3 SCC 1)

Indian Medical Association vs. V.P. Shantha and others (1995) 6 SCC 651
Jacob Mathew vs. State of Punjab and another (2005) 6 SCC 1
Bolam vs. Friern Hospital (1957) 1 WLR 582 : (1957) 2 All ER 118

For the appellants	:	Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. Advocate Generals, with Mr. Bhupinder Thakur, Deputy Advocate General.
For the respondents	:	Mr. Raman Sethi, Advocate, for respondent No.1. Mr. R.K. Bawa, Senior Advocate, with Mr. Ajay Kumar Sharma, Advocate, for respondent No.2. Respondent No.3 already exparte.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The State has filed this first appeal against the judgment and decree dated 5.1.2001 passed by learned District Judge, Solan (for short 'trial Court') in Civil Suit No. 8/1 of 1997 whereby it awarded an amount of Rs. 2,25,000/- as damages to the plaintiff/respondent No.1 on account of death of Sandhya and on the principle of vicarious liability this amount was directed to be paid by the appellants.

2. Brief facts of the case as set out in the plaint are that Sandhya (deceased) was working as Instructor at Angan Bari Teachers Training Centre, Theog and her marriage was solemnized on 11.5.1995. Immediately after her marriage, she conceived pregnancy and since November, 1995 she was on medical leave. On 25.4.1996 she was admitted in District Hospital, Solan as an emergency case. Defendant No.6 Dr. R.P. Sahani was in the OPD and got her admitted as she was bleeding and labour pain had started. Dr.Sahani handed over the case to Dr. Kamlesh Sharma, defendant No.5, as it related to the department of Gynaecology. At about 6.30 it was realized that Gynaecologist i.e. Dr. Maya Ahuja, defendant No.4 being specialist should be called. As a result, she was sent for and came at 9.00 p.m. After examining the deceased, defendant No.4 allegedly left the hospital. According to the plaintiff, the condition of Smt. Sandhya deteriorated as the bleeding went on unabated. This caused anxious moments for PW-2 being her father. He went to defendant No.4 at her residence and asked her to further examine the patient, but the defendant No.4 did not come to the hospital. According to the plaintiff, defendant No.4 only came at 9.00 a.m. on the following day i.e. 26.4.1996 and got ultrasound test of Smt. Sandhya conducted and in the said test it was found that fetus was dead and dead child was delivered. It was because of the profuse and continuous bleeding that the deceased ultimately had to refer to IGMC, Shimla, but even then the defendant No.4 commanded to retain the patient. The said defendant No.4 is alleged to have not attended upon the patient properly and neglected to look after her according to the professional ethics.

3. It was further averred that from 9.00 p.m. on 25.4.1996 to 3.30 a.m. on 26.4.1996, the defendant No.4 left the patient to her own fate despite knowing her serious and deteriorating condition and it was on account of non-serious attitude of defendant No.4 towards the patient that she ultimately died. The plaintiff maintained that had the defendant No.4 being a Gynaecologist attended to the patient promptly and properly she would not have died. It was on these allegations that the plaintiff, who is the husband of the deceased, filed the suit for damages wherein the defendants No. 1 to 3 i.e. State of Himachal Pradesh, through Secretary (Health), Director Health and Chief Medical Officer, Solan, were impleaded as parties with the allegation that the said defendants were vicariously liable for the death of Sandhya.

4. The defendants No.1 to 3 filed joint written statement wherein it was averred that defendant No.4 was very much alive to the medical treatment of the deceased Sandhya and therefore, there was no lapse, laxity or misconduct on her part in rendering treatment to the

deceased. It was further averred that despite giving best medical treatment, the deceased died due to post partum hemorrhage

5. The defendant No.4 Dr. Maya Ahuja filed a separate written statement wherein she averred that she never came to the hospital at 9.00 p.m. on 25.4.1996 as alleged and further denied having been given any treatment to the patient at that time. She further averred that first call given to her to attend upon the patient was at 2.45 a.m. on 26.4.1996 and she immediately came to the hospital at 3.30 a.m. on the same date i.e. 26.4.1996 and examined, treated and ensured all possible medication to the patient. Defendant No.4 further maintained that she left the hospital at 5.00 p.m. on 25.4.1996 and resumed her duty on the following day i.e. 26.4.1996 at 9.00 a.m. According to her, it was defendant No.5 Dr. Kamlesh, who was on duty on the intervening night of 25th and 26th April, 1996 and, therefore, it was her duty to attend upon the patient on the intervening night. She further averred that right from 9.00 a.m. on 26.4.1996 she was in the OPD as she was on duty there to examine the patients. The condition of the patient at the time she left OPD was normal. She admitted that the blood group 'O negative', which was required to be transfused to Sandhya, was not available in the hospital. She further admitted that the patient was referred to IGMC, Shimla, but lateron could not be shifted because of deterioration in her health. Lastly, it was averred that defendant No.4 was not in any manner negligent or careless in rendering medical treatment to the deceased.

6. The defendants No. 5 and 6 filed their written statement wherein they supported the stand of defendant No.4.

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

1. *Whether Smt. Sandhya wife of plaintiff died on 26.4.1996 in District Hospital, Solan due to the negligent conduct of defendant No.4 by not properly treating and attending Smt. Sandhya Devi, as alleged? OPP*
2. *If issue No.1 is proved, whether defendant No.4 committed breach of the duty in not attending Smt. Sandhya properly, as alleged? OPP*
3. *Whether Smt. Sandhya at the time of delivery died due to negligence of defendant No.4?OPP*
4. *If issues No.1 to 3 are proved, whether the plaintiff is entitled to damages, if so, to what extent and from whom? OPP(Recast on 6.9.1999)*
5. *Whether legal and valid notice under Section 80 CPC has been served? OPP*
6. *Whether the suit is malicious and frivolous as alleged? OPD-4.*
7. *Whether the suit is not maintainable as alleged? OPD-4.*
8. *Relief.*

8. After recording the evidence and evaluating the same, the learned trial Court decreed the suit by awarding damages of Rs.2,25,000/- and the said amount was held to be recoverable only from defendants No. 1 to 3.

9. It is in this backdrop that the defendant No.1 i.e. State of Himachal Pradesh has filed the instant appeal on the ground that the findings recorded by the learned trial Court are perverse and based upon surmises and conjectures and, therefore, deserves to be set-aside. It is further argued by learned Additional Advocate General that the learned trial Court has not even considered the pleadings of the plaintiff which were wholly different and therefore could not be made basis for awarding compensation, more particularly, when it is settled law that when no amount of evidence for which there is no foundation led in the pleadings could be looked into by the trial Court.

10. On the other hand, Mr. Raman Sethi, Advocate assisted by Ms. Parminder Kaur, Advocate, would vehemently argue this is different case where *res ipsa loquitur* could have been applied as a young lady has lost her life only on account of the sheer negligence of defendants No. 4 to 6, more particularly, defendant No.4 and, therefore, the judgment and decree as passed by learned trial Court needs to be upheld.

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

11. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

> ***"26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.***
>
> ***27. The expression "perverse" has been defined by various dictionaries in the following manner:***
>
> > ***1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition***
> >
> > ***PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.***
> >
> > ***2. Longman Dictionary of Contemporary English - International Edition***
> >
> > ***PERVERSE: Deliberately departing from what is normal and reasonable.***
> >
> > ***3. The New Oxford Dictionary of English - 1998 Edition***
> >
> > ***PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.***
> >
> > ***4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)***
> >
> > ***PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.***
> >
> > ***5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition***
> >
> > ***PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.***
>
> ***28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8***
>
> > ***"8...We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has***

committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

> ***"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.***
>
> ***10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable 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, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."***

30. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

> ***"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."***

12. What is 'perverse' has further been considered by this Court in ***RSA No.436 of 2000***, titled ***'Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others***, decided on 28.05.2015 in the following manner:-

> ***"25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result***

in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

13. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.* ***Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)

> ***"11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."***

10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)

> ***"10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."***

11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be

totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

> ***"34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:***

> ***'103. Power of High Court to determine issues of fact.- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—***
>
> > ***(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or***
> >
> > ***(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."***
>
> ***The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."***

14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)

> ***"30. 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. 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. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"***
>
> ***This Court has also dealt with other aspects of perversity."***

14. Admittedly, this is a first appeal and the jurisdiction of this Court while hearing the same is very wide like the learned trial Court and it is open to the defendants to attack all findings on fact and/or on law in the first appeal and would have to be decided on the basis of following exposition of law as propounded by the Hon'ble Supreme Court in ***Shasidhar and others*** *versus* ***Ashwini Uma Mathad and another****, (2015) 11 SCC 269*, wherein it was observed as under:-

> **"10.** ***The powers of the first appellate Court, while deciding the first appeal under Section 96 read with Order XLI Rule 31 of the Code, are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra.***

11. As far back in 1969, the learned Judge - V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first appellate Court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under: (SCC OnLine Ker paras 1-3)

> ***"1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.***
>
> ***2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.***
>
> ***3.Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation." (Emphasis supplied)***

12. This Court in a number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate Court under Section 96 of the Code. We consider it apposite to refer to some of the decisions.

13. In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)

> ***"15.....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."***

The above view has been followed by a three-Judge Bench decision of this Court in Madhukar & Ors. v. Sangram & Ors.,(2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

14. In H.K.N. Swami v. Irshad Basith,(2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3)

"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

15. Again in Jagannath v. Arulappa & Anr., (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court observed as follows: (SCC p.303, para 2)

"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion....."

16. Again in B.V Nagesh & Anr. vs. H.V. Sreenivasa Murthy, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words:(SCC pp. 530-31, paras 3-5)

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the

relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

17. The aforementioned cases were relied upon by this Court while reiterating the same principle in State Bank of India & Anr. vs. Emmsons International Ltd. & Anr., (2011) 12 SCC 174. This Court has recently taken the same view on similar facts arising in Vinod Kumar vs. Gangadhar, 2014(12) Scale 171."

15. Adverting to the facts, it would be necessary to first refer to the pleadings in the suit. It is not in dispute that the suit has been filed on the basis of tortuous liability based on the plea of negligence of defendants No. 4 to 6, particularly, defendant No.4. It is more than settled that where negligence or contributory negligence is charged, full details must be given of the acts on which the party pleading relies as constituting negligence. (Refer:***Prafulla Ranjan Sarkar*** vs. ***Hindusthan Building Society Ltd., AIR 1960 Calcutta 214***).

16. Now, therefore, it would be necessary to advert to the pleadings of negligence set out in the suit. From a complete reading of the plaint, it would be noticed that the plea of negligence is contained in paras 3 and 4 of the plaint wherein it is stated that after admission of Sandhya in the hospital on 25.4.1996 at about 5.30 p.m. the doctor on duty told the parents of Sandhya that she will be attended upon by Gynaecologist /specialist and a person/official of District Hospital, solan was sent to call defendant No.4 to attend late Sandhya. However, the defendant No.4 only came to the hospital at about 9.00 p.m. and told the parents of Sandhya that she was normal and there was nothing to worry about it and accordingly Sandhya was shifted to maternity room as she was suffering from labour pains. After giving some instructions to nurses, defendant No.4 went to her residence and did not come back even on calling and in the meanwhile Sandhya's condition had become critical. The defendant No.4 was so carelessness and negligent in attending Sandhya that she only came on the next day and referred Sandhya for ultra sound which was conducted on 26.4.1996 at 9.30 a.m. and by that time her condition was all the more critical. After that Sandhya was again brought to maternity room where she delivered a dead child and her condition thereafter became serious and was referred to IGMC, Shimla. However, before she could be taken to IGMC, Shimla, defendant No.4 had again taken her to the maternity ward and started her examination and in the meanwhile, she died in District Hospital, Solan on 26.4.1996. It is further alleged that Sandhya had died due to carelessness of defendant No.4 because had she examined Sandhya well in time and given proper treatment, her life could have been saved. It is further averred that Sandhya had died due to breach of duty on the part of defendant No.4 as even despite emergency, defendant No.4 did not attend upon Sandhya, as a result whereof she died.

17. Now, adverting to the written statement filed by defendant No.4, it would be noticed that she has tried to controvert all allegations set out in the plaint. She admitted that Sandhya was admitted in the hospital on 25.4.1996 at about 6.30 p.m. and not 5.00 p.m. as was alleged by the plaintiff. It was further averred that when she was brought to the hospital, then Dr. R.P. Sahni was on duty, who admitted her to the hospital and recorded his note that Sandhya was pregnant and was a bleeding case and she was accordingly put under the care of Dr. Kamlesh Sharma, who started the treatment. This defendant denied having come to the hospital at 9.00 p.m. on 25.4.1996 and further allegation of the plaintiff that she told the parents of Sandhya and gave certain instructions, were totally denied by her. Since her duty was off at 5.00 p.m. on 25.4.1996, she left the hospital to resume her duty on the next day i.e. 26.4.1996 at 9.00 a.m. However, in the intervening night of 25.4.1996 and 26.4.1996 at 2.45 a.m. Dr. Kamlesh

Sharma recorded that the patient should be shown to Gynaecologist and it was then at 3.30 a.m. on 26.4.1996 that defendant No.4 was summoned from the residence and she immediately reached the hospital without any loss of time and advised treatment to the patient. The patient was given all possible medical treatment i.e. glucose through intravenous and blood transfusion and was given all other medicines available with the hospital that were required before and after delivery. She was also presented for ultra sound and the report was that fetus was dead. This ultra sound test was done at about 9.00 a.m. on 26.4.1996 when the patient was quite normal and her condition was neither critical nor serious. It was then that defendant No.4 went to Out Door Patient (OPD) at 9.00 a.m. because her duty was there to examine out door patients and at that time the pulse condition of the patient was quite normal. Thereafter she remained under the care of Dr. Kamlesh Sharma, who was first on call duty. The consent of the present guardian i.e. father of Sandhya was taken as the plaintiff was not there to look after his wife and the father of Sandhya consented to the delivery by her daughter at any risk. Thus, it was with the consent of father of Sandhya that delivery took place and the same was normal. The parents of Sandhya had already been told previously that they should keep the blood ready which may be required after delivery as whatever blood was available in the hospital had been transfused to the patient. After delivery Sandhya suffered from postpartum haemorrhage and other complications, even then the mother and father of Sandhya could not make any arrangement of blood. The death of Sandhya was the direct result of postpartum haemorrhage and for no other reasons and, therefore, there was no negligence on the part of defendant No.4. Since the postpartum haemorrhage trouble had arisen after the delivery, the parents of deceased who were there were told to take the patient to IGMC, Shimla, but she died of the above said trouble in the hospital. However, before that all necessary medical treatment was given by defendant No.4.

18. The plaintiff did not file any replication to the written statement of defendant No.4.

19. Now, adverting to the evidence led by the plaintiff. PW-1 Dinesh Chauhan, is the husband of deceased Sandhya, but admittedly he was not there in the hospital at the relevant time and, therefore, his statement being based upon hear say is not admissible in evidence. However, the plaintiff has examined Bhagwan Singh as PW-2, who happens to be the father of deceased Sandhya, who had in fact got her admitted in the hospital.

20. PW-2 deposed that his daughter had been admitted by Dr. Sahani and at that time she remained normal for some time, however, thereafter her condition deteriorated because of profuse bleeding. After that he was informed in the hospital that there is a lady doctor specialist and she would be coming at 9 O'clock. She came and assured him that Sandhya's condition would be all right and thereafter she left. He thereafter tried to contact her over telephone but could not do so and was informed that she would be available only in the morning and he was asked to arrange for two bottles of blood. Defendant No.4 came at 9.30 a.m. and ordered for an ultra sound. After that the treatment continued and at about 12 O'clock his daughter Sandhya was ordered to be referred to Shimla, but when he consulted Gynaecologist i.e. defendant No.4 she refused to refer her and in between 12.30 – 1.00 p.m. Sandhya died. In case defendant No.4 would have referred Sandhya at night, then hopefully his daughter Sandhya would have survived.

21. In cross-examination by defendants No. 1, 3, 5 and 6, the witness stated that on 26.4.1996 by 10.00 a.m. he was convinced that medical treatment being given to his daughter was not proper, however, he did not deem it proper to make a complaint to the CMO as he was not permitted to go inside nor the situation was appropriate for doing so. He did not know whether the patient had been given all of blood by that time, which they had arranged for, or not. He denied that the doctor had asked him to arrange for more blood. He stated that he discussed with my son-in-law about the statement which was required to be given to the Court. He had accompanied his son-in-law and narrated the entire incident to the lawyer. He admitted that the glucose had been administered to his daughter, but specifically stated that blood had not been transfused. One boy had donated blood in the hospital in his presence and his name was duly

entered in the records. He denied the suggestion that excessive bleeding led to the death of his daughter as he could not arrange for the blood. He further denied the suggestion that the treatment as given by the doctor was right and proper and stated that his daughter died due to the negligence on the part of the doctor.

22. In cross-examination by defendant No.4, this witness stated that he had filed a written complaint to the CMO about the negligence on her part that had led to the death of his daughter. He did not consider it necessary to have the post mortem conducted. He further stated that when the complaint was moved to the CMO, he had assured that the inquiry would be got conducted, but he was not associated in the inquiry. He did not complain against Maya Ahuja i.e. defendant No.4 and stated that he had gone to call her twice i.e. at 4.00 p.m. and 7.00 a.m. on 26.4.1996. Her residence was below the Co-operative office. He stated that he did not know about the condition of child when the ultra sound was conducted. He denied the suggestion that defendant No. 4 was present there from 4 O'clock to 9 O'clock. Volunteered to state that she had come at 9.30 and Dr. Kamlesh had given treatment in her absence. At 7.00 a.m. defendant No. 4 informed him to arrange for blood. He went to Kandaghat at 8 O'clock and brought along a boy for donating blood, but could not re-collect his name. He had met the boy at 8.30 a.m. and both of them had come back by taxi, but he did not remember the registration number of the taxi. He had hired the taxi from Solan and paid Rs.400/- for to and fro journey. He met the boy in the Bazaar at Kandaghat and boy's father was a lawyer. He did not remember the name of boy or his father. He had never visited their residence, rather he stated that he knew the name of the boy at that time but by now, he had forgotten it. He denied the suggestion that Sandhya did not die of negligence or mistake on the part of the doctors, but admitted the suggestion that death was caused due to postpartum haemorrhage.

23. Now adverting to the evidence of the defendants. Dr. H.K. Premi, Professor of Obstetrics and Gynaecology, IGMC, Shimla was examined as DW-1 by defendant No.4, who in his examination-in-chief stated that he was Professor of Obsteritics and Gynaecology for the last three months. According to him, haemorrhage during pregnancy is responsible for 25 to 60% of maternal deaths occurring during pregnancy and labour and out of this post partum haemorrhage (Atonic) type is the most common. This type of haemorrhage is leading cause of maternal mortality in India as well as in our State. He stated that he had examined the records of the present case that was presented to him and on the basis of such record, he was of the opinion that fetal death in this case must have occurred because of retroplacental clot formation alongwith separation of the placenta. This type of haemorrhage to cause foetus death should be to the tune of 2.5 litres or more and or 1/3rd of the placenta should have separated to produce the death of the foetus and this retroplacental haemorrhage in turn can explain the post partum haemorrhage (Atonic) which the patient had and which eventually resulted in a death. According to him, such a massive haemorrhage it is mandatory first to replace the fluids in the form of ringers lacted, normal saline, dextro saline to maintain the renal and cerebral perfusion. Blood has to be given after the cessation of the bleeding to improve the oxygen carrying capacity of the patient. But transfusing the patient while she is profusely bleeding will be a futile exercise. He further stated that when the patient is in the state of labour pain and shock and further bleeding profusely in a particular hospital while under the treatment of a Gynaecologist, it is not advisable to refer her to any institution having advanced or better medical facilities. The blood group O negative is highly scarce and rarely available.

24. On being cross-examined by defendants No. 1 to 3, 5 and 6, he categorically admitted that after going through the records that was made available to him, he was of the opinion that the death of Sandhya occurred not because of any negligence or lapse on the part of the doctor or the mode of treatment adopted by them and further stated that in India, the major reason for such haemorrhage and the consequential death is the anemic state with which the patient actually suffered. The anemic pregnancy in India is 40 to 90%. The routine antenatal check up by the Gynaecologist avoids such like complications and consequential deaths occurring thereof.

25. In cross-examination by the plaintiff, the witness categorically admitted that he had not seen the original record of the patient i.e. Sandhya deceased and the same were not brought before him. At that stage the Court deferred the statement of this witness and on being re-called, specifically stated that he had not been asked by the Civil Hospital to give any opinion and further no record has been made available to him.

26. DW-2 H.B. Kashyap, Chief Pharmacist, D.H.Solan, only produced the record as was sought for.

27. Defendant No.4 Maya Ahuja appeared as DW-3, stated that she had been working in Civil Hospital, Solan as Gynae Specialist for a period of five years and had during this period conducted more than 1000 cases of delivery. Before that she had been working as Registrar in George Medical College, Lucknow. She had seen the original file regarding Sandhya serial No. 1252 of Civil Hospital, Solan, who according to her was admitted in the hospital by Medical Officer on duty Dr. Sahani on 25.4.1996 at 6.30 p.m. After admission, she was being treated by Dr. Kamlesh Sharma, who was on duty for that day. On the next day i.e. 26.4.1996 at 2.45 a.m. Dr. Kamlesh Sharma had called her to give special opinion regarding the said patient, upon which she immediately rushed to the spot within 15-20 minutes. On reaching the hospital, she examined the patient and on the basis of physical findings concluded that the patient was in labour pains. The condition of the foetus was not made out by the physical finding so the treatment was given to enhance the labour and even ultra sound was advised. The condition of the patient and foetus was explained to the attendant and risk involved was also explained in details and signatures taken. She proved Ext. DA, Ext.DB and Ext.DC which were the opinion and advice given by her. She further stated that ultra sound test was not available even in emergency during the night time. She advised the ultra sound examination of the patient which was conducted at 10 .00 a.m. on 26.4.1996. On receipt of the ultra sound report, it was revealed that the foetus was dead and there was a retroplacental clot that was present. As the case was of a serious nature and therefore, as a precautionary measure, she got the consent of the father of the deceased on form Ext.DD. On such consent being given, further treatment was carried out. At 12.30 p.m., she asked the attendants of the deceased to arrange blood which was of O negative which is rarely available and was not available in the hospital at the relevant time. The statement of the mother of the deceased Ext.DE was taken which was in her own hand and duly signed by her in her presence whereby she expressed her inability to arrange for the blood at that time. The patient delivered a dead male foetus at 12.45 p.m., the placenta deliver was normal. However, the uterus was filled with clots and the patient was having severe post partum haemorrhage but the bleeding could not be controlled and bimanual uterine massage was done, bitadine pack was put in the uterus to control the bleeding. Injection methergin 4-5 AMP and injection prostidin two Amp. was given. Intera venous lomodex was running and one unit of blood was also run. Despite all these measures, patient could not be revived. This treatment was given vide Ext.DF. According to this witness, this was the best and maximum possible treatment that could be given by her to the patient. One unit of blood was supplied at 12. P.m. by the Blood Bank of Civil Hospital. The witness reiterated that the attendants of the patient could not make available the blood despite having been asked to arrange the same in advance. She further stated that the father of the deceased never brought any person to her for blood donation and further stated that 20-60 percent of patient of maternal death are due to the post partum haemorrhage. She stated that ultra sound revealed that there was retroplacental clot formation and death of the foetus. To cause the death of foetus the size of retroplacental must have been of substantial size i.e. loss of 1-2 litres of blood in the uterus and this blood in the uterus prevents the uterus from contraction of muscles of uterus meaning to atony and that leads to post partum haemorrhage. Before the report of ultra sound the adequate management of patient had already started with I.v. line blood that had been given to the patient. The treatment was given by her in the hospital and was more than sufficient, but the attendants of the deceased failed to make available any blood. She further clarified that even if the blood was made available it would not have mattered much. She further stated that since the patient was already in labour pain and therefore it was not advisable to her for medical reasons to shift the patient to Shimla hospital or PGI, Chandigarh, more so, when the

patient had been bleeding profusely as there was all possibilities of the patient collapsing on the way. She stated that it was wrong on the part of the plaintiff to state that she had been summoned between 9.00 p.m. on 25.4.1996 to 2.00 a.m. on 26.4.1996. She stated that Dr. Kamlesh Sharma had examined this case at 2.45 a.m. on 26.4.1996 and she was there in the hospital at 3.30 a.m. Lastly she stated that cause of death of Sandhya was because of post partum haemorrhage and not on account of any act of any negligence on her part.

28. On being cross-examined by the plaintiff, the witness stated that in general practice in medical treatment serious patient, are always attended first. She denied the suggestion that she came to know at about 9.00 a.m. in the morning of 26.4.1996 that foetus had died in the uterus. She further denied the suggestion that she left the patient unattended and gone to the OPD at 9.00 a.m. on 26.4.1996. She further denied that there is no facility to treat patients like Sandhya in Civil Hospital, Solan. She clarified that prescription slip mark 'A' was not initialed by her and further stated that she could not say by whom the same was signed. She admitted her signature on Ext.DG and admitted that as per Ex. PG the patient was referred by her to Kamla Nehru Hospital, Shimla because of non-availability of blood. At that time the patient started collapsing, therefore, the treatment was started with the consent of her attendants. She further clarified that blood group O negative is a rare blood and was not available in the hospital. She did not refer the patient to IGMC, Shimla because this blood group O negative is/was not available there also, but admitted that she had not sought any information with regard to this from IGMC, Shimla. But clarified that she was knowing it as a Doctor that generally this blood group O negative was not available there also. She stated that the patient Sandhya was bleeding and was in labour pain. She was an anemic and her condition was not critical or serious at that time. She denied the suggestion that father of Sandhya Sh. Bhagwan Singh had approached her at about 8.00 p.m. and 9.00 p.m. on 25.4.1996 and she further denied that in response to this call, she had come to the hospital and after imparting instructions to nursing staff had left the hospital. She further denied the suggestion that after imparting instruction, she was again given a call by the father of deceased Sandhya but had not come to attend the patient. She admitted that Sandhya remained under her treatment and medication from 3.30 a.m. to 1.00 p.m. on 26.4.1996. She denied the suggestion that despite the death of foetus and clotting having occurred in uterus, she did not care about Sandhya and failed to attend her by remaining busy with the treatment of outdoor patients.

29. In response to the court question, this witness stated that she had visited the patient from 3.30 a.m. to 1.00 p.m. on 26.4.1996 approximately 10-12 times. After 12.00 p.m. till her death, she remained with the patient at her bed side. She gave a call to the Surgeon Dr. S.R. Sharma, Dr. Ashok Handa, Anaethist and Physician A. K.Arora, who came and helped her in reviving the patient.

30. On resumption of cross-examination, she admitted that any call given to the Specialist or other doctors, is recorded by the concerned doctor giving the call, but the call given to the aforesaid doctors was not recorded by her because she was busy attending the patient whose condition was deteriorating drastically. She denied that entire prescription and diagnosis of the patient was written by her after the patient had already died. She clarified that the reference regarding the calling of aforesaid doctors could not be noted down in the medical record after the death because the file had already gone to the CMO. She stated that the death certificate was not issued by the doctor attending the patient and is given by the Medical Superintendent. She further stated that the dead body of the patient was handed over by nursing staff to the relatives. The regular night duty of doctor remains from 9.00 p.m. to 9.00 a.m. She stated that her visiting time was not mentioned in the record. She denied the suggestion that it was incumbent upon the doctor to mention the time on the description of every visit. She denied the suggestion that the death of Sandhya occurred because she came late in response to the call given to her to attend the patient and thereafter remained negligent in giving her medical treatment. She further denied that non-availability of blood group O negative was the cause of death of the patient and clarified that cause of her death was post partum haemorrhage. She

lastly stated that the death occurred because bleeding in the uterus itself which led to the excessive bleeding after the delivery of dead foetus.

31. No evidence was led by other defendants i.e. 1 to 3, 5 and 6.

32. At this stage, Mr. Raman Sethi, learned counsel for respondent No.1 would argue that this is a fit case where the doctrine of *res ipsa loquitur* is applicable and, therefore, the plaintiff is in no obligation to further prove the negligence as the same is writ large. I am afraid that such plea cannot be accepted. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or commission which would result in harm or injury to the patient. Even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions. (Refer: ***Martin F. D'SOUZA vs. Mohd. Ishfaq (2009) 3 SCC 1).***

33. The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law require. (Refer: ***Indian Medical Association vs. V.P. Shantha and others (1995) 6 SCC 651).***

34. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to to an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason – whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society. (Refer ***Jacob Mathew vs. State of Punjab and another (2005) 6 SCC 1).***

35. Negligence in civil law is understood to be an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not

36. Medical negligence has been lucidly and elaborately explained by the Hon'ble Supreme Court in ***Jacob Mathew's*** case (supra) wherein it was observed as under:

> ***Negligence by professionals***
>
> ***"18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession***

which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In Michael Hyde and Associates v. J.D. Williams & Co. Ltd., [2001] P.N.L.R. 233, CA, Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charlesworth & Percy, ibid, Para 8.03)

19. An oftquoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair J. in Bolam v. Friern Hospital Management Committee, [1957] 1 W.L.R. 582, 586 in the following words:

> ***"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill . A man need not possess the highest expert skill... It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." (Charlesworth & Percy, ibid, Para 8.02).***

21. The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (Fourth Edition, Vol.30, Para 35):-

> ***"35. The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible***

body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."

The abovesaid three tests have also been stated as determinative of negligence in professional practice by Charlesworth & Percy in their celebrated work on Negligence (ibid, para 8.110).

23. The decision of House of Lords in Maynard v. West Midlands Regional Health Authority, [1985] 1 All ER 635 (HL) by a Bench consisting of five Law Lords has been accepted as having settled the law on the point by holding that it is not enough to show that there is a body of competent professional opinion which considers that decision of the defendant professional was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken, it was reasonable, in the sense that a responsible body of medical opinion would have accepted it as proper. Lord Scarman who recorded the leading speech with which other four Lords agreed quoted the following words of Lord President (Clyde) in Hunter v. Hanley 1955 SLT 213 at 217), observing that the words cannot be bettered:

> ***"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional menThe true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care...."***

Lord Scarman added:

> ***"A doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."***

His Lordship further added that :

> ***"[A] judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred."***

24. The classical statement of law in Bolam's case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before Courts in India and applied to as touchstone to test the pleas of medical negligence. In tort, it is enough for

the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

26. No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur.

30. The purpose of holding a professional liable for his act or omission, if negligent, is to make the life safer and to eliminate the possibility of recurrence of negligence in future. Human body and medical science both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

31. The subject of negligence in the context of medical profession necessarily calls for treatment with a difference. Several relevant considerations in this regard are found mentioned by Alan Merry and Alexander McCall Smith in their work "Errors, Medicine and the Law"

(Cambridge University Press, 2001). There is a marked tendency to look for a human actor to blame for an untoward event a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. To draw a distinction between the blameworthy and the blameless, the notion of mens rea has to be elaborately understood. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. Human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator i.e. the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how in real life the doctor functions. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.

32. At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are: (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation the person holding the 'smoking gun'.

41. Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Anr. (1969) 1 SCR 206 was a case under Fatal Accidents Act, 1855. It does not make a reference to any other decided case. The duties which a doctor owes to his patients came up for consideration. The Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor without taking the elementary caution of giving anaesthetic to the patient. The doctor was held guilty of negligence and liability for damages in civil law. We hasten

to add that criminal negligence or liability under criminal law was not an issue before the Court as it did not arise and hence was not considered.

45. M/s Spring Meadows Hospital and Anr. v. Harjol Ahluwalia through K.S. Ahluwalia and Anr. (1998) 4 SCC 39 is again a case of liability for negligence by a medical professional in civil law. It was held that an error of judgment is not necessarily negligence. The Court referred to the decision in Whitehouse & Jorden, [1981] 1 ALL ER 267, and cited with approval the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence:-

> ***"The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."***

48. We sum up our conclusions as under:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time

(that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

37. The basic principle relating to medical negligence is known as the Bolam Rule as laid down in ***Bolam vs. Friern Hospital (1957) 1 WLR 582 : (1957) 2 All ER 118*** and the same has been approved by the Hon'ble Supreme Court in ***Jacob Mathew's*** case. Fixing negligence is the standard of the ordinary skilled doctor exercising and professing to have that special skill, but a doctor need not possess the highest expert skill.

38. Despite the aforesaid principles, difficulties have been faced by the Courts in the application of those general principles to specific cases. The Courts have recognised that law, like medicine, is an inexact science. However, the Courts have recognised that (i) Judges are not experts in medical science, rather they are laymen and, therefore, this itself often difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective, since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and (ii) a balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation.

39. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. There is a tendency of confuse a reasonable person with an error-free person. An error of judgment may or may not be negligent. It depends on the nature of the error. Also, now what is reasonable and what is unreasonable is a matter on which even experts may disagree. Also, they may disagree on what is a high level of care and what is a low level of care. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation, or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.

40. The standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. Also, where the charge of negligence is of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time.

41. The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalized if he adopts the former procedure, even if it results in a failure.

42. There may be a few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, the doctor should not be held liable. Science advances by experimentation, but experiments sometimes end in failure. However, in such cases, it is advisable for the doctor to explain the situation to the patient and take his written consent.

43. Apart from the above, as held in ***Jacob Mathew's*** case (supra), negligence in the context of medical profession necessary calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from the one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows, a practice acceptable to the medical profession of that day, he/she cannot be held liable for negligence merely because a better alternative course

or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the doctor followed.

44. Now, adverting to the judgment rendered by the learned trial Court, it would be seen that the said Court has been swayed more by emotions than by reasons. The learned Court below has failed to take into consideration the pleadings with respect to the negligence and thereafter ignored the evidence available on record, which in no manner establishes the negligence on the part of the defendants, more particularly defendant No.4.

45. The plaintiff has failed to establish the plea of negligence on the part of any of the defendants either in the pleadings or in the evidence so led, therefore, there are no reasons for the trial Court to have drawn a conclusion by infusing its own concepts of morality and so called professional ethics and professional aptitude and thereby decreed the suit by holding the defendant No.4 to be negligent.

46. Undoubtedly, this is an unfortunate case where Sandhya died in the hospital, but her death cannot be attributed to any laxity or negligence on the part of the doctors, attending to her, more particularly defendant No.4.

47. The plaintiff has led no evidence to show that in what manner defendant No.4 has not acted with standard of care, whereas defendant No.4 has led sufficient evidence to show that she acted in accordance with the general and approved practice. In fact the only allegations set-out against defendant No.4 appears to be that she did not attend the patient promptly on 25.4.1996 and thereafter did not attend her after 9.00 a.m. on 26.4.1996. However, both these allegations are belied from the pleadings as also the evidence led on record.

48. As observed by the Hon'ble Supreme Court, no sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake and a single failure may cost him/her dear in his/her career.

49. Apart from the above, it is the responsibility of the government hospital to ensure that there is always a doctor on duty who is available round the clock and the doctor on duty is not only expected but is duty bound to constantly monitor the patient round-the-clock. But then there is no rule which requires a particular doctor be it even a specialist to work round the clock for 24 hours. The doctors have the fixed duty time and work in shifts. It is only when there is an emergency that the specialist in the concerned field is called upon to attend upon the patient. In the instant case, admittedly, defendant No.4 had rendered duty from 9.00 a.m. to 5.00 p.m. on 25.4.1996 and thereafter as per the rules and practice after completing her shift, it was the shift of Dr. Kamlesh Sharma, who after facing difficulty in treating the patient had called upon defendant No.4 to attend upon the patient at 2.45 a.m. and it is not in dispute that defendant No.4 in fact came and attended the patient at 3.30 a.m. on 26.4.1996 and only after treating her, she left for her residence. Not only this, as per the duty roster, she again reported at 9.00 a.m. on 26.4.1996 and thereafter attended the patient.

50. Lastly even defendants No. 1 to 3 could not have been held vicariously liable, that too, observing that there have been mal-administration of the hospital or that they have been non-serious attitude and indifferent work culture aggravated by the negligent act performed by defendant No.4.

51. In view of the aforesaid discussion, I find merit in this appeal and the same is accordingly allowed. The judgment and decree dated 5.1.2001 passed by learned District Judge, Solan in Civil Suit No. 8/1 of 1997 is set-aside and resultantly the suit filed by the plaintiff is ordered to be dismissed. The pending application(s) if any, also stands disposed of, leaving the parties to bear their own costs.

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