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Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel for the petitioner submitted that he did not want to continue with the present petition and same be dismissed as withdrawn- In view of statement of the Learned Counsel, petition is dismissed as withdrawn.

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Code of Criminal Procedure, 1973- Section 378- Accused was found sitting in the Volvo Bus on seat No. 30- he got perplexed on seeing the police- conductor disclosed that luggage of the accused was inside the dickey and was marked with chalk - one bag bearing Mark seat No. 30 was taken out and during the search 190 grams of charas was recovered – accused was acquitted by the Trial Court- an application was filed seeking leave to appeal against the order passed by trial Court- independent witnesses had turned hostile- merely because, prosecution witnesses corroborated each other and link evidence was established is not sufficient when the bag was not produced before the Court- Trial Court had appreciated the facts properly- hence, leave to appeal refused.

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Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 465 and 471 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- police had not claimed that custodial interrogation is necessary in the present case- interests of the State or general public will not be affected by keeping the accused inside the jail- therefore, bail granted.

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Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail.

Title: Jatinder Singh Vs. State of Himachal Pradesh Page-122

Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be

disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail.
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Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.
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Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.
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Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.
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Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.
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Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.
Title: Himesh Sharma Vs. State of H.P Page-229

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition for quashing the FIR registered against him- respondent contended that final report has been presented before the Court; therefore, petition is not maintainable- petitioner contended that the dispute is essentially of a civil nature and is given a cloak of a criminal case, therefore, Court has jurisdiction to quash the criminal proceedings- held, that complaint can be quashed where a dispute is predominately of a civil nature and not when the allegation against the petitioner constitutes a criminal offence - these principles cannot be made applicable when a prima facie case is made out against the petition which has culminated

into a charge-sheet- only the Court where the charge-sheet has been filed should be left to deal with the same- petition dismissed.

Title: Lashkari Ram Vs. State of H.P. & anr. Page-250

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition seeking quashing of FIR as well as order passed by JMIC, Kasauli and Sessions Judge, Solan- it was alleged that respondent No. 2 had sold 11,170 apple boxes to respondent No. 3- respondent No. 3 had paid amount of Rs. 20 lacs and remaining amount was not paid- 11,170 apple boxes were stored in the cold store owned by petitioner No. 1- held, that respondent No. 3, purchaser of the goods, had acquired title from respondent No. 2- mere non-payment of part of sale consideration cannot constitute an entrustment- thus, no offence punishable under Section 406 of IPC was made out against the respondent No. 3 or respondent No. 1- further, petitioner was not liable to pay the sale consideration and it cannot be held liable for the non- payment of the sale consideration- accordingly, FIR ordered to be quashed- however, the order regarding the sale of the apples cannot be challenged on behalf of petitioner No. 1 who is merely a bailee.

Title: Uma Akash Agro Pvt. Ltd. and others Vs. State of H.P. and others Page-90

Companies Act, 1956 - Section 433 (e)- Petitioner claimed that respondent/company was indebted to the petitioner for a Sum of Rs. 12,06,580/- against Bill dated 26.9.2006- service tax on previous bill of Rs. 30,000/- and penalty of Rs.1,50,000/- for backing out of the contract is payable- held, that where the company disputes the claim and the dispute is bona-fide, it cannot be said that company was avoiding its liability- said inference can only be drawn when debt is undisputed or bona-fide or some sham defence is sought to be raised towards the liability -winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bonafide disputed by the Company- balance-sheet shows that Company is financially sound and solvent – respondent has disputed the debt and it cannot be said that there was no bonafide reason for non-payment of the amount- therefore, winding up petition cannot be allowed for realizing the debt.

Title: Soni Gulati & Co. vs. JHS Svendgaard Laboratories Limited Page-182

Constitution of India, 1950- Article 226- Petitioner pleaded that more than 50% of the paper was out of syllabus –Registrar, H.P. University submitted a report that some questions were out of syllabus- held, that students should not suffer for the fault of the university- University directed to award marks regarding the questions set out of syllabus to the students.

Title: Kamal Dev Verma son of Sh. R.C.Verma & others Vs. H.P. University & others Page-275

Constitution of India, 1950- Article 226- Petitioner sought a writ of certiorari for quashing an order of the cabinet to shift Divisional Office of HPPWD from Balakrupi to Tanda- held, that a decision to shift the office of DFO was a policy decision and the Court will not interfere with the same except where the policy is contrary to Law or Constitution or is arbitrary or irrational - merely because certain section of the public does not approve the decision is no ground to interfere with the same- petition dismissed.

Title: Jagjeevan Singh and another Vs. State of H.P. and another Page-21

Constitution of India, 1950- Article 226- Petitioner was appointed as clerk-cum-typist in Indian Red Cross Society- she claimed regularization of her services- claim was denied by the Labour Court on the ground that Red Cross Society is not a State and the petitioner is not an employee of the State Government- held, that Red Cross Society falls within the definition of State under Article 12 of the Constitution of India- it cannot deny regularization to its employee for 26 years, whereas employees in the State Government are regularized after 7 years – petition allowed and the respondent directed to consider the case of the petitioner for regular appointment.

Title: Seema Mehta Vs. Chairman-cum-Deputy Commissioner and another Page-236

Constitution of India, 1950- Article 226- Petitioner was appointed as Part Time Water Carrier- her services were terminated- petitioner claimed that no notice was served upon her prior to the termination of her services – respondent stated that date of birth of the petitioner was recorded as 1940 in the family register- therefore, she had attained the age of superannuation ever prior to her appointment- when this fact came to the notice of the respondent, petitioner was retired from the services- held, that order retiring the services of the petitioner involved civil consequences, therefore, a notice was required to be served upon the petitioner prior to the passing of the order- since no notice was served upon the petitioner, therefore, petition allowed and the order passed by the respondent set aside.

Title: Shankari Devi Vs. State of H.P. & ors. Page-243

Constitution of India, 1950- Article 226- Petitioner was debarred from taking part in any activities or proceedings of the Gram Panchayat by the Deputy Commissioner- an appeal was preferred before Divisional Commissioner which was dismissed- held that order passed by Divisional Commissioner is non-speaking one, hence, order passed by him set aside with the direction to pass a reasoned and speaking order.

Title: Dharam Singh Negi Vs. State of H.P. & others (D.B.) Page-181

'G'

Gramin Dak Sevak (Conduct and Employment) Rules, 2001- Rule 10- Petitioner was involved in indiscipline and forgery- Inquiry was conducted against him- Inquiry Officer found that all the charges were proved – Disciplinary Authority imposed the penalty of the removal – record established that petitioner had forged the signatures of the Head of Village on many occasions- he was involved in indiscipline and had undermined the authorities and had disgraced them - a person who indulges in illegal activities and commits fraudulent or frivolous acts by deceitful means, is to be dealt with iron hands – Writ Court cannot re-appreciate the evidence- considering the gravity of the accusations, the punishment cannot be said to be disproportionate or shocking - Writ petition dismissed.

Title: Roop Chand Vs. Union of India & others (D.B.) Page- 137

'H'

H.P. Land Revenue Act, 1954- Section 45- Petitioners filed an application before Learned A.C. 2nd Grade stating that they were in possession and their possession be recorded in the revenue record- correction of revenue record was ordered by Learned A.C. 2nd Grade- this order was challenged unsuccessfully before Sub Divisional Collector and Divisional Commissioner - orders were set aside by Financial Commissioner- petitioners claimed that amount of Rs.10,000/- was received by predecessor-in-interest of the respondent and the possession was delivered at the spot- held, that oral sales were not permissible in the year 1980 when amount was paid- sale was effected for more than Rs. 100/- and could have only been made by way of registered document- statement was vague and will not amount to the

from a height cannot be ruled out, especially when body was recovered at a distance of more than 100 meters below the path- accused acquitted.

Title: Hema Ram Vs. State of Hemachal Pradesh (D.B.) Page-218

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased left his house to bring some articles but did not return - his dead body was found by his wife-it was revealed during the investigations that accused had consumed alcohol with the deceased and they had killed the deceased due to animosity- accused 'D' confessed to commission of crime before 'Y'- wife of the deceased and PW-2 admitted that there was no enmity between the deceased and the accused- there was no evidence that deceased was last seen with the accused- extra judicial confession made by the accused that they had sent the deceased 'Upar' (Abode of God) cannot be construed to be an admission of guilt- statement of witness to recovery was not inspiring confidence- deceased was under heavy influence of liquor- Doctor had not ruled out the possibility of sustaining injury by way of fall- held, that in these circumstances, acquittal of the accused was justified.

Title: State of Himachal Pradesh Vs. Durgu Ram and another (D.B.) Page-152

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased solemnized love marriage with accused no. 1- both husband and wife used to quarrel with each other- she wanted to take control of the finances- she and her brother subjected the deceased to cruelty and abetted him to commit suicide- deceased died by jumping into the river- held, that in order to prove the abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary- parents of the deceased nowhere deposed that accused wanted to control the finances- colleagues of the deceased stated that salary was remitted directly to the bank- Bank Manager deposed that deceased was operating the account himself and all the benefits of the deceased were released to his mother- no complaint was made by the deceased regarding the cruelty- mere daily quarrels cannot amount to abetment – in these circumstances, acquittal of the accused was justified.

Title: State of Himachal Pradesh Vs. Renuka Devi & others (D.B.) Page-158

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased was married to accused 'K'- accused harassed the deceased for bringing insufficient dowry- she narrated the incident of harassment to her father, step mother, Pardhan and ward member- milk was not provided to her children on which she complained to her father- complainant provided cow to the deceased two months prior to her death - deceased died and was cremated without intimating any person- held, that there should be nexus between abetment and suicide- no positive, cogent and reliable evidence was led to prove that accused had abetted the deceased to commit suicide- accused acquitted of the commission of offence punishable under Section 306 of IPC.

Title: State of Himachal Pradesh Vs. Kaur Singh son of Utam Singh & others (D.B.) Page-167

Indian Penal Code, 1860- Section 395- PW-2 had kept boxes of nose pins and other ornaments in her home- 4-5 persons entered in the room armed with pistols and darat- they searched the almirah and took away the ornaments- mobile phone and chains were also taken away- prosecution witnesses stated that door was opened after some time- it was not believable that door could be opened from inside when it was bolted from outside- in case, door was opened by pushing it, latch would have broken but police had not seized the broken latch- further, prosecution version that accused entered the house when PW-3 used

the toilet, cannot be believed- presence of witnesses to the disclosure statement was doubtful- local police was not informed about the recovery nor independent witness was associated at the time of seizure of the mobile phone- independent witnesses ought to have been joined at the time of recovery -further recovery was made from an open place which was not believable - DNA profile matched with one accused but the Medical Officer did not depose that sample was preserved by her- Medical Officer, CH, Sundernagar was not examined to prove preservation of blood sample- it was not believable that door of gold smith could be opened by pushing it inside- held, that these circumstances create doubt regarding prosecution version- accused acquitted.

Title: Azam Vs. State of H.P. (D.B.) Page-65

Indian Penal Code, 1860- Section 498-A read with Section 34 - Accused 'K' used to harass the deceased for bringing insufficient dowry- she narrated the incident of harassment to her parents as well as Pardhan and ward member- milk was not provided to her children on which she complained to her father- two months prior to her death, complainant provided cow to the deceased- deceased died and was cremated without intimating any person-PW-1 specifically stated that accused used to call the deceased 'Kanjar' (Person leading illicit life)- held, that calling a married woman 'Kanjar' ipso facto amounts to cruelty upon married woman- other prosecution witnesses also deposed that deceased used to complain about the harassment- held that the prosecution had proved its case for the commission of offence punishable under Section 498-A read with Section 34 IPC.

Title: State of Himachal Pradesh Vs. Kaur Singh son of Utam Singh & others(D.B.) Page-167

Indian Penal Code, 1860- Sections 302 and 201- Accused told that deceased had not returned from Sujanpur- people got suspicious and conducted search of the house of the accused- blood stained bed-sheet, Chadar, Dupatta and a blanket were recovered from an almirah in the house- matter was reported to the police – inquiry was made from the accused – he confessed to the killing of the deceased- accused made a disclosure statement that he had killed his wife and had concealed the body in a septic tank - deceased was recovered from septic tank but she was breathing- she succumbed to her injuries subsequently- a danda was recovered on the basis of disclosure statement made by the accused- blood stained clothes were also recovered from the house of the accused- blood was detected on the shirt and Salwar of the deceased- held, that chain of circumstances were complete and the accused was rightly convicted by the Court.

Title: Ranjodh Singh Vs. State of Himachal Pradesh Page-51

Indian Penal Code, 1860- Sections 302 and 201 read with Section 34- Deceased had engaged the services of 'B' and other Gorkhas- wife of the deceased told that deceased had not reached his home, although, he had told his mason or labrourers that he was going to his house- a missing report was lodged subsequently- accused got the dead body, a stick, wooden plank with which the dead body was tied and rope recovered – he also gave Nishandehi of the place where he had killed the deceased- Medical Officer stated that it was not possible to opine about the exact cause of death but the possibility of the head injury could not be ruled out- no material was placed on record to show that there was any dispute regarding the payment- there was discrepancy regarding the person who had recorded the statement of the accused under Section 27 of the Indian Evidence Act- danda, wooden plank or rope were not sent for analysis to FSL- no entry was made at the time of taking out the

case property for production before the Court- held, that in these circumstances, prosecution version was not proved.

Title: Bishan Singh alias Bishnoo Vs. State of Himachal Pradesh (D.B.) Page-337

Indian Penal Code, 1860- Sections 302 and 201 read with Section 34- Marriage of the deceased was settled with the daughter of co-accused 'N'- deceased had given Rs. 50,000/- to 'N' as marriage consideration amount- the daughter of 'N' stayed with deceased at Kullu-Manali for about 10-12 days – 'N' brought back his daughter from Manali and got her married somewhere else- deceased used to demand money from 'N'- accused used to quarrel with deceased- deceased went to the house of 'N' for demanding money but did not return- his dead body was found in the water of a dam – accused were arrested- clothes and stick were recovered at their instance- Medical Officer opined that deceased could have died by infliction of injury with a stick- case of the prosecution is based upon circumstantial evidence- dead body was found in a dam and the possibility of the involvement of 3rd person could not be ruled out- co-accused had sustained injuries which were not explained by the prosecution, which means that prosecution has concealed the genesis of the incident- witnesses to the disclosure statement did not support the prosecution version- blood group of the blood detected on the clothes was not determined and, therefore, it is not sufficient to connect the accused with the commission of crime- suspicion howsoever strong cannot take place of proof – held, that in these circumstances, acquittal of the accused was justified.

Title: State of Himachal Pradesh Vs. Nomu Ram and others (D.B.) Page-277

Indian Penal Code, 1860- Sections 302 and 376- Accused attempted to rape the deceased- deceased resisted on which accused gave a blow on the head of the deceased with a stone- he met 'D' and told him that he had murdered a woman and needed money to run away- 'D' told the contractor regarding the murder who advised 'D' to take the accused to Pradhan- accused made extra judicial confession before Pradhan- Pradhan informed the police on which FIR was registered- Pradhan improved his version in the Court making his statement doubtful- there were contradictions in the statements of the prosecution witnesses- making of extra judicial confession to a person who is not known to the accused is highly improbable – further name of the victim was not mentioned in the extra-judicial confession- extra-judicial confession is a weak piece of evidence- extra-judicial confession was not corroborated and was lacking in detailed particulars –held, that in these circumstances, acquittal of the accused was justified.

Title: Govinda alias Rahul Vs. State of Himachal Pradesh Page-2

Indian Penal Code, 1860- Sections 304-II and 506-I read with Section 34- Complainant party wanted the accused to remove the obstruction caused on the passage commonly used by the villagers - accused failed to remove such obstruction - when she tried to remove the obstruction, accused pelted the stones- one stone hit 'V' who sustained injuries- he was taken to PGI where he succumbed to the injuries- Medical Officer opined that there was fracture of skull and death was caused on account of shock caused due to extra dural haemorrhage - presence of the deceased was duly proved by the complainant party- testimonies of the witnesses corroborated each other- it was duly proved that accused had hurled abuses and had proclaimed to settle the matter – they caused injuries to the complainant party- all the accused were together and shared their common intention- hence, conviction of the accused was justified.

Title: Nand Lal and others Vs. State of H.P. Page-127

Indian Succession Act, 1925- Section 63- Plaintiff claimed that no Will was executed by her husband during his life time and the Will propounded by the defendant is invalid, inoperative and ineffective qua the rights of the plaintiff- wife and mother of the deceased were alive at the time of execution of the Will, however, no reference was made to them in the Will- there is no evidence to suggest that deceased did not have a cordial relation with his mother and wife, therefore, it is highly improbable that a person executing a Will in favour of third person, will not make a reference to his wife and mother at the time of execution of the Will- deprivation of the natural heirs is not a suspicious circumstance but in view of non-mentioning of the legal representative of the deceased, the Will is required to be seen with care and caution- propounder is required to prove that there was some reason for leaving aside his aged mother and wife- propounder had failed to prove that he attended to the deceased at the time of his illness and was with him in the hospital- mere registration of the Will does not dispense with the statutory requirement of proving the Will in accordance with law- where there are some suspicious circumstances, burden is upon the propounder to prove the due execution of the Will.

Title: Subhash Kumar Vs. Mandra Devi (deceased) through L.R.s Ujjagar Singh and others Page-198

'L'

Land Acquisition Act, 1894- Section 18- One of the petitioners had died during the Reference Petition before the trial Court- this fact was not brought to the notice of trial Court- held, that in case award was passed in ignorance of death of the sole petitioner, award has to be set aside - in case of more than one petitioner, death of one of the petitioners does not make the award a nullity and the legal representatives can be brought on record in appeal.

Title: General Manager, Northern Railway vs. Ramesh Chand and others Page-102

'M'

Motor Vehicle Act, 1988- Section 149- Driver was driving the Mahindra Jeep whose gross weight is 2270 kilograms, therefore, it falls within the definition of light motor vehicle and endorsement of PSV is not required in the driving license– Insurance Company had not led any evidence that accident had taken place due to the reason that driver of the offending vehicle was competent to drive one kind of vehicle and he was found driving different kind of vehicle – held that in these circumstance, Tribunal had fallen in error in saddling the owner and the driver with the liability.

Title: Manohar Lal Vs. Sukh Bahadur & others Page-29

Motor Vehicle Act, 1988- Section 149- Insurance Company covered the risk of 8 persons including 5 passengers; therefore, deceased cannot be called to be a gratuitous passenger.

Title: Oriental Insurance Co. Ltd. Vs. Kishan Chand & others Page-37

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that driver did not have a valid and effective driving licence at the time of accident- held, that it was for the insurer to plead and prove that owner had committed willful breach of the terms and conditions of the policy- insurer had not led any evidence to prove the breach of the terms and conditions of the policy and it was rightly held liable.

Title: United India Insurance Company Ltd. Vs. Madhvender Kuthleharia and others Page-62

Motor Vehicle Act, 1988- Section 149- MACT held that owner was liable to pay compensation- driver had a learner driving licence w.e.f. 22.10.2002 to 21.4.2003- the accident had taken place on 14.10.2002, therefore, driver did not have a valid driving licence at the time of accident- held, that in these circumstances, insured had committed the breach of the terms and conditions of the policy and owner was rightly ordered to pay compensation.

Title: Ajay Kumar Vs. Shubham Kumar and others Page-1

Motor Vehicle Act, 1988- Section 149- Petitioner pleaded that deceased had gone to attend the marriage but on return, the vehicle met with an accident- held, that in view of averments made in the petition, injured and deceased were travelling as gratuitous passengers- insurer was rightly directed to satisfy the awards with a right to recovery.

Title: Oriental Insurance Company Ltd. Vs. Geeta Devi & others Page-325

Motor Vehicle Act, 1988- Section 166- Claim petition was dismissed on the ground that claimant had earlier filed a claim petition which was dismissed in default- held, that provisions of Code of Civil Procedure are not applicable to MACT- procedural technicalities cannot be used to decline the claim of a person- petition was dismissed in absence of both the parties and, therefore, second petition was maintainable.

Title: Jagdish Vs. Rahul Bus Service & others Page-298

Motor Vehicle Act, 1988- Section 166- Claimant had boarded the bus- she sustained injuries in the accident and was taken to PGI, Chandigarh- her right arm was amputated below elbow- she was only 13 years old and a student of class 6th – she sustained 80% disability- Tribunal awarded compensation of Rs. 2,09,400/- with interest @ 7.5% per annum from the date of the Claim Petition - held, that Tribunal had not assessed the just compensation- it had not taken into consideration the physical frame of the injured-claimant, her marriage prospects, amenities, future income, pain and sufferings and other prospects- claimant was aged 13 years and would have become earning hand after five years, even a housewife is earning Rs. 6,000/- per month by making contribution towards her family- keeping in view the percentage of disability, loss of income can be taken as Rs. 4,000/- per month and applying multiplier of '15', claimant would be entitled for Rs. 7,20,000/- under the head 'loss of earning' – amount of Rs. 50,000/- awarded towards the 'future medical treatment'- amount of Rs. 40,000/- awarded under the head 'pain and sufferings'- Rs. 1,00,000/- awarded under the head 'future pain and sufferings'- Rs. 1,00,000/- awarded under the head 'loss of amenities of life' and Rs. 2,00,000/- awarded under the head 'marriage prospects'- thus, total amount of Rs. 12,31,400/- awarded to the petitioner.

Title: Pooja Devi Vs. General Manager, Punjab Roadways & others Page-42

Motor Vehicle Act, 1988- Section 166- Deceased was drawing salary of Rs. 13,315/-- Tribunal had wrongly assessed his monthly income as Rs.12,455/-- amount of 50% was wrongly deducted towards his personal expenses, whereas 1/3rd amount was to be deducted towards personal expenses- compensation enhanced to Rs.14,02,800/-.

Title: Balkar Singh & others Vs. Ram Pal alias Sanju & others Page-295

Motor Vehicle Act, 1988- Section 166- Rashness and negligence is an essential ingredient for maintaining the claim petition- it is for the claimant to lead evidence and to prove on

preponderance of probabilities that the driver had driven the offending vehicle rashly and negligently- respondent examined 6 witnesses who proved that respondent was not driving the vehicle but deceased was driving the vehicle at the time of accident- this evidence was not rebutted- therefore, claimants are not entitled for any compensation.

Title: Kamla Devi & others Vs. Ravinder Gupta Page-27

Motor Vehicle Act, 1988- Section 168- Claimant had claimed the compensation of Rs.12,00,000/-, whereas, he was entitled for more compensation- held, that it is permissible for MACT to grant more compensation than claimed- it is duty of Claim Tribunal to award just compensation.

Title: Jagdish Vs. Rahul Bus Service & others Page-298

Motor Vehicle Act, 1988- Section 169- First petition was consigned to record room- it was contended that second petition is not maintainable- held, that even if first petition had been dismissed in default, second petition is maintainable.

Title: Anupam Kumar Vs. Harmeet Singh Ghai & others Page-293

Motor Vehicle Act, 1988- Section 169- It was contended that claimant had not lodged FIR and therefore, claim petition is not maintainable- held, that lodging of FIR, dismissal of criminal case or acquittal cannot be ground to deny compensation.

Title: Jagdish Vs. Rahul Bus Service & others Page-298

'N'

N.D.P.S. Act, 1985- Section 15- 138.500 kg of poppy husk was found in the vehicle of accused - PW-1 to PW-3 did not support the prosecution version- all the seals were not found intact in the Court- no entry was made regarding taking out of the case property from Malkhana and depositing it - held, that in these circumstances, prosecution had failed to prove that contraband was recovered from exclusive and conscious possession of the accused- accused acquitted.

Title: Hardeep Singh Vs. State of H.P.(D.B.) Page-258

N.D.P.S. Act, 1985- Section 20- Accused was carrying a bag which was containing 2 kg 500 grams charas - independent witness had not supported the prosecution version- accused was not apprised of his legal right to be searched before Magistrate or Gazetted Officer- no entry was made regarding the taking out of the case property after it was brought from the Court- it has caused serious prejudice to the accused- held, that in these circumstances, prosecution version was not proved – accused acquitted.

Title: Rajesh Kumar Vs. State of H.P. Page-231

N.D.P.S. Act, 1985- Section 20- Accused 'P' was carrying a boru on his shoulder- accused 'P' and 'A' were holding a pithu bag from each side- they tried to run away on seeing the police but were apprehended- their search was conducted- boru contained 24 kg. of charas and pithu contained 8 kg. of charas- prosecution witnesses admitted that police officials prepared the documents together by sitting in the police station- no entry was made in the malkhana register regarding taking out of the property for sending it to FSL for analysis- further, there is no entry regarding the re-deposit or taking the case property to the Court or deposit in malkhana after it was brought from the Court- no independent witness was associated- held, that in these circumstances, case of the prosecution was not proved- accused acquitted.

Title: Deep Bahadur Vs. State of H.P. (D.B.) Page-95

N.D.P.S Act, 1985- Section 20- Search of the vehicle was conducted during which 500 grams of charas was recovered – when parcel Ex. P1 was opened in the Court, it was

containing another parcel Ex. P2 sealed with seal impression 'P'- seal impression 'P' was put on the parcel when the contraband was seized- parcel was opened for analysis at FSL, Junga and the seals were bound to be removed at FSL- no entry was made in the Malkhana register regarding taking out of the property for production before the Court- case property was to be taken out after making entry in the Malkhana register and after recording the same in the daily dairy – case property was to be re-deposited in malkhana register and entry in the daily dairy was to be recorded- held, that these circumstances make it doubtful that case property remained intact- hence, accused acquitted.

Title: Sashi Kumar and another Vs. State of Himachal Pradesh (D.B.) Page-116

'P'

Prevention of Corruption Act, 1988- Section 13(2)- **Indian Penal Code, 1860-** Sections 467, 468, 471, 419, 420 and 120-B- a surprise checking of the record was conducted during which signatures on some of the forms were found to be forged- FIR was registered- SDM, Palampur initiated inquiry regarding the licence being forged by the accused- ADM, Kangra concluded that accused had forged the signatures- however, signatures on the forged licences, signatures of the accused and SDM were not sent for comparison- SDM admitted that accused used to bring licences in bulk and he used to sign them in bulk - hand-writing expert also found that licences were in hand-writing of the accused but this opinion is not sufficient as the hand-writing of the SDM was not sent for comparison- further, no evidence was led that applicant had paid the driving licence fee in excess of the prescribed fee, therefore, offence punishable under Section 13(2) of Prevention of Corruption Act, 1988 was not proved- held, that in these circumstances, acquittal of the accused was justified.

Title: State of H.P. Vs. Kulbhushan Sood and others (D.B.) Page-193

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G.M. (Operation) S.B.I. & Anr. versus R. Periyasamy, 2015 AIR SCW 455

Gian Mahtani Vs. State of Maharashtra AIR 1971 SC 1898

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

Gurpal Singh versus Darshan Singh 1998 (1) S.L.J. 174

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Harishchandra Ladaku Thange v. State of Maharashtra, (2007) 11 SCC 436

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh (2014) 9 SCC 78

Hussain Pasha versus Andhra Pradesh State Road Trans. Corpn. & Anr., II (2007) ACC 454

'I'

IBA Health (India) Private Limited vs. INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553

Indian Council for Enviro-Legal Action Vs. Union of India and others (2011) 8 SCC 161

Israr v. State of U.P. AIR 2005 SC 249

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J.Samuel and others vrs. Gattu Mahesh and others, (2012) 2 SCC 300

Jagdish and others vs. State of Rajasthan and another, 1998 Cr.L.J. 554

Jose Vs. The State of Kerla (Full Bench), AIR 1973 SC 944

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Karmi Devi versus Satendra Kumar Singh and another, reported in 2010 ACJ 1661

Kavita versus Deepak and others, 2012 AIR SCW 4771

Krishan Murari vs. Amar Dutt Sharma 1994 (Suppl.) Sim. L.C. 242

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Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832,

Lalla Ram versus D.C.M. Chemical Works Ltd. and another, (1978) 3 SCC 1

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M.Mohans vs. State, AIR 2011 SC page 239

M.P. Electricity Board versus Jagdish Chandra Sharma, (2005) 3 Supreme Court Cases 401

Madhu Versus State of Kerala, (2012) 2 SCC 399

Madhusudan Gordhandas & Co. Vs. Madhu Woollen Industries (P) Ltd. 1971(3) SCC 632

Makhan Singh vrs. State of Haryana, JT 2015 (4) SC 222

Mantoo Sarkar versus Oriental Insurance Company Limited and others, (2009) 2 Supreme Court Cases 244,

Mediquip Systems (P) Ltd. Vs. Proxima Medical System GmbH 2005(7) SCC 42

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

Mookkiah and another Vs. State, (2013) 2 SCC 89

Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43

Musheer Khan and another Vs. State of Madhya Pradesh, AIR 2010 SC 762

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N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674

Nancy Bhatt & another Vs. State of H.P. and another, ILR, H.P. Volume XLV- II, 2015, Page 550

Nand Lal and another vs. State of H.P. and others, 2014 (2) HLR (DB) 982

Nanhar Vs. State of Haryana, (2010) 11 SCC 423

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

New India Assurance Co. Ltd. versus C. Padma and another, AIR 2003 Supreme Court 4394

New India Assurance Co. Ltd. versus R. Srinivasan, AIR 2000 Supreme Court 941

Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916

Nirmala J. Jhala versus State of Gujarat and another, 2013 AIR SCW 1800

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Om Parkash Sharma vs. Indian Red Cross Society, Punjab and another, 2005 (3) PLR, 271

Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717

Oriental Insurance Co. Ltd. versus Shri Kishan Chand & others, ILR, HP, 2015 Volume-III,

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

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P.D. Dinakran (1) vs. Judges Inquiry Committee and others (2011) 8 SCC 380

Padala Veera Reddy v. State of Andhra Pradesh and others, 1989 Supp (2) SCC 706

Pant Raj Sachdev vs. The Indian Red Cross Society and others, 1986 (1) SLR 675

Paramjeet Batra vs. State of Uttarakhand and others (2013) 11 SCC 673

Parkash vrs. State of Karnataka, (2014) 12 SCC 133,

Pentakota Satyanarayana and others versus Pentakota Seetharatnam and others AIR 2005 SC 4362

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

Perla Somasekhara Reddy and others Vs. State of A.P., (2009) 16 SCC 98

Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (dead) by LRS and others, (2008) 8 SCC 321,

Pradeshiya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical and Another 1994 (79) Company Cases 835

Prakash vs. State of Rajasthan (Apex Court DB), 2013 Cri.L.J. 2040

Prandas v. The State, AIR 1954 SC 36

Pudhu Raja and another Vs. State Represented by Inspector of Police, (2012) 11 SCC 196

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R. Vishwanatha Pillai versus State of Kerala and others, AIR 2004 Supreme Court 1469

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Raghunath Vs. State of Haryana, (2003) 1 SCC 398

Rahim Beg v. State of U.P. (1972) 3 SCC 759

Rai Singh vs. State of Haryana, AIR 1971 SC 2505

Rajkishore Mohanty and another Vs. Kangali Moharana and others AIR (59) 1972 Orissa 119

Ram Niwas vs. Rajinder Prasad 1996 (1) RCR 427

Ram Saran Mahto vs. State of Bihar, AIR 1999 Supreme Court page 3435

Ram Singh @ Chhaju Vs. State of Himachal Pradesh, (2010) 2 SCC 445

Ramaiah alias Rama vs. State of Karnataka, (2014)9 SCC 365

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172

Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644

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

Rewat Ram vs. Ashok Kumar and others 2011 (Supp) Him L.R. 1580

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S.P.Bhatnagar and another Vs. The State of Maharashtra, AIR 1979 SC 826

S.R. Tewari versus Union of India & Anr., with S.R. Tewari versus R.K. Singh & Anr., 2013 AIR SCW 3338

S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others, (2008) 11 SCC 186

Sakharam Vs. State of Madhya Pradesh, AIR 1992 SC 2045

Sakharam Vs. State of Madhya Pradesh, AIR 1992 SC 758

Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, AIR 2008 SC 2066,

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Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Savithri and others versus Karthyayani Amma and others (2007) 11 SCC 621

Savitri and others versus M.A.C.T.-cum-District and Sessions Judge, Jhunjhunu and others, 2013 ACJ 1361

Shakuntala Devi versus Savitri Devi and others AIR 1997 HP 43

Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116

Sheodan Singh versus Daryao Kunwar, AIR 1966 Supremem Court 1332

Sita Ram and others vs. State of Haryana and another, 1997(3) Crimes 362 (P&H)

Sital Prasad Saxena Vs. Union of India and others, AIR 1985 SC 1

Smt. Savita versus Bindar Singh & others, 2014 AIR SCW 2053

Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627

State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382

State Bank of India & Ors. versus Ramesh Dinkar Punde, 2006 AIR SCW 5457

State Bank of India and others Vs. S.N. Goyal (2008) 8 SCC 92

State of H.P. vs. Ani Kumar and others, 2012(2) Shim. LC 710

State of H.P. vs. Umardeen, 2012(1) Shim.LC 108

State of Haryana and another versus Jasbir Kaur and others, AIR 2003 Supreme Court 3696

State of M.P. vs. Surendra Singh, AIR 2015 SC 398

State of Madhya Pradesh vrs. Union of India and another, (2011) 12 SCC 268

State of Maharashtra Vs. Annappa Bandu Kavatage, AIR 1979 SC 1410

State of Maharashtra Vs. Champalal Punjaji Shah, AIR 1981 SC 1675
State of Punjab and others versus Ram Singh Ex-Constable, (1992) 4 SCC 54
State of Punjab Vs. Shamlal Murari, AIR 1976 S.C. 1177
State of Rajashthan Vs. Talevar and another, 2011 (11) SCC 666
State of Rajasthan v. Kashi Ram (2006) 12 SCC 254
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt, 2012 (1) SCC 602
State of U.P Vs. Ram Veer Singh and others, AIR 2007 SC 3075
State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
State of West Bengal vs. Orilal Jaiswal and another, 1993(3) Crimes 518 SC
Surendra Vs. State of Rajasthan, AIR 2012 SC (Supp) 78
Swaran Sharma vs. State of Haryana, 2007 (4) PLR, 526

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Tara Chand and others versus Virender Singh and another, ILR, HP, 2015, (XLV)-II, Page, 367
The District Red Cross Society, Sirsa vs. Radha Kishan Rajpal and another, 2005 (1) SLR, 781
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
The Management of Tournamulla Estate versus Workmen, (1973) 2 SCC 502
The Sale Tax Officer, Banaras and others Vs. Kanhaiya Lal Makund Lal Saraf, AIR 1959 SC 135,
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U.P. State Road Transport Corporation, Dehradun versus Suresh Pal, 2006 AIR SCW 4903
U.P. State Road Transport Corporation versus Suresh Chand Sharma *with* Suresh Chand Sharma versus State of U.P. and Anr., 2010 AIR SCW 3859
Union of India and others versus Narain Singh, (2002) 5 Supreme Court Cases 11
Union of India and others versus P. Gunasekaran, 2014 AIR SCW 6657
United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174

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Vijay Industries Vs. NATL Technologies Limited 2009(3) SCC 527
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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

Ajay Kumar ...Appellant
VERSUS
Shubham Kumar and others ...Respondents.

FAO No.519 of 2007.
Decided on: 01.05.2015**.**

Motor Vehicle Act, 1988- Section 149- MACT held that owner was liable to pay compensation- driver had a learner driving licence w.e.f. 22.10.2002 to 21.4.2003- the accident had taken place on 14.10.2002, therefore, driver did not have a valid driving licence at the time of accident- held, that in these circumstances, insured had committed the breach of the terms and conditions of the policy and owner was rightly ordered to pay compensation. (Para-4 to 6)

For the Appellant: Mr.Rajesh Mandhotra, Advocate.
For the Respondents: Mr.Anup Rattan, Advocate, for respondent No.1.
Mr.Rajiv Jiwan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Challenge in this appeal is to the award, dated 24th June, 2006, passed by Motor Accident Claims Tribunal(II), Kangra at Dharamshala, H.P., (hereinafter referred to as the 'Tribunal'), in MAC Petition No.33-J of 2003, titled Shubham Kumar versus Ajay Kumar and others, whereby a sum of Rs.2,01,200/-, with interest at the rate of 6% per annum, stands awarded in favour of the claimant (respondent No.1 herein) and the owner (appellant herein) was saddled with the liability, (for short the 'impugned award').

2. The insurer, the driver and the claimant have not questioned the impugned award on any ground, thus the same has attained finality so far as it relates to them. Only the owner/insured has challenged the impugned award on the ground that the Tribunal has fallen in error in fastening the owner with the liability.

3. I have gone through the impugned award and the record of the case.

4. Admittedly, the driver of the offending vehicle, namely, Mohinder Singh, was having learner's license valid w.e.f. 22nd October, 2002 to 21st April, 2003, while the accident had taken place on 14th October, 2002. Thus, it is apparent that the driver of the offending vehicle was not having a valid driving license on the fateful day when the accident had taken place.

5. The Tribunal has rightly made discussion in paragraph 12 of the impugned award and has rightly decided issue No.3 in favour of the insurer, by holding that the insured has committed breach of the terms and conditions contained in the insurance policy.

6. Having said so, no interference is required. Accordingly, the appeal is dismissed and the impugned award is upheld.

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

Govinda alias Rahul …Appellant
Versus
State of Himachal Pradesh …Respondent

Cr. Appeal No. 133/2011
Reserved on: 29.4.2015
Decided on: 1.5.2015

Indian Penal Code, 1860- Sections 302 and 376- Accused attempted to rape the deceased- deceased resisted on which accused gave a blow on the head of the deceased with a stone- he met 'D' and told him that he had murdered a woman and needed money to run away- 'D' told the contractor regarding the murder who advised 'D' to take the accused to Pradhan- accused made extra judicial confession before Pradhan- Pradhan informed the police on which FIR was registered- Pradhan improved his version in the Court making his statement doubtful- there were contradictions in the statements of the prosecution witnesses- making of extra judicial confession to a person who is not known to the accused is highly improbable – further name of the victim was not mentioned in the extra-judicial confession- extra-judicial confession is a weak piece of evidence- extra-judicial confession was not corroborated and was lacking in detailed particulars –held, that in these circumstances, acquittal of the accused was justified. (Para-25 to 31)

Cases referred:
Rahim Beg v. State of U.P. (1972) 3 SCC 759
Akanman Bora v. State of Assam Cr. LJ 1988 (3) 572
State of Rajasthan v. Kashi Ram (2006) 12 SCC 254

For the Appellant : Mr. Vivek Darhel, Advocate vice Mr. Virender Singh Chauhan, Advocate.
For the Respondent : Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against Judgment dated 30.4.2011 rendered by learned Additional Sessions Judge, Fast Track court, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 3FTC/7 of 2009, whereby appellant-accused (herein after referred to as 'accused'), who was charged with and tried for offence under Section 302 and 376 IPC, stands convicted under Section 302 IPC with rigorous imprisonment for life and to pay a fine of Rs.10,000/-, in default of payment of fine to further undergo rigorous imprisonment for two years. He was acquitted under Section 376 IPC.

2. Case of the prosecution in a nutshell is that on 29.11.2008, Dashoda Devi was going alone from village Barla to village Darwa for attending marriage in her relations and when she reached near Gaad Pump house in the jungle path, accused met her. He, after

seeing the deceased alone in the jungle path, with the intention to commit sexual intercourse with her, caught hold of her from behind her waist and despite the cries made by the deceased Dashoda Devi, accused did not leave her and after pushing her back, he laid her on the path and started making attempts to commit sexual intercourse with her and when the deceased resisted the attempt of the accused, accused again pushed her towards the bushes below 'Dank' and accused thereafter also came below to the bushes where deceased was lying and again attempted to forcibly commit sexual intercourse with her. When the deceased did not stop crying, accused lifted a big stone which was lying there and hit on the head of the deceased Dashoda Devi twice and after she became unconscious he attempted to have sex with her and further he again gave blow twice with the same stone on the head of the deceased Dashoda Devi. Accused went to the pump house where his companion Dipender met him to whom the accused disclosed that he had murdered one woman and demanded some money from Dipender and started saying that he will flee away from that place. Dipender told accused that he is not having any money with him and they will visit Darwa and demand money from their contractor by telephoning him. They came to their quarter at Darwa where Dipender asked the accused to sit in the room and he will come back to the room after making telephone call to their contractor. Dipender, on telephone, told contractor regarding killing of the woman by accused and on this, he asked Dipender to take the accused before Pradhan, Gram Panchayat Darwa and he will telephone the Pradhan. Dipender thereafter came to his quarter and told the accused that the telephone of contractor is disconnecting and they will go to the Pradhan and demand money from him.

3. Accused and Dipender came to Puran Chand. Accused made extra-judicial confession before Puran Chand Gupta about killing of Dashoda Devi. Pradhan took few local people to the place pointed out by the accused. They found dead body of deceased in the bushes of 'Dank' (cliff). Accused identified the stone. Pradhan informed the police. Police reached the spot. Statement of Puran Chand Gupta was recorded under Section 154 of the Code of Criminal Procedure. FIR was registered. Spot map was prepared. Photographs were taken. Dead body of deceased Dashoda Devi was sent for post-mortem examination at CHC Dharampur. Case property was deposited by SI SHO Ramesh Thakur with MHC Police Station Kasauli. MHC sent the case property to FSL Junga on 4.12.2008. Investigation was completed. Challan was put up in the Court after completion of all codal formalities.

4. Prosecution has examined as many as 19 witnesses. Accused was also examined under Section 313 CrPC. According to the accused, he was falsely implicated. Accused was convicted and sentenced as noticed herein above by the trial Court. Hence, this appeal.

5. Mr. Vivek Darhel, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General has supported the judgment of trial court dated 30.4.2011.

7. We have heard the learned counsel for the parties and gone through the judgment and record very carefully.

8. PW-1 Puran Chand testified that on 29.11.2008, accused Govinda came to his shop at about 6.00 pm. Accused was working with Ashok Kumar. Accused told him that he has killed a woman by hitting stone on her head near Gaad Pump House. He,

accompanied by Bhagat Ram, Naresh, Devi Chand, Dipender and Ramesh went to the spot. Govinda took them to the spot. They noticed a woman lying dead on the spot in bushes. They identified her. Blood was oozing out from upper side of temporal bone. They informed the police post. Police came to the spot. Accused, on being asked, told that he killed the woman for sex. When she did not agree, he killed her. Police took into possession dead body vide Ext. PW-1/A. Police also seized stone vide seizure memo Ext. PW-1/B. He identified the stone. On the next day, police took them to the spot. Police seized blood stained earth from the spot vide seizure memo Ext. PW-1/D. Accused got the spot of incident identified vide memo Ext. PW-1/F. In his cross-examination, he has deposed that Dipender Thapa had come with him to the spot at 6.00 pm. Thereafter he came with them alongwith dead body to the Vipin's shop. He admitted that police took Dipender in Jeep to Kandaghat Police Station for saving him from the crowd. He received a telephonic call from Ashok at 6.00 pm telling him that Dipender had told that Govinda who is a labourer with him, has murdered a woman.

9. PW-2 Naresh Kumar deposed that on 29.11.2008, at about 6.15 pm, Puran Chand Gupta, Pradhan, Darwa told him that one Gorkha Rahul alias Govinda has pelted stone near pump house and killed a lady. He alongwith Pradhan, Puran Chand Gupta and Bhagat Ram visited the pump house at Gaad. There they found dead body of Dashoda Devi, who was also known to him as Dashoda was a neighbourer. Her dead body was stained with blood. Police also visited the spot. Police noticed dead body at the spot. Accused was also present, as he was brought by Pradhan from quarter with Gorkha namely Dipender. Police has taken into possession blood stained stone and put in a cloth parcel sealed with seal impression 'K'. Police also took into possession blood stained leaves, grass and soil from the spot.

10. PW-3 Vipin Kumar deposed that on 29.11.2008, Dipender Thapa, Karan Bahadur and Govinda had proceeded to work to the pump house. At about 6.00 pm, Dipender Thapa had come to his shop and told him that he wanted to make a call to Ashok Contractor. Dipender Thapa had made a call from his STD to contractor Ashok and thereafter he went to the shop of Puran Chand, Pradhan. Dipender Thapa was alone at that time. On 4.12.2008, he and Pradhan Puran Chand were associated in the investigation by the police. In the custody of police, accused took them to the place of occurrence. He identified the spot and told them that he killed Dashoda Devi with a stone. Police prepared Nishandehi vide ex. PW-1/F. He was declared hostile and cross-examined by Public Prosecutor. In his cross-examination, he has admitted that Dipender Thapa had told him that Rahul had murdered a woman. This fact was also disclosed by Dipender Thapa to Ashok Kumar.

11. PW-4 Bhagat Ram deposed that on 29.11.2008, Pradhan disclosed to him that one Gorkha Govinda came to his shop and disclosed to him that he killed a lady by hitting her with stone. He, accompanied by Pradhan Puran Chand, Naresh Kumar and Devi Chand went to the spot at Gaad. Police also visited the spot. Accused was with them at that time. Accused, on being asked why he killed the woman, told that he wanted to have sex with her, but she did not agree, on which he killed her. In his cross-examination, he has admitted that in his presence, accused Govinda has disclosed nothing to the Pradhan.

12. PW-5 Devi Chand, deposed that on 29.11.2008, Pradhan, Gram Panchayat Darwa called him to his shop at about 6.15 pm and told him that one Gorkha Govinda alias Rahul came to his shop and disclosed to Pradhan Puran Chand that he killed a lady by hitting with stone near Guard Pump. He accompanied Pradhan Puran Chand, Naresh,

Bhagat Ram and Devi Chand and Govinda (accused) and went to the spot i.e. Gaad Pump. They noticed body of a woman lying on the spot. Police asked accused and he told that he was working with Ashok Kumar, contractor. Accused had killed the deceased Dashoda Devi for sex.

13. PW-6 Sunder Singh deposed that on 29.11.2008, in the evening time, his aunt Dashoda Devi came from village Barla to village Darwa for attending a marriage. She told him to accompany her to village Darwa. He told that he would come later. She proceeded to Darwa to attend marriage. She used to reside at village Barla with them. He also proceeded to village Darwa at about 7-8 pm to attend the marriage. He attended the marriage at Darwa and came to know that one lady had been killed. During night period, he visited the place at guard pump where a dead body was lying in the bushes. He noticed injury on the upper side of temporal bone and blood was oozing out from the injury. He identified the dead body. In his cross-examination, he has admitted that he disclosed to the police during investigation that accused had killed Dashoda Devi to commit sex with her and on her refusal he had killed her with stone (confronted with statement mark 'B', wherein, it is not so recorded).

14. PW-7 Ashok Kumar deposed that on 29.11.2008, at about 6.15 pm, he received a telephone call. Again stated about 6.00 to 6.15 pm, he received a telephonic call from Dipender Thapa. He called him from STD shop of Vipin Kumar and told on the telephone that he has disclosed that he had killed someone and demanded money. He directed him to inform the Pradhan. He also told that he should not flee from there. In his cross-examination, he has admitted that he called Puran Chand on 29.11.2008 at 12-1.00 pm. He further stated that when he telephoned Pradhan, he disclosed to him that he has murdered someone on 29.11.2008. He did not meet Pradhan Puran Chand on 29.11.2008.

15. PW-8 Dipender Thapa is a material witness. According to him, accused told him that he had murdered a woman and demanded money. He told that he did not have any money. He came to Darwa alongwith accused. Then he called on telephone his contractor, Ashok Kumar and told that accused has told him that he (accused) had killed a woman and he had committed murder. Ashok Kumar directed to disclose the entire incident to Pradhan Puran Chand. Thereafter, he alongwith accused went to the shop of Pradhan Puran Chand where he disclosed to the Pradhan that he had murdered (voluntarily stated 'not in his presence'). There were 10-12 people. Thereafter, he came to the Tank at Darwa and slept there due to fear. On the next day, he went to Ashok Kumar, contractor.

16. PW-9 HHC Shayam Lal, is a formal witness.

17. PW-10 Jagat Ram deposed that on 29.11.2008, he alongwith police party, SHO Ram Thakur, was present near Gaad Pump House. Dead body of one woman was lying in the bushes. Case FIR No. 83 dated 29.11.2008 was registered.

18. PW-11 Dharam Chand Patwari has proved copy of Jamabandi Ext. PW-11/A and map Ext. PW-11/B.

19. PW-12 MC Jai Chand is a formal witness.

20. PW-13 Chet Ram recorded Rapat No. 34 dated 30.11.2008. ASI MA Khan handed over 19 sealed parcels to him. He entered them in the Malkhana register. Stone weighing 10 kg was also handed over to him. He sent the case property to FSL Junga on 4.12.2008 vide RC No. 60/2008 through constable Shyam Lal alongwith samples of seal 'M'

and 'K'. In his cross-examination, he has admitted that Rapat Ext. PW13/A was recorded by him, name of Gorkha was not disclosed to him.

21. According to PW-14 Manohar Lal, deceased died due head injury leading to severe blood shock, cardio respiratory arrest and finally death. The time between injury and death was instantaneous. Time between death and post-mortem was about 12-24 hours.

22. PW-15 Dr. Naresh Attri has examined accused and issued MLC Ext. PW-15/B.

23. PW-16 Balo Devi deposed that on 29.11.2008 she was going to attend a marriage at Darwa at about 3.00 pm. She was going on foot. When she reached at the pump house, then one Gorkha was standing in the way. He came from backside and pushed her with his shoulder. She turned towards him and he folded his hands for 'Namaste' and started walking swiftly on foot. One person came on the spot and remained there. Thereafter, she did not know what happened. In her cross-examination, she admitted that she has not narrated the fact of murder of her Devrani (Sister-in-law) to any person except Police on 4.12.2008.

24. PW-17 Ramesh Chand deposed that the police noticed a dead body lying in the bushes near Pump House. Puran Chand's statement was recorded under Section 154 CrPC vide Ext. PW-1/C. FIR was registered. Photographs were also taken. Dead body of the deceased was taken into possession vide seizure memo Ext. PW-1/A. Stone was recovered on 30.11.2008. Control samples of soil/ leaves were taken. He recorded statements of 5 witnesses on 30.11.2008. In his cross-examination, he has admitted that name of Gorkha was not disclosed by the Pradhan to the police when he intimated regarding the incident on 29.11.2008. He also admitted that Dipender Thapa had also been interrogated for one day in the Kasauli Police Station on 30.11.2008.

25. Case of the prosecution precisely is that accused after killing deceased Dashoda Devi made extra-judicial confession before Puran Chand. Puran Chand and other witnesses went to the spot and noticed dead body lying in the bushes. Police also reached the spot. body was taken into possession. Post-mortem was got conducted. Dashoda Devi died due to head injury. Statement of PW-1 Puran Chand was recorded under Section 154 CrPC on 29.11.2008. According to the contents of Ext. PW-1/C, Rukka, accused came to the shop of PW-1 Puran Chand and disclosed that he killed one woman near Gaad Pump House by hitting her with a stone. He informed the police post Kuthar. Police reached the spot. Police took into possession the stone, and according to him, Govinda has murdered the deceased since the deceased resisted his advances. However, Puran Chand (PW-1) deposed in the Court that accused was accompanied by Dipender Thapa. He came to the shop at 6.00 pm. PW-1 Puran Chand has made improvements in his statement recorded under Section 154 CrPC. It is settled law that Rukka or FIR need not be encyclopaedia but bare necessary facts must be stated in the same. In Ext. PW-1/C, PW-1 Puran Chand has not stated the name of the deceased who was allegedly killed by the accused. He has narrated that the accused has made disclosure statement that he had killed a woman by hitting her with a stone.

26. In case Dipender Thapa had accompanied the accused to the shop of Puran Chand, he should have definitely stated so in the statement recorded under Section 154 CrPC. PW-8 Dipender Thapa has also testified that he alongwith accused went to the shop of Pradhan Puran Chand where he (accused) disclosed to Puran Chand that he has

committed murder, though voluntarily stated that 'not in his presence'). Thus, there is doubt whether the accused went to the shop of Puran Chand in the company of Dipender or not, when it is not so stated in the Rukka, Ext. PW-1/C. PW-13, in his cross-examination has admitted that in the Rapat, Ext. PW-13/A, name of Gorkha was not disclosed to him. Similarly, PW-17, Ramesh Thakur SI has also admitted in his cross-examination that the name of Gorkha was not disclosed by the Pradhan to the police when he intimated about the incident on 29.11.2008. In case, accused had made disclosure statement before Puran Chand, he would have definitely told this fact while informing police post Kuthar. PW-1 Puran Chand has testified in his examination-in-chief that he accompanied Bhagat Ram, Naresh, Devi Chand and Dipender Thapa and they went to the spot. However, PW-8, Dipender Thapa deposed that he alongwith accused went to the shop of Pradhan Puran Chand and thereafter he went to the Tank at Darwa and slept there. Thus, there is major contradiction in the statements of PW-1 Puran Chand and PW-8 Dipender Thapa. According to the PW-1 Puran Chand, PW-8 had accompanied him to the spot but PW-8 has deposed that he had gone to sleep in his Dera, after accused made extra-judicial confession.

27. Case of the prosecution is that Dipender Thapa (PW-8) had gone to the shop of PW-3 Vipin Kumar to make a telephonic call. PW-3 Vipin Kumar deposed that at about 6.00 pm, Dipender came to his shop and told that he had killed Dashoda Devi. Statement of PW-3 was recorded on 4.12.2008. Statements of all the witnesses are required to be recorded immediately. According to PW-16 Balo Devi, accused had pushed her with shoulder and thereafter she turned towards him. He folded his hands. Thus, prosecution tried to establish that the accused was on the path near Pump House and was identified by Balo Devi. In her cross-examination, PW-16 has admitted that she has not narrated that accused murdered her Devrani (Sister-in-law), to any person except the Police on 4.12.2008. It is not believable that in case, she had identified the accused on 29.11.2008, and he has murdered her Devrani on 29.11.2008, this fact was bound to be disclosed by her to her family members.

28. Case of the prosecution is based on circumstantial evidence. In order to prove the case based on circumstantial evidence, it is necessary to complete the entire chain of events. All the circumstances must point towards the guilt of the accused alone. In the instant case, prosecution has failed to complete the entire chain of events linking the accused with the commission of alleged offence. Mr. M.A. Khan, has argued that the accused has murdered the deceased since she resisted the attempts of the accused to rape her. Accused has been acquitted of charge under Section 376 IPC. Mr. Khan has also argued that the accused made extra-judicial confession before Puran Chand (PW-1), Bhagat Ram(PW-4) and Devi Chand (PW-5). However, fact of the matter is that in view of the variance in the statements of PW-1 recorded under Section 154 CrPC and statement recorded before the court, the alleged extra-judicial confession by accused is doubtful. According to PW-8, Dipender Thapa, 10-12 people were already at the spot when he visited the shop of PW-1 alongwith accused. The extra-judicial confession is required to be made before a particular person and not in front of so many people as stated by PW-8 Dipender Thapa. Thus, the prosecution has failed to prove its case against the accused beyond reasonable doubt.

29. Their lordships of the Hon'ble Supreme Court in **Rahim Beg v. State of U.P.** reported in (1972) 3 SCC 759, have held that where extra-judicial confession is alleged to have been made to a person having no history of previous association between the witness and the confessing accused as may justify the inference that the accused could repose

confidence in him, it is highly improbable that the accused would have gone to him and blurt out a confession. Their Lordships have held as under:

> **" 18. We may now deal with the evidence regarding the extra-judicial confession of the two accused to Mohammad Nasim Khan (P.W.4) and the recovery of ornaments belonging to the deceased from the two accused. It is primarily upon these two pieces of prosecution evidence that the conviction of the accused has been based. So far as the confession to Mohd. Nasim Khan is concerned, we find that, according to the said witness, the two accused came to him at his house in Sakunpur on August 4, 1969 and told him about their having raped and killed the daughter of Ramjas by strangulating her as well as regarding the removal of her ornaments. Mohammad Nasim Khan belongs to another village. There was no history of previous association between the witness and the two accused as may justify the inference that the accuse could repose confidence in him. In the circumstances, it seems highly improbable that the two accused would go to Mohammad Nasim Khana and blurt out a confession. It is also no clear as to why the two accused should try to run away on seeing the police party coming with Mohammad Nasim Khan if Mohammad Nasim Khan had gone to the police at the request of the accused. According to Mohammad Nasim Khan, Gur Sewak PW was with the police Sub Inspector when the Sub-Inspector came with Mohammad Nasim Khan to his house and apprehended the accused. The evidence of Ramjas PW however, shows that Gur Sewak PW went with Ramjas to the mortuary on the night between 3 and 4 August, 1969 and that on August 4, 1969 Gur Sewak remained with Ramjas throughout the day at Rae Bareli. It was on August 5, 1969 that, according to Ramjas, he and Gur Sewak returned to their village after throwing the dead body of Kesh Kali in Sain river. It would thus appear that Ramjas PW who, being the father of the deceased, had no particular reason to damage the prosecution case and to support the accused has contradicted Mohammad Nasim Khan has on the point that Gur Sewak PW was with the police Sub-Inspector on August 4, 1969. The fact that Mohammad Nasim Khan has deposed regarding the presence of Gur Sewak with the police Sub-Inspector with a view to support the prosecution case even though, according to Ramjas PW, Gur Sewak was not with the police Sub-Inspector shows that Mohammad Nasim Khan has scant regard for truth. The evidence of extra-judicial confession is a weak piece of evidence. The evidence in this respect adduced by the prosecution in the present case is not only of a frail nature, it is lacking in probability and does not inspire confidence.**

In this case, there was no previous association of the accused with PW-1 Puran Chand except that PW-1 stated that accused and Dipender used to come to buy articles from his shop.

30. A Division Bench of Gauhati High Court in **Akanman Bora v. State of Assam** reported in Cr. LJ 1988 (3) 572, has held that since there was no disclosure of name

of the victim, extra-judicial confession was a weak piece of evidence. It was found to be infirm. It was held that:

> **"12. The Village Defence Party members PW 5 Prasad Saikia and PW 6 Padmaswar Bora intercepted the accused in the night of 22-5-1981. It is in their evidence that on quarry the accused disclosed to them that he committed murder of a person at Dhunaguri village. They took the accused to Bangalmara police post and handed him over to the Officer-in-Charge of that post. Both the witnesses were independent and disinterested. They had no reason whatsoever to falsely manufacture the statement of extra-judicial confession of the accused to falsely implicate him. However, that extra-judicial confession suffers from infirmity, as there was no disclosure of the name of the victim. extra-judicial confession is a weak piece of evidence. When it suffers infirmity, as in the instant case, it further loses its evidentiary value. Therefore, the type of extra-judicial confession narrated by PWs 5 and 6 in no way helps the prosecution.**

In the instant case also, as noticed above, PW-1 stated that accused proclaimed before him that he has killed a woman without naming her.

31. Their lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Kashi Ram** reported in (2006) 12 SCC 254, have held that extra-judicial confession is a weak piece of evidence and it must be proved like any other fact. Their Lordships have held as under:

> **" 14. On appeal, the High Court reversed the findings of fact recorded by the trial court and acquitted the respondent. Before adverting to the other incriminating circumstances we may at the threshold notice two of them, namely, the circumstance that the respondent made an extra-judicial confession before PWs 3 and 4, and the circumstance that recoveries were made pursuant to his statement made in the course of investigation of the waist cord used for strangulating Kalawati (the deceased) and the keys of the locks which were put on the two doors of his house. The High Court has disbelieved the evidence led by the prosecution to prove these circumstances and we find ourselves in agreement with the High Court. There was really no reason for the respondent to make a confessional statement before PWs 3 and 4. There was nothing to show that he had reasons to confide in them. The evidence appeared to be unnatural and unbelievable. The High Court observed that evidence of extrajudicial confession is a weak piece of evidence and though it is possible to base a conviction on the basis of an extra-judicial confession, the confessional evidence must be proved like any other fact and the value thereof depended upon the veracity of the witnesses to whom it was made. The High Court found that PW 3 Dinesh Kumar was known to Mamraj, the brother of deceased Kalawati. PW 3 was neither a Sarpanch nor a ward member and, therefore, there was no reason for the respondent to repose faith in him to seek his protection. Similarly, PW 4 admitted that h e was not even acquainted with the accused. Having regard to these facts and circumstances, we agree with the High Court that the case of the prosecution that the**

respondent had made an extra-judicial confession before PWs 3 and 4 must be rejected."

In the instant case, extra-judicial confession is alleged to have been made before PW-1, Puran Chand. Extra-judicial confession is not corroborated and lacking detailed particulars. Facts and circumstances of the case rule out possibility of making alleged extra-judicial confession before PW-1 Puran Chand.

32. Accordingly, the appeal is allowed. Judgment dated 30.4.2011 rendered by learned Additional Sessions Judge, Fast Track court, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 3FTC/7 of 2009 is set aside. Accused is acquitted of the offence under Section 302 IPC by giving him benefit of doubt. He be released forthwith, if not required in any other case by the Police. Fine amount, if any, deposited by the accused, be refunded to him. Registry is directed to issue the release warrants of the accused and send the same to the Superintendent of Jail, concerned immediately.

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

Harish Chander & others ...Petitioners

Versus

Financial Commissioner and others ...Respondents

CWP No. 2813 of 2013
Date of decision: 1.5.2015

H.P. Land Revenue Act, 1954- Section 45- Petitioners filed an application before Learned A.C. 2nd Grade stating that they were in possession and their possession be recorded in the revenue record- correction of revenue record was ordered by Learned A.C. 2nd Grade- this order was challenged unsuccessfully before Sub Divisional Collector and Divisional Commissioner - orders were set aside by Financial Commissioner- petitioners claimed that amount of Rs.10,000/- was received by predecessor-in-interest of the respondent and the possession was delivered at the spot- held, that oral sales were not permissible in the year 1980 when amount was paid- sale was effected for more than Rs. 100/- and could have only been made by way of registered document- statement was vague and will not amount to the sale- land had vested in BBMB at the time of making of statement- borrowing of Rs. 10,000/- and putting the predecessor-in-interest of the petitioners in possession will not amount to acquiring right or interest. (Para-4 to 16)

Case referred:
Tara Chand and others versus Virender Singh and another, ILR, HP, 2015, (XLV)-II, Page, 367

For the Petitioners: Mr. Digvijay Singh, Advocate.

For the Respondents: Mr.V.K. Verma, Mr.Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondent No. 1.

Mr. G.R. Palsra, Advocate, for respondents No. 2 to 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

By medium of this writ petition, the petitioners have called in question the order passed by the Financial Commissioner (Appeals), whereby he accepted the appeal preferred by the private respondents and rejected the claim of the petitioners seeking correction of entries in revenue records.

The facts in brief may be noticed.

2. The predecessor-in-interest of the petitioners filed an application before the Assistant Collector IInd Grade, Sundernagar on 13.12.1987 stating that he was in possession of Khasra No. 441 and 442, kita 2 measuring 1116.0 Sq. meters situate in village Ropa since 1980 and therefore, his possession be recorded in the revenue record. The Assistant Collector IInd Grade vide his order dated 29.2.1988, ordered the correction of the revenue records w.e.f. Rabi Girdwari on 1988. This order was challenged by the private respondents before the Sub Divisional Commissioner, who upheld the same. In further challenge, even the Divisional Commissioner upheld this order, constraining the private respondents to approach the Financial Commissioner, who finally allowed the petition and quashed the orders passed by all the authorities below.

3. The petitioners have challenged this order as being based on assumptions and presumptions, conjectures and surmises. They have further averred that once the consideration amount of Rs.10,000/- had been received by the predecessor-in-interest of the respondents and possession delivered to their predecessor-in-interest, then there was nothing wrong with the orders passed by the revenue authorities in ordering the entry of possession in favour of the petitioners in the revenue records.

4. The private respondents 2 to 6, who are the successors of Lal Man, have in their reply averred that in the year 1980 when an amount of Rs.10,000/- is alleged to have been paid to their predecessor Lal Man by the predecessor-in-interest of the petitioners, then oral sales were not permissible and whereas under Section 17 of the Registration Act, the sale deed was compulsorily required to be registered since the value of the sale consideration was more than Rs.100/-. It is also submitted that Lal Man at the relevant time had no right, title and interest or authority to sell the land as he was neither its owner nor in possession and the same at that time belonged to the Bhakra Beas Management Board. It is also contended that the A.C. IInd Grade had no power to record the statements of the parties and further had no jurisdiction to change the revenue entries on the basis of the impermissible oral sale.

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

6. It would be seen from the records that the possession of the petitioners had been ordered to be recorded only on the basis of a statement alleged to have been made by Sh.Lal Man before the Assistant Collector IInd Grade on 19.2.1988 when the proceedings were infact pending before it. It is recorded therein that he had received Rs.10,000/- from Sadhu, father of Mangat Ram as sale consideration and he therefore, had no objection in case the possession of Mangat Ram is recorded over the land in dispute.

7. Interestingly, this statement bears a thumb impression, whereas it has been proved on record that Sh.Lal Man was literate and therefore, there was no occasion for him to have put his thumb impression on the statement. The relevant portion of the statement reads thus:-

> *"That khata khatauni min 68/183, Khasra No. 441, 452, area 1116 sq. mt. has been given in 'Bhai Bandi' to Shri Sadhu S/o Sidhu, who are growing vegetables, they are not paying me any rent but they have given me Rs.10,000/- in the shape of a sale, I owe them back the said money and at this juncture I do not possess the money to return them."*

8. Apparently, this statement is absolutely vague and by no standards can be construed to be an agreement of sale. Above all, where was the necessity of recording such statement particularly when the predecessor-in-interest of the petitioners is alleged to have paid the entire sale consideration. Why he did not choose to file a suit for specific performance for having the agreement enforced? Why did he approach the revenue authorities instead of the Civil Court, is not forthcoming. After all any person who had paid the entire sale consideration would be more interested in getting the agreement enforced and claim title, rather than just seeking a mere paper entry regarding possession in the revenue record.

9. That apart, it has come on record that the land at the time when the statement was recorded was in fact vested with the BBMB and therefore, the statement of Sh. Lal Man was otherwise of no consequence.

10. Above all, what surprise me is the fact that though the order dated 29.2.1988 was itself under challenge initially before the Sub Divisional Collector and thereafter before the Divisional Commissioner himself, yet an officer that too of the rank of the Divisional Commissioner would still choose to rely upon the revenue entries which in turn were admittedly based upon the impugned orders itself that too by attaching presumption of truth to it in accordance with Section 45 of the H.P. Land Revenue Act, 1954 (for short 'Act'). The relevant observation is extracted below:-

> *"I have considered the arguments put forth by the parties and have also gone through the record and law. It transpires from the record that as per statement of Sh. Lalman, predecessor-in-interest of the petitioners recorded by the AC IInd grade Sunder Nagar on 19.02.1988 has categorically stated that he had received Rs.10,000/- from the predecessor in interest of the present respondents in the shape of sale of land and has admitted that the land under dispute is possessed by the present respondents. Record further shows that on this statement, the AC IInd Grade Sunder Nagar has passed the order on 29.02.1988 for correction of revenue entries on the patent facts prevailing on the spot for which he is competent to do. It is also on the record that after attestation of the mutation of correction it had been implemented in the subsequent Jamabandi of Muhal Ropa prepared in year 1988-89, 1993-94, 1998-99 and 2003-04. These entries incorporated in the above Jamabandis, have got presumption of truth in accordance with Section 45 of the H.P. Land Revenue Act, 1954. The petitioners could not establish their claim raised by them in the present revision. There is no illegalities or irregularities in the orders passed by both the courts below. Hence, the revision fails."*

11. The aforesaid passage reflects complete ignorance and lack of legal knowledge of the Divisional Commissioner or else there was no occasion for him to have invoked the provisions of Section 45 of the Act when the order passed by the A.C.IInd Grade on 29.02.1988 on the sole basis of which the revenue entries had admittedly been ordered to be corrected was itself under challenge before him.

12. It is in similar circumstances that a coordinate Bench of this Court (Justice Rajiv Sharma) in ***CMPMO No.421 of 2014*** titled ***Tara Chand and others*** *versus* ***Virender Singh and another***, decided on 19.03.2015, was constrained to make the following observations:

> *"13 This Court is of the considered view that the Assistant Collector or Collector, Commissioner and Financial Commissioner (Appeals), must have the requisite legal background to adjudicate the matters under the H.P. Land Revenue Act, 1953. They determine the valuable rights of the parties. The quasi judicial authorities are also required to take notice of the facts and thereafter to apply the law. The adjudication by the revenue authorities has certain trappings of the Court as well.*
>
> *14. Their lordships of the Hon'ble Supreme Court in the case of* ***Thakur Jugal Kishore Sinha vrs. The Sitamarhi Central Co-operative Bank Ltd. And another****, reported in* ***AIR 1967 SC 1494****, have held that the Assistant Registrar discharging functions of Registrar under S. 48 read with S. 6 (2) of Bihar and Orissa Co-operative Societies Act is a Court. Their lordships have held as under:*
>
> > *"11. It will be noted from the above that the jurisdiction of the ordinary civil and revenue courts of the land is ousted under s. 57 L4 Sup. Cl/67-12 of the Act in case of disputes which fell under S. 48. A Registrar exercising powers under S. 48 must therefore be held to discharge the duties which would otherwise have fallen on the ordinary civil and revenue courts of the land. The Registrar has not merely the trappings of a court but in many respects he is given the same powers as are given to ordinary civil courts of the land by the Code of Civil Procedure including the power to summon and; examine witnesses on oath, the power to order inspection of documents, to hear the parties after framing issues, to review his own, order and even exercise the inherent jurisdiction of courts mentioned in s. 151 of the Code of Civil Procedure. In such -a case, there is no difficulty in holding that in adjudicating upon a dispute referred under s. 48 of the Act, the Registrar is to all intents and purposes a court discharging the same functions and ,duties in the same manner as a court of law is expected to do.*
> >
> > *20. It was sought to be argued that a reference of a dispute had to be filed before the Registrar and under sub-s. 2(b) of s. 48 the Registrar transferred it for disposal to the Assistant Registrar and therefore his position was the same as that of a nominee under the Bombay Cooperative Societies Act. We do not think that contention is sound merely because sub-s. (2) (c) of s. 48 authorises the Registrar to refer a dispute for disposal of an arbitrator or arbitrators. This procedure was*

however not adopted in this case and we need not pause to consider what would have been the effect if the matter had been so transferred. The Assistant Registrar had all the powers of a Registrar in this case as noted in the delegation and he was competent to dispose of it in the same manner as the Registrar would have done. It is interesting to note that under r. 68 sub-r. (10) of the Bihar and Orissa Cooperative Societies Rules, 1959 :

> *"In proceedings before the Registrar or arbitrator a party may* be *represented by a legal practitioner."*

In conclusion, therefore, we must hold that the Assistant Registrar was functioning as a court in deciding the dispute between the bank and the appellant and Jagannath Jha."

15. Their lordships of the Hon'ble Supreme Court in the case of ***Union of India vrs. R. Gandhi President, Madras Bar Association & connected matter****, reported in* ***(2010) 11 SCC 1****, have held that so far as technical members are concerned, mere experience in civil service, is not enough and to be technical members of tribunals, persons concerned should be persons with expertise in the area of law concerned or allied subjects and mere experience in civil service cannot be treated as technical expertise in the area of law concerned. Their lordships have further held that the rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. Their lordships have held as under:*

> *"106. We may summarize the position as follows:*
>
> *(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.*
>
> *(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.*
>
> *(c) Whenever there is need for `Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful*

and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.

108. The Legislature is presumed not to legislate contrary to rule of law and therefore know that where disputes are to be adjudicated by a Judicial Body other than Courts, its standards should approximately be the same as to what is expected of main stream Judiciary. Rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the legislature proposes to substitute a Tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members."

16. In the case of State of ***Gujarat and another vrs. Gujarat Revenue Tribunal Bar Association and another****, reported in* ***(2012) 10 SCC 353****, their lordships of the Hon'ble Supreme Court have held that where there is a lis between the two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority i.e. a situation where, (a) a statutory authority is empowered under a statute to do any act; (b) the order of such authority would adversely affect the subject; and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject; and (d) the statutory authority is required to act judicially under the statute, the decision of the such authority is a quasi judicial decision. Their lordships have held as under:*

"18. Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialized adjudication alongside the courts. Therefore, a particular Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act (b) the order of such authority would adversely affect the subject and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a 'court', but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court.

21. The present case is also required to be examined in the context of Article 227 of the Constitution of India, with specific reference to the 42nd Constitutional Amendment Act 1976, where the expression 'court' stood by itself, and not in juxtaposition with the other expression used therein, namely, 'Tribunal'. The power of the High Court of judicial superintendence over the Tribunals, under the amended Article 227 stood obliterated. By way of the amendment in the sub article, the words, "and Tribunals" stood deleted and the words "subject to its appellate jurisdiction" have been substituted after the words, "all courts". In other words, this amendment purports to take away the High Court's power of superintendence over Tribunals. Moreover, the High Court's power has been restricted to have judicial superintendence only over judgments of inferior courts, i.e. judgments in cases where against the same, appeal or revision lies with the High Court. A question does arise as regards whether the expression 'courts' as it appears in the amended Article 227, is confined only to the regular civil or criminal courts that have been constituted under the hierarchy of courts and whether all Tribunals have in fact been excluded from the purview of the High Court's superintendence. Undoubtedly, all courts are Tribunals but all Tribunals are not courts.

22. The High Court's power of judicial superintendence, even under the amended provisions of Article 227 is applicable, provided that two conditions are fulfilled; firstly, such Tribunal, body or authority must perform judicial functions of rendering definitive judgments having finality, which bind the parties in respect of their rights, in the exercise of the sovereign judicial power transferred to it by the State, and secondly such Tribunal, body or authority should be the subject to the High Court's appellate or revisional jurisdiction.

23. In S.P. Sampath Kumar v. Union of India, AIR 1987 SC 346, this Court held that, in the Central Administrative Tribunal (hereinafter referred to as the 'CAT'), the presence of a judicial member was in fact a requirement of fair procedure of law, and that the administrative Tribunal must be presided over in such a manner, so as to inspire confidence in the minds of the people, to the effect that it is highly competent and an expert body, with judicial approach and objectivity and, thus, this Court held that the persons who preside over the CAT, which is intended to supplant the High Court must have adequate legal training and experience. This Court further observed that it was desirable that a high- powered committee, headed by a sitting Judge of the Supreme Court who has been nominated by the Chief Justice of India to be its Chairman, should select the persons who preside over the CAT, to ensure the selection of proper and competent people to the office of trust and help to build up its reputation and accountability. The Tribunal should consist of one Judicial Member and one Administrative Member on any Bench.

24. In L. Chandra Kumar v. Union of India & Ors., AIR 1997 SC 1125, this Court held that the power of judicial review of the High Court under Article 226 of the Constitution of India, being a basic feature of the Constitution cannot be excluded. In this context, the Court held:

> *"88….It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself……."*

The Court further observed that the creation of this Tribunal is founded on the premise that, specialised bodies comprising of both, well trained administrative members and those with judicial experience, would by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. The contention that the said Tribunal should consist only of a judicial member was rejected, and it was held that such a direction would attack the primary grounds of the theory, pursuant to which such Tribunals were constituted.

25. In V.K. Majotra & Ors. v. Union of India & Ors., AIR 2003 SC 3909, this Court reversed the judgment of the Allahabad High Court wherein, direction had been issued that the Vice Chairman of the CAT could be only a retired Judge of the High Court, i.e., a Judicial Member and that such a post could not be held by a Member of the Administrative Service, observing that such a direction had put at naught/obliterated from the statute book, certain provisions without striking them down.

26. A Constitution Bench of this Court in Statesman (Private) Ltd. v. H.R. Deb & Ors., AIR 1968 SC 1495, examined the provisions of Sections 7(3)(d) and g(1) of the Industrial Disputes Act, 1947, which contain the expression 'judicial office', and held that a person holds 'judicial office' if he is performing judicial functions. The scheme of Chapters V and VI of the Constitution deal with judicial office and

judicial service. Judicial service means a separation of the judiciary from the executive in public services. The functions of the labour court are of great public importance and are quasi-judicial in nature, therefore, a man having experience of the civil side of the law is more suitable to preside over it, as compared to a person working on the criminal side. Persons employed performing multifarious duties and, in addition, performing some judicial functions, may not truly fulfil the requirement of the statute. Judicial office thus means, a fixed position for the performance of duties, which are primarily judicial in nature.

27. In Kumar Padma Prasad v. Union of India & Ors., (1992) 2 SCC 428, this Court held that the expression, `judicial office' in the generic sense, may include a wide variety of offices which are connected with the administration of justice in one way or another. The holder of a judicial office under Article 217(2)(a), means a person who exercises only judicial functions, determines cases inter- se parties and renders decisions in purely judicial capacity. He must belong to the judicial services which is a class in itself, is free from executive control, and is disciplined to hold the dignity, integrity and independence of the judiciary. The Court held that `judicial office' means a subsisting office with a substantive position, which has an existence independence from its holder.

……..

33. During the course of arguments before the High Court, learned Additional Advocate General had conceded that the judgments and orders passed by the Tribunal can be challenged under Article 227 of the Constitution. Thus, it has been conceded before the High Court that the High Court has supervisory control over the Tribunal, to the extent that it can revise and correct the judgments and orders passed by it. In such a fact-situation, the consultation/concurrence of the High Court, in the matter of making the appointment of the President of the Tribunal is required.

34. The object of consultation is to render the consultation meaningful to serve the intended purpose. It requires the meeting of minds between the parties involved in the process of consultation on the basis of material facts and points, to evolve a correct or at least satisfactory solution. If the power can be exercised only after consultation, consultation must be conscious, effective, meaningful and purposeful. It means that the party must disclose all the facts to other party for due deliberation. The consultee must express his opinion after full consideration of the matter upon the relevant facts and quintessence."

17. In the case of ***Satya Pal Anand vrs. State of Madhya Pradesh and another****, reported in* ***(2014) 7 SCC 244****, their lordships of the Hon'ble Supreme Court have held that the Registrars, Joint Registrars of the Co-operative Societies and other officials discharging quasi-judicial functions are supposed to be conscious of competing rights and decide issues justly, fairly and by legally sustainable orders. The State Government was directed to*

appoint suitable persons as Registrars, Joint Registrars, etc. commensurate with the functions exercised under scheme of State Cooperative Societies Act. Their lordships have held as under:

> *"20. Having determined the question raised, we would like to emphasize the need for appointment of suitable persons not only as Registrar, Joint Registrar etc. but as Chairman and members of the tribunal as well. While discharging quasi-judicial functions Registrar, Joint Registrars etc. have to keep in mind that they have to be independent in their functioning. They are also expected to acquire necessary expertise to effectively deal with the disputes coming before them. They are supposed to be conscious of competing rights in order to decide the case justly and fairly and to pass the orders which are legally sustainable.*
>
> *21. In this behalf, we would like to refer to judgment dated 3.9.2013 passed in the Review Petition (C) No.2309/2012 (Namit Sharma case). In that case, one unfortunate feature that was noted was that experience over the years has shown that the orders passed by Information Commissions have, at times, gone beyond the provisions of the Right to Information Act and that Information Commissions have not been able to harmonise the conflicting interests indicated in the preamble and other provisions of the Act. The reasons for this experience about the functioning of the Information Commissions could be either that the persons who do not answer the criteria mentioned in Sections 12(5) and 15(5) have been appointed as Chief Information Commissioner or that the persons appointed even when they answer the aforesaid criteria, they do not have the required mind to balance the interests indicated in the Act. It was therefore insisted that experienced suitable persons should be appointed who are able to perform their functions efficiently and effectively. In this behalf certain directions were given and one of the directions was that while making recommendation for appointment of CIC and Information Commissioners the Selection Committee must mention against name of each candidate recommended the facts to indicate his eminence in public life (which is the requirement of the provision of that Act), his knowledge and experience in the particular field and these facts must be accessible to the citizens as part of their right to information under that Act, after the appointment is made.*
>
> *22. Taking clue from the aforesaid directions, and having gone through the similar dismal state of affairs expressed by the petitioner in the instant petition about the functioning of the cooperative societies, we direct that the State Government shall, keeping in mind the objective of the Act, the functions which the Registrar, Joint Registrar etc. are required to perform and commensurate with those, appointment of suitable persons shall be made. Likewise, having regard to the fact that the Chairman of the Tribunal is to be a judicial person, namely, Former Judge of the High Court or the District Judge, we are of the opinion that for appointment of the Chairman and the Members of the*

> *Tribunal, the respondent- State is duty bound to keep in mind and follow the mandate of the Constitution Bench judgment of this Court in R.Gandhi (supra). Thus, for appointment of the Chairman and Members of the Tribunal, the selection to these posts should preferably be made by the Public Service Commission in consultation with the High Court."*

> *18. In the case of Mamuda Khateen and ors. Vrs. Beniyan Bibi and ors., reported in AIR 1976 Calcutta 415, the Full Bench has held that where an appeal is barred by limitation and an application is made under Section 5 of the Limitation Act for condonation of delay alongwith the memorandum of appeal, until the application under Section 5 of the Limitation Act is allowed, the appeal cannot be finally allowed or admitted. It has been held as follows:*

> > *"7. It seems to us that when an appeal is barred by limitation and an application is made under Section 5 of the Limitation Act for condonation of the delay along with the memorandum of appeal, until the application under Section 5 is allowed the appeal cannot be filed or admitted at all. In other words, till a favourable order is made on the application under Section 5 the appeal is non est. In that event, the question of rejecting a memorandum of appeal does not arise at all at this stage."*

> *22. It is reiterated that the functions discharged by the revenue authorities under the H.P. Land Revenue Act, 1953 are quasi-judicial in nature. They determine the lis between the parties. Their decision is binding upon the parties subject to appeal. The orders passed by the appellate authority are open to supervision under Article 226 and 227 of the Constitution of India. Under the scheme of the H.P. Land Revenue Act, 1953, in certain contingencies the revenue authorities can convert themselves into Courts and their orders are to be treated as decrees."*

13. The very object of Constitution of Revenue Courts in the scheme of administration of justice was to provide an additional and speedy forum. It is, therefore, of uttermost importance to ensure that the revenue authorities work in a proper, effective and efficacious manner while exercising their power to hear and dispose of quasi-judicial matters of appeal, revision etc. which require some basic knowledge of law. While making decisions, the Revenue Courts must not lack judicious approach.

14. The Revenue Courts make decisions about fundamental issues which affect the rights of the parties and are treated as final unless challenged. It is, therefore, very critical that the Revenue Courts make fair decisions and must possess some basic knowledge of law as they have a sacrosanct duty to administer justice.

15. The Revenue Courts are conferred with the discretion to adjudicate upon quasi-judicial matters and such discretion is governed by the maxim "*discretio est discerner per lagan quid sit justum (*discretion consists in knowing what is just in law). Discretion in general is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution, to discern between falsity and truth, between shadow and substance, between equity and colourable glosses and pretences and not to do according to the will and

private affections or illwill. It has to be done according to the rules of reasons and justice, not according to private opinion. It has to be done according to law and not humour. It is not be arbitrary vague and fanciful but legal and regular.

16. Reverting back to the facts, the Financial Commissioner has rightly concluded that the basic question regarding borrowing of Rs.10,000/- and putting the predecessor-in-interest of the petitioners in possession over the land temporarily, even if taken to be correct, cannot be equated with acquiring of right or interest, which otherwise was required to be established before a competent Court, that too after leading evidence to this effect.

17. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

****

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

Jagjeevan Singh and another ...Petitioners.

Versus

State of H.P. and another ..Respondents.

CWP No. 618 of 2013
Date of decision: 1st May, 2015

Constitution of India, 1950- Article 226- Petitioner sought a writ of certiorari for quashing an order of the cabinet to shift Divisional Office of HPPWD from Balakrupi to Tanda- held, that a decision to shift the office of DFO was a policy decision and the Court will not interfere with the same except where the policy is contrary to Law or Constitution or is arbitrary or irrational - merely because certain section of the public does not approve the decision is no ground to interfere with the same- petition dismissed. (Para-6 to 11)

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

For the Petitioners: Mr. R.K.Sharma, Senior Advocate, with Mr. Gaurav Thakur, Advocate.

For the Respondents : Mr. Virender Kumar Verma, Mr. Rupinder Singh, Additional Advocate Generals, with Ms. Parul Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral*)

By medium of this petition, the petitioner has sought writ of certiorari for quashing order dated 2.2.2013 (Annexure P-27) whereby the State Government in its

Cabinet meeting decided to shift back the Divisional Office of HPPWD (for short 'Division') from Balakrupi to Tanda.

2. The petitioners have averred that in teeth of more than 25 resolutions of various Panchayats, the decision of the respondents to shift back the division from Balakrupi to Tanda is illegal, malafide, discriminatory and appears to be a political motivated to harass the public or else such a decision would not have been arrived at.

3. In response to the writ petition, the respondents in their reply have stated that shifting of the division to Tanda is a conscious decision taken by the Cabinet keeping in view the work load of Kangra Division which has the jurisdiction over six sub-divisions. The present work load in this division is of `4279.62 lacs. Moreover, because of the Medical College at Tanda, more attention to the building works was required to be paid as the sanctioned work of these buildings alone was `4863.64 lacs.

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

5. Mr. V.K. Verma, learned Additional Advocate General has raised preliminary objection regarding the very maintainability of the writ petition on the ground that impugned decision regarding shifting of division is a policy matter and, therefore, should not be interfered with by the Courts. While on the other hand, learned counsel for the petitioners would argue that this Court can always exercise powers of judicial review even in policy matters when the same is contrary to law or is in violation of the provisions of the Constitution or is arbitrary or irrational and Courts must perform their constitutional duties by striking it down.

6. A similar question came up for consideration before the learned Division Bench of this Court (of which I was one of the member) in ***CWP No. 621 of 2014*** titled ***Nand Lal and another*** vs**.** ***State of H.P. and others*** reported in ***2014 (2) HLR (DB) 982*** where the petitioners therein had challenged the decision of the Government to open a Government Degree College at Diggal on the ground that the same should be opened at Ramshehar (Nalagarh) because the Panchayats of the area of Ramshehar had made demand for sanctioning and opening of the College at Ramshehar which was more feasible and centrally located. This Court held as under:

> "*4. Heard. The moot question for consideration in this writ petition is- whether the petitioners can question the decision made by the Government for opening a Government Post Graduate College at Diggal, District Solan?*
>
> *5. During the process of consideration of the issue, the residents of various Gram Panchayats of Ramshehar area made resolution(s) and represented to the Government for sanctioning and opening a Degree College at Ramshehar (Nalagarh), District Solan, instead of at Diggal, District Solan. After considering all the documents and keeping in view the policy-norms, governing the field, the respondents made decision to open the said college at Diggal.*
>
> *6. The petitioners are aggrieved for the reason that the State Government has not made decision in accordance with the facts, their contentions read with norms and policy.*

7. It is a beaten law of land that Government decision and policy cannot be subject matter of a writ petition, unless its arbitrariness is shown in the decision making process.

8. It is averred that Panchayats of the area of Ramshehar have made demand for sanctioning and opening the said college at the said place, which is centrally located and is feasible also.

9. The Apex Court in Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399, has laid down the guidelines and held that Courts should not interfere in policy decision of the Government, unless there is arbitrariness on the face of it.

10. The Apex Court in a latest decision reported in Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616, also held that interference by the Court on the ground of efficacy of the policy is not permissible. It is apt to reproduce paragraph 14 of thesaid decision as under:

> *"14. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in multi-brand retail trading does not appear to suffer from any of these vices."*

14. The Apex Court in the case titled as Mrs. Asha Sharma versus Chandigarh Administration and others, reported in 2011 AIR SCW 5636 has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise, scientific or logical and in the interest of society. It is apt to reproduce para 10 herein:

> *"10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and nonarbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to Netai Bag v. State of West Bengal [(2000) 8 SCC 262 : (AIR 2000 SC 3313)]."*

15. It appears that the respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court can not sit in appeal and examine correctness of policy decision. The Apex Court in the case titled as Bhubaneswar Development Authority and another versus Adikanda Biswal and others, reported in (2012) 11 SCC 731 laid down the same principle. It is apt to reproduce para 19 of the judgment herein:

> *"19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of*

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

7. The aforesaid judgment was followed by the learned Division Bench of this Court (of which I was one of the member) in ***CWP No. 4625 of 2012 titled Gurbachan*** vs**. *State of H.P. and others,*** decided on 15th July, 2014, which pertained to the shifting of the veterinary dispensary from village Kosri to village Lunus, in Tehsil Nalagarh, District Solan, H.P. This Court after reiterating what had been stated in ***Nand Lal's*** case (supra) refused to interfere and observed that this Court cannot sit in appeal and examine the correctness of a policy decision.

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

> *"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.*
>
> *24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.*
>
> *25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is*

arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005) 13 SCC 287 wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp. 288-89, para 5)

> *"5……In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India (1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki, 1992 Supp (1) SCC 548. In A.K. Roy v. Union of India, (1982) 1 SCC 271, it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."*

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

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

> *" 229. "It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on*

a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."

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

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

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

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

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

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

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

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

Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561 and State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 46.)"

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

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

10. Therefore, the moot question required to be considered is as to whether merely because certain section of the general public does not subscribe and approve the decision of the Government for transferring the division from Balakrupi to Tanda, can the same be nullified on this ground alone. It is more than settled that individual interest must yield in favour of societal and public interest and this Court would only interfere with policy decision if the petitioners can carve out a case falling within the parameters as set out in para 9 supra.

11. The requirement of having a full fledged Government Medical College at Tanda is of paramount importance as the same shall cater to the medical needs of nearly half of the State because of its strategic location. Once an amount of `4863.64 lacs is being spent on the building works of this College, it is then obvious that these works will have to be overseen, monitored and supervised. Therefore, in such circumstances, no fault can be found with the decision of the respondents whereby they took a decision to transfer the Divisional Office of the HPPWD from Balakrupi to Tanda. The petitioners have failed to point out as to how and in what manner this decision is either arbitrary or irrational much less capricious or whimsical.

12. In view of the aforesaid discussion, I find no ground to interfere in this petition, hence the same is dismissed along with pending application(s) if any. The parties are left to bear their own costs.

****

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

Smt. Kamla Devi & others ...Appellants.

Versus

Shri Ravinder Gupta ...Respondent.

FAO No. 214 of 2008

Decided on: 01.05.2015

Motor Vehicle Act, 1988- Section 166- Rashness and negligence is an essential ingredient for maintaining the claim petition- it is for the claimant to lead evidence and to prove on preponderance of probabilities that the driver had driven the offending vehicle rashly and negligently- respondent examined 6 witnesses who proved that respondent was not driving the vehicle but deceased was driving the vehicle at the time of accident- this evidence was not rebutted- therefore, claimants are not entitled for any compensation. (Para- 4 to 8)

For the appellants: Mr. H.C. Sharma, Advocate.
For the respondent: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is award, dated 04.12.2007, made by the Motor Accident Claims Tribunal-II, Mandi, H.P., Camp at Karsog (for short "the Tribunal") in Claim Petition No. 40 of 2003, titled as Smt. Kamla Devi and others versus Shri Ravinder Gupta, whereby the claim petition filed by the appellants came to be dismissed, however, Rs.50,000/- came to be awarded under 'No Fault Liability' (for short "the impugned award").

2. The owner-insured-respondent herein has not questioned the impugned award on any count, thus, has attained finality so far it relates to him.

3. Learned counsel for the appellants-claimants argued that the vehicle, i.e. maruti car, bearing registration No. HP-30-0097, was driven by the respondent herein, namely Shri Ravinder Gupta, rashly and negligently on 31.12.2002, near Chindi and caused the accident, in which deceased, namely Shri Prem Singh, sustained injuries and succumbed to the injuries.

4. It is beaten law of land that *sine qua non* for maintaining the claim petitions is rash and negligent driving of the vehicle by its driver.

5. It was for the claimants-appellants to lead evidence and to prove by preponderance of probabilities that the driver had driven the offending vehicle rashly and negligently.

6. The respondent-Ravinder Gupta has examined six witnesses. All of them have stated that Ravinder Gupta was not driving the offending vehicle at the relevant point of time, but, it was Prem Singh, who had snatched the keys from Ravinder Gupta and driven the car, which met with the accident.

7. Learned counsel for the appellants-claimants half heartedly argued that FIR was registered against Ravinder Gupta and there is evidence on the file that he was driving the offending vehicle at the relevant point of time, but was not able to shatter the evidence led by Ravinder Gupta. The fact of the matter is that it was deceased-Prem Singh who was driving the offending vehicle at the time of the accident, as held by the Tribunal while passing the impugned award.

8. Having glance of the above discussions, I am of the considered view that the impugned award is well reasoned, legal one and needs no interference.

9. Accordingly, the appeal is dismissed and the impugned award is upheld, as indicated hereinabove.

10. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Manohar Lal .....Appellant
Versus
Sukh Bahadur & others ...Respondents

FAO No. 399 of 2007
Decided on : 1.05.2015

Motor Vehicle Act, 1988- Section 149- Driver was driving the Mahindra Jeep whose gross weight is 2270 kilograms, therefore, it falls within the definition of light motor vehicle and endorsement of PSV is not required in the driving license– Insurance Company had not led any evidence that accident had taken place due to the reason that driver of the offending vehicle was competent to drive one kind of vehicle and he was found driving different kind of vehicle – held that in these circumstance, Tribunal had fallen in error in saddling the owner and the driver with the liability. (Para-5 to 23)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832,
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant : Mr. Y.P. Sood, Advocate.
For the respondents: Mr. Sanjeev Kuthiala, Advocate for respondents No. 1 & 2.
Mr. J.S. Bagga, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject mater of this appeal is the award, dated 18th June, 2007, made by the Motor Accident Claims Tribunal-II, Fast Track, Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 71 of 2004, titled Sh. Sukh Bahadur & another versus Sh. Manohar Lal & others, whereby compensation to the tune of Rs.1,75,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants and the owner and the driver came to be saddled with the liability (hereinafter referred to as the "impugned award").

2. The claimants, the driver and the insurer have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

3. The insured-owner has challenged the impugned award on the ground that the driver was having the valid and effective driving licence at the time of accident and he has not committed any breach.

4. Thus, the only issue to be determined in this appeal is-whether the Tribunal has rightly discharged the insurer-Oriental Insurance Company from the liability and saddled the owner and the driver with the same.

5. Admittedly, the driver was driving Mahindra Jeep bearing registration No. HP-34-0432, the gross weight of which is 2270 kilograms, as per the Registration Certificate, Ext. R-3, is a light motor vehicle.

6. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle", as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively of the Motor Vehicles Act, 1988, (hereinafter referred to as 'the MV Act') herein:

> *"2. .....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> xxx xxx xxx
>
> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.*
>
> *xxx xxx xxx*
>
> *(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."*

7. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

8. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

9. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

> ***"3. Necessity for driving licence.*** *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*
>
> *(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."*

10. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

11. My this view is supported by Section 10 of the MV Act, which reads as under:

> *"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*
>
> *(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-*
>
> *(a) motor cycle without gear;*
>
> *(b) motor cycle with gear;*
>
> *(c) invalid carriage;*
>
> *(d) light motor vehicle;*
>
> *(e) transport vehicle;*
>
> *(i) road-roller;*
>
> *(j) motor vehicle of a specified description."*

12. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stands deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

13. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180**

of 2002, decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-*
>
> > *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
> >
> > *.....*
> >
> > *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*
>
> *In the given circumstances of the case PSV endorsement was not required at all."*

14. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place;*

Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

15. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

16. Having glance of the above discussions, I hold that the endorsement of PSV was not required.

17. It is also not a case of the insurer that the accident was due to the reason that the driver of the offending vehicle was competent to drive one kind of the vehicle and was found driving different kind of vehicle, which was the cause of the accident.

18. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** held that it has to be pleaded and proved that the driver was having licence to drive one kind of vehicle, was found driving another kind of vehicle and that was the cause of accident. If no such plea is taken, that cannot be ground for discharging the insurer. It is apt to reproduce para 84 of the judgment herein:

"84. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 *of the Act enables Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are (a) Motorcycles without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in*

broad types mentioned in sub-section (2) of Section 10. They are `goods carriage', `heavy-goods vehicle', `heavy passenger motor-vehicle', `invalid carriage', `light motor-vehicle', `maxi-cab', `motorcycle', `omnibus', `private service vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal. A person possessing a driving licence for `motorcycle without gear', for which he has no licence. Cases may also arise where a holder of driving licence for `light motor vehicle' is found to be driving a `maxi-cab', `motor-cab' or `omnibus' for which he has no licence. In each case on evidence led before the tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence. Emphasis added."

19. In the said judgment, the Apex Court has also laid down principles, how can insurer avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment in **Swaran Singh's case (supra):**

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by *the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and

the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

20. In a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** the owner had performed his duties and obligations, which he was required to do and satisfied himself that the driver was having valid driving licence. The Apex Court held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

> *"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors., reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.*
>
> 9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence *and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.*
>
> *10. .....*
>
> *11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."*

21. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

> "10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the

extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence *possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

22. Admittedly, the driver was having driving licence to drive 'light motor vehicle'. This Court has held in so many cases, FAO No. 538 of 2007, titled as Oriental Insurance Company Ltd. versus Sh. Khem Chand & others, decided on 27.02.2015, being one of them, that the driver who was having licence to drive "light motor vehicle", requires no "PSV" endorsement.

23. Having said so, I am of the considered opinion that the Tribunal has fallen in error in saddling the insured-owner and the driver with the liability and exonerating/discharging the insurer from the liability. Accordingly, the insurer-Oriental Insurance Company is saddled with the liability.

24. The impugned award so far as it relates to right of recovery is set aside.

25. The Registry is directed to release the award amount in favour of the claimants, strictly as per the terms and conditions, contained in the impugned award.

26. The appeal is disposed of and the impugned award is modified, as indicated hereinabove.

27. Send down the record after placing a copy of this judgment on the file.

****

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

Oriental Insurance Co. Ltd. ...Appellant.
Versus
Shri Kishan Chand & others ...Respondents.

FAO No. 186 of 2008
Decided on:01.05.2015

Code of Civil Procedure, 1908 - Order 9 Rule 4- claimant had filed a Claim Petition, which was dismissed in default and application under Order 9 Rule 4 was also withdrawn by the claimant- held, that procedural wrangles and tangles, hyper technicalities and mystic maybes should not be a ground to dismiss the Claim Petition – a fresh suit can be filed under Order 9 Rule 4, if it is not barred by limitation. (Para-7 to 14)

Code of Civil Procedure, 1908- Order 22- Insurer pleaded that owner has died and appeal had abated - deceased was a gratuitous passenger- held that provisions of Order 22 regarding the abatement have not been made applicable to MACT, therefore, Claim Petition would not abate on the death of the owner/insured. (Para-15 to 20)
Motor Vehicle Act, 1988- Section 149- Insurance Company covered the risk of 8 persons including 5 passengers; therefore, deceased cannot be called to be a gratuitous passenger. (Para-21 to 25)

Cases referred:
N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

For the appellant:	Mr. Deepak Bhasin, Advocate.
For the respondents:	Ms. Archana Dutt, Advocate, for respondent No. 1. Mr. Abhyendra Gupta, Advocate, vice Mr. Nimish Gupta, Advocate, for respondents No. 2 and 4. Name of respondent No. 3 stands already deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is award, dated 29.02.2008, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba, (H.P.) (for short "the Tribunal") in MAC Petition No. 19 of 2006, titled as Sh. Kishan Chand versus The Oriental Insurance Company Ltd. and others, whereby compensation to the tune of Rs. 1,78,770/- with interest @ 9% per annum from the date of petition till realization came to be awarded in favour of the claimant-injured with a direction to the appellant-insurer to satisfy the award (for short "the impugned award").

2. The claimant-injured, the driver and the owner-insured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling the insurer with liability.

4. Thus, the only questioned to be determined in this appeal is - whether the appellant-insurer came to be rightly saddled with liability or otherwise?

5. Learned counsel for the appellant-insurer argued that the claim petition filed by the claimant-injured was not maintainable for the following reasons:

> (1) That the claimant-injured had filed a claim petition, which came to be dismissed in default, constraining the claimant-injured filed an application under Order 9 Rule 4 of the Code of Civil Procedure (for short "CPC") for setting aside the dismissal, which was also withdrawn by the claimant-injured;

(2) That during the pendency of the claim petition, the owner-insured has died, thus, the appeal has abated in terms of the mandate of Order 22 CPC; and

(3) That the claimant-injured was a gratuitous passenger.

6. The arguments of the learned counsel for the appellant-insurer, though attractive, are devoid of any force for the following reasons:

7. Granting of compensation is a social one and it is for the welfare of the victims of the vehicular accidents. The purpose of granting compensation in terms of the mandate of Chapters XI and XII of the Motor Vehicles Act, 1988 (for short "the MV Act") is for the welfare of the claimants, who have become victims of vehicular accident, in order to save them from social evils, like starvation etc.

8. The aim and object of awarding compensation is just to ameliorate the sufferings of the claimants and the Courts/Tribunals have to decide the matter as early as possible, that too, summarily in terms of the mandate of Chapter XII of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act").

9. The Apex Court and other High Courts have held that the Courts should not succumb to the procedural wrangles and tangles, hypertechnicalities and mystic maybes and that should not be a ground to dismiss the claim petition and to defeat the rights of the claimants.

10. The same principle has been laid down by the Apex Court in the cases titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354; Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627;** and **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646,** and by this Court in **FAO No. 339 & 340 of 2008,** titled as NIC versus Parwati & others; **FAO No. 172 of 2006,** titled as Oriental Insurance Company versus Shakuntla Devi & others; **FAO No. 396 of 2012,** titled as Asha & others versus Moti Ram & others and **FAO No. 4248 of 2013,** titled as Magni Devi & others versus Suneel Kumar & others, decided on 13.03.2015.

11. It is beaten law of land that limitation cannot be a ground to defeat the claim petitions. The MV Act has gone through a sea change in the year 1994 and the provision dealing with limitation was deleted and the claim petitions can be filed at any point of time. Thus, limitation cannot come in the way of the claimants for filing claim petitions.

12. The next argument of the learned counsel for the appellant-insurer that the claim petition was not maintainable because the first claim petition came to be dismissed in default, was not restored, is not tenable for the reason that in terms of Order IX Rule 4 CPC, a fresh suit can be filed, provided it is not hit by limitation.

13. It is apt to reproduce the relevant portion of the dismissal order, dated 18.02.2005, made by the Tribunal, Exhibit RJ, herein:

"Present: None.

Case called thrice during the day, but none appeared for the parties. Hence, the petition is dismissed in default. It be consigned to the record room after due completion."

The first claim petition was dismissed in default in absence of all the parties, thus, fresh claim petition was maintainable.

14. Order of dismissal in default is not a decree in terms of the mandate of Section 2 (2) (b) of CPC. It is apt to reproduce Section 2 (2) CPC herein:

> *"2. .....*
>
> *(2)"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation. - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and party final."*

Thus, it can be safely said that doctrine of *res judicata* is not applicable.

15. The claim petition is to be taken to its logical end without any delay, that too, summarily. The cumbersome procedure is not to be followed in view of the mandate of Sections 169 and 176 (b) of the MV Act.

16. Sections 169 and 176 (b) of the MV Act read as under:

> *"**169. Procedure and powers of Claims Tribunals** :- (1) In holding any inquiry under section 168 , the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.*
>
> *(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material object and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.*
>
> *(3) Subject to any rules that may be made in this behalf, the Claims Tribunal?may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry.*
>
> *.....*
>
> ***176. Power of State Government to make rules** :-*

A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:-

(a) .....

(b) the procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;

....."

17. The States have framed Rules in terms of Sections 169 and 176 (b) of the MV Act and some of the provisions of CPC have been made applicable. The State of Himachal Pradesh has also framed the Himachal Pradesh Motor Vehicle Rules, 1999 (hereinafter referred to as "the Rules").

18. It is apt to reproduce Rule 232 of the Rules herein:

*"**232. The Code of Civil Procedure to apply in certain cases:-***

The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."

19. This Rule provides which of the provisions of the CPC are applicable. Order XXII of the CPC deals with abatement and the provisions of said Order have not been made applicable. Only on this count, the argument of the learned counsel for the appellant-insurer, that the claim petition was abated, merits to be turned down.

20. These provisions of law provide that all the provisions of CPC are not applicable, thus, the claim petitions cannot be dismissed in view of the procedural wrangles and tangles, as stated hereinabove.

21. The next argument of the learned counsel for the appellant-insurer that the claimant-injured was travelling in the offending vehicle as a gratuitous passenger, is also devoid of any force because the insurance contract, Exhibit RA, covers the risk of eight persons, i.e. driver, conduct, owner and five passengers. It is apt to reproduce the relevant portion of Exhibit RA herein:

Details of the Vehicle Insured

<table>
<tr><td>Number of Vehicle HP 44 0140</td><td colspan="2">Licensed Carrying Capacity</td><td rowspan="2">Cubic Capacity Horse Power</td></tr>
<tr><td>Make & year of Manufacture

Mahindra 1998</td><td>Gross Vehicle Weight in kg.</td><td>Passenger Carrying Capacity</td></tr>
<tr><td>Engine No.</td><td rowspan="2">2270 kgs</td><td rowspan="2">2+5+1 = 8</td><td rowspan="2">62 HP</td></tr>
<tr><td>Chassis No.</td></tr>
</table>

22. While going through the insurance contract, one comes to an inescapable conclusion that the risk of five passengers is covered.

23. Viewed thus, it can be safely said that the claimant-injured was not a gratuitous passenger. The appellant-insurer has to plead and prove that the owner-insured has committed any willful breach in terms of the insurance contract, has failed to prove the said issue.

24. Having said so, the Tribunal has not committed any error in saddling the appellant-insurer with liability.

25. It is also apt to record herein that the appellant-insurer has not led any evidence, thus, has failed to discharge the onus to prove issues No. 3 to 9.

26. Accordingly, the appeal is dismissed and the impugned award is upheld, as indicated hereinabove.

27. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper verification.

28. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Pooja Devi .....Appellant

Versus

General Manager, Punjab Roadways & others ...Respondents

FAO No. 479 of 2007
Decided on : 1.05.2015

Motor Vehicle Act, 1988- Section 166- Claimant had boarded the bus- she sustained injuries in the accident and was taken to PGI, Chandigarh- her right arm was amputated below elbow- she was only 13 years old and a student of class 6th – she sustained 80% disability- Tribunal awarded compensation of Rs. 2,09,400/- with interest @ 7.5% per annum from the date of the Claim Petition - held, that Tribunal had not assessed the just compensation- it had not taken into consideration the physical frame of the injured-claimant, her marriage prospects, amenities, future income, pain and sufferings and other prospects- claimant was aged 13 years and would have become earning hand after five years, even a housewife is earning Rs. 6,000/- per month by making contribution towards her family- keeping in view the percentage of disability, loss of income can be taken as Rs. 4,000/- per month and applying multiplier of '15', claimant would be entitled for Rs. 7,20,000/- under the head 'loss of earning' – amount of Rs. 50,000/- awarded towards the 'future medical treatment'- amount of Rs. 40,000/- awarded under the head 'pain and sufferings'- Rs. 1,00,000/- awarded under the head 'future pain and sufferings'- Rs. 1,00,000/- awarded under the head 'loss of amenities of life' and Rs. 2,00,000/- awarded

under the head 'marriage prospects'- thus, total amount of Rs. 12,31,400/- awarded to the petitioner. (Para-12 to 34)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the appellant :	Mr. J.R. Poswal, Advocate.
For the respondents:	Nemo for respondent No. 1.
	Mr. Ashish Verma, Advocate vice Mr. Anuj Nag, Advocate, for respondent No. 2.
	Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 3 & 4.
	Mr. B.M. Chauhan, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Despite service, there is no representation on behalf of respondent No. 1, hence he is set ex-parte.

2. By the medium of this appeal, the appellant has challenged the award, dated 14th August, 2007, made by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, (hereinafter referred to as 'the Tribunal') in MAC Petition No. 91 of 2004, titled **Pooja Devi versus the General Manager, Punjab Roadways, Ropar & others**, whereby compensation to the tune of Rs.2,09,400/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in her favour and against the respondents (hereinafter referred to as the "impugned award").

3. Before I deal with the facts of the case and the findings recorded in the impugned award by the Tribunal, I deem it proper to record herein that the Tribunal has dealt with the claim petition casually and has not reached to the claimant-injured.

4. The appellant-claimant-injured being victim of the motor vehicular accident, which was caused on 25th May, 2004, at about 1.45 p.m., on National High Way No. 21, at Chehri near Chharol, District Bilaspur, by the contributory negligence of Gurnam Singh, driver of bus bearing registration No. PB-12-C-9004 and Rakesh Kumar, driver of tempo Tata Pick Up 207 bearing registration No. HP-20-C-0266, while driving the said vehicles, rashly and negligently, had invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, (for short "the Act"), for grant of compensation to the tune of Rs.15,00,000/-, as per the break-ups given in the claim petition.

5. It is averred in the claim petition that the claimant had boarded the offending bus, sustained injuries in the accident, was taken to P.G.I., Chandigarh, where

she remained admitted from 25.05.2004 to 31.05.2004, which resulted in amputation of her right arm, above elbow. Thereafter, she was taken for treatment to Anandpur Civil Hospital, where she remained admitted from 31.05.2004 to 16.06.2004.

6. FIR No. 77/2004, dated 25.05.2004, under Sections 279, 337, 201 of the Indian Penal Code and 184 & 187 of the Motor Vehicles Act, was lodged in Police Station Sadar, District Bilaspur. Investigation was conducted and challan was presented against both the drivers under Sections 279, 337 & 338 of the Indian Penal Code before the Chief Judicial Magistrate, Bilaspur, H.P. The claimant, who was 13 years of age and a student of sixth class at the time of accident, has suffered 80% disability, which has shattered her physical frame and has made her permanently disabled.

7. The respondents contested the claim petition on the grounds taken in their memo of objections.

8. Following issues came to be framed by the Tribunal on 11.07.2005

"1. *Whether the petitioner has sustained injuries in the accident which took place due to the rash and negligent driving of bus No. PB-12-C-9004 by respondent No. 2 and driver of tempo Pick 207 No. HP-20-C-0266, respondent No. 5? .....OPP*

2. If issue No. 1 supra is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from which of the respondents? ...OPP

3. Whether the driver of the offending vehicle i.e. respondent No. 5 was not having a valid and effective driving license at the time of the accident, if so, its effect? ...OPR-6

4. Relief."

9. The claimant examined Ramesh Chand (PW-1), Chaman Lal (PW-2) and Dr. Navtej Pal (PW-3). Driver of bus Gurnam Singh appeared in witness box as RW-1 and Driver of Tempo Pick Up Rakesh Kumar appeared in the witness box as RW-2. The insurer of the tempo i.e. respondent No. 5 and the owner of the bus, i.e. respondent No. 1 have not led any evidence.

10. The Tribunal dealt with the claim petition casually and awarded compensation to the tune of Rs.2,09,400/- with interest @ 7.5% per annum to the claimant from the date of the claim petition till its realization, which is too meager.

11. All the witnesses have stated that both the drivers have driven the offending vehicles rashly and negligently, caused the accident in which the claimant suffered injuries, which has remained unrebutted.

12. The Tribunal has come to the conclusion that the claimant-injured was traveling in the offending bus, the accident was outcome of the rash and negligent driving of both the drivers and the claimant was also negligent. The Tribunal has held that 60% of the compensation was to be satisfied by the insurer of the tempo and 30% of the same was to be satisfied by the owner and driver of the offending bus, i.e. the General Manager, Punjab Roadway and Gurnam Singh, respectively, jointly and severally.

13. The drivers, the owners of the offending vehicles and the insurer of the tempo have not questioned the impugned award. Thus, it has attained finality, so far as it relates to them.

14. Keeping in view the averments contained in the claim petition read with the reply filed by the respondents and the evidence on record, I deem it proper to hold that the claimant was not negligent in any way and the driver of the tempo was negligent to the extent of 60% and the driver of the bus was negligent to the extent of 40%.

15. Having said so, the claimant has proved that both the drivers had driven the offending vehicles rashly and negligently. The insurer of the offending vehicle-tempo is saddled with the liability to the extent of 60% and the owner of the bus, i.e. respondent No. 1 is saddled with the liability to the extent of 40%. Accordingly, the findings returned by the Tribunal on issue No. 1 are modified.

16. Before I deal with Issue No. 2, I deem it proper to deal with issue No. 3.

17. It was for the insurer of the tempo-New India Assurance Company to lead evidence, but it has failed to discharge the onus. At the cost of repetition, it has not questioned the impugned award. Thus, the findings returned by the Tribunal on issue No. 3 are also upheld.

18. The findings returned by the Tribunal on Issue No. 2 are trash and unreasonable for the following reasons.

19. Admittedly, the appellant-claimant-injured was admitted in the hospital for about one month i.e. w.e.f. 25th May, 2004 to 16th June, 2004.

20. The Tribunal has awarded a meager amount while ignoring the facts that the claimant has suffered too much, was not in a position to move, was bed ridden, had undergone pain and sufferings and has to undergo pain and sufferings forever and has lost marriage prospects. The accident has shattered her physical frame and she has become dependant.

21. The Tribunal has not assessed the just compensation. It had to take into consideration the physical frame of the injured-claimant, marriage prospects, amenities of life, future income, pain and sufferings and other prospects.

22. The question is - how to grant compensation in such injury cases? The concept of granting compensation is outcome of Law of Torts. The Tribunal, while considering the case for grant of compensation, has to do some guess work.

23 The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages*

are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

10. *It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.*

11. *In the case Ward v. James, 1965 (1) All ER 563, it was said:*

> *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."*

12. *In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.*

13. *This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):*

> *"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."*

14. *In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-*

> *"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award.*
>
> *The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."*

24. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085**, while granting compensation in such a case. It is apt to reproduce para-7 of the judgment hereinbelow:

> *"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."*

25. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR**

SCW 4787 also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."*

26. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

> "16. *In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:*
>
> *"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.*
>
> *The heads under which compensation is awarded in personal injury cases are the following:*

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

v) (Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. .....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

27. The Tribunal has awarded Rs.1,08,000/- to the claimant under the head 'loss of future income', which is too meager.

28. Admittedly, the claimant was 13 years of age at the time of accident. After a lapse of about five years, she would have become an earning hand. By a guess work, even a house wife is earning more than Rs.6,000/- per month by making contribution towards her family by maintaining the household works and other marital and family matters. But the claimant is not in a position to render any service towards her family and has become dependant. If we take her as a labourer or housewife, she would have been earning not less than Rs.6,000/- per month. Keeping in view the percentage of the disability, it can safely be held that the claimant has lost source of income to the tune of Rs.4,000/- per month. Thus, she is deprived of the earning capacity to the tune of Rs.4,000/- per month. The multiplier applied by the Tribunal is just and appropriate. Accordingly, the claimant is held

entitled to the sum of Rs.4,000/- x 12 = Rs.48,000 x 15 = Rs.7,20,000/- (rupees seven lacs twenty thousands only) under the head 'loss of earning'.

29. Admittedly, the claimant had spent a lot of money on her treatment and has to go for treatment in future also. The Tribunal has only awarded the amount of Rs.9,400/- under the head 'expenditure on medicines'. The Tribunal has lost sight of the very important fact that the claimant has to undergo treatment in future also. Accordingly, the compensation amount to the tune of Rs.9,400/- (rupees nine thousand four hundred only) awarded under the head 'expenditure on medicines', is maintained and she is also held entitled to the sum of Rs.50,000/- (rupees fifty thousands only) under the head 'expenditure on future treatment'.

30. The Tribunal has awarded Rs.1,000/- (rupees one thousand only) under the head 'taxi charges', Rs.6,000/- (rupees six thousands only) under the head 'attendant charges' and Rs.5,000/- (rupees five thousands only/-) under the head 'special diet, is maintained.

31. The Tribunal has not awarded just and appropriate compensation to the claimant under the head 'pain and sufferings', because she has to undergo pain and sufferings throughout her life. Thus, she is held entitled to the tune of Rs.40,000/- (rupees forty thousands only) under the head 'pain and sufferings undergone' and Rs.1,00,000/- (rupees one lac only) under the head ' future pain and sufferings'.

32. The Tribunal has only awarded Rs.20,000/- to the claimant under the head 'loss of amenities of life', which is too meager, is held entitled to the sum of Rs.1,00,000/- (rupees one lac only) under the head 'loss of amenities of life'.

33. The Tribunal has fallen in error in granting compensation to the tune of Rs.20,000/- under the head 'loss of suitable match' to the claimant. At least, the amount of Rs.2,00,000/- (rupees two lacs only) was to be awarded to the claimant under the head 'marriage prospects'. Had she been in good health, she would have enjoyed the charm of marital life, of which she is deprived of. Accordingly, she is held entitled to the sum of Rs.2,00,000/- (rupees two lacs only) under the head 'marriage prospects'.

34. Having glance on the aforesaid discussion, the claimant is entitled to Rs.7,20,000/- under the head 'loss of future income'; Rs.9,400/- under the head 'expenditures on medicines', Rs.50,000/- under the head 'expenditure on future treatment'; Rs.1,000/- under the head 'taxi charges', and Rs.6,000/- under the head 'attendant charges', Rs.5,000/- under the head 'special died, Rs.40,000/- under the head 'pain and sufferings undergone', Rs.1,00,000/- under the head 'future pain and sufferings', Rs.1,00,000/- under the head 'loss of amenities of life' and Rs.2,00,000/- under the head 'marriage prospects', total amounting to Rs.12,31,400/- (rupees twelve lacs thirty one thousands four hundred only) and the amount of compensation is enhanced to Rs.12,31,400/- with interest at the rate of 7.5% per annum from the date of the impugned award till its realization.

35. In view of the aforesaid discussion, it is held that 60% of the compensation amount shall be deposited by the insurer of the tempo i.e. the New India Assurance Company and 40% of the compensation amount shall be deposited by the owner of the bus, i.e. the General Manager, Punjab Roadways Ropar, within six weeks before the Registry.

36. On deposition, 75% of the compensation amount be deposited in the name of the claimant in the fixed deposit and 25% be released in her favour through payees' cheque account.

37. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

38. Send down the record after placing a copy of this judgment on the file.

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

Ranjodh Singh ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr. Appeal No. 274/2011
Reserved on: 29.4.2015
Decided on: 1.5.2015

Indian Penal Code, 1860- Sections 302 and 201- Accused told that deceased had not returned from Sujanpur- people got suspicious and conducted search of the house of the accused- blood stained bed-sheet, Chadar, Dupatta and a blanket were recovered from an almirah in the house- matter was reported to the police – inquiry was made from the accused – he confessed to the killing of the deceased- accused made a disclosure statement that he had killed his wife and had concealed the body in a septic tank - deceased was recovered from septic tank but she was breathing- she succumbed to her injuries subsequently- a danda was recovered on the basis of disclosure statement made by the accused- blood stained clothes were also recovered from the house of the accused- blood was detected on the shirt and Salwar of the deceased- held, that chain of circumstances were complete and the accused was rightly convicted by the Court. (Para-28 to 30)

Indian Evidence Act, 1872- Section 3- Evidence of the witnesses cannot be discarded on the ground of relationship. (Para-31 and 32)

Cases referred:

Babu Lal and others v. State of Madhya Pradesh AIR 2004 SC 846
Vinay Kumar Rai and another v. State of Bihar (2008) 12 SCC 202
Israr v. State of U.P. AIR 2005 SC 249

For the Appellant : Mr. T.S. Chauhan, Advocate.
For the Respondent : Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against judgment dated 7.7.2011 rendered by learned Sessions Judge, Hamirpur, Himachal Pradesh in Sessions Trial No. 28 of 2010,

whereby appellant-accused (herein after referred to as 'accused'), who was charged with and tried for offence under Sections 302 and 201 of Indian Penal Code, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.20,000/- for offence under Section 302 IPC, and in default of payment of fine to further undergo imprisonment for six months, and under Section 201 IPC, he has been sentenced to rigorous imprisonment for three years and to pay a fine of Rs.20,000/-, and in default of payment of fine, to further undergo imprisonment for six months.

2. Case of the prosecution, in a nutshell, is that on 21.7.2010, at about 10.00 pm, accused called Pawna Devi alias Pano Devi on telephone whether Raj Kumari (deceased) had come to their house or not and Pano Devi replied in negative. Thereafter, Pano Devi asked her brother-in-law, Roshan Lal on telephone as to whether Raj Kumari had come to his house or not and Roshan Lal also replied in negative. Pano Devi further told Roshan Lal that accused Ranjodh Singh was asking about Raj Kumari as she had not returned home from Sujanpur. On 22.7.2010 at about 8.30 AM, Roshan Lal, Desh Raj, Praveen Kumar, Pawna Devi alias Pano Devi, Maya Devi, Nirmala Devi and Naseeb Devi went to the house of the accused in order to know whereabouts of Raj Kumari. After reaching at his house, Roshan Lal inquired from accused about Raj Kumari and he told them that Raj Kumari did not return home since the previous day from Sujanpur. Roshan Lal was not satisfied with the reply of the accused. They got suspicious and started searching the house. They recovered blood stained bed-sheet, Chadar, Dupatta and a blanket from an almirah in the house. After recovery of blood stained clothes, they became more suspicious. Desh Raj went to the police station, Sujanpur, where he gave application, Ext. PW.2/A. SI/SHO, Ramesh Chand, alongwith other police officials went to the house of accused. The police and Roshan Lal again asked the accused about the whereabouts of Raj Kumari and accused confessed that after killing Raj Kumari, with a Danda on the previous night, he wrapped the dead body in a gunny bag and threw the same in Beas river. Thereafter, SHO Ramesh Chand recorded statement of Roshan Lal under Section 154 CrPC Ext. PW1/A. Consequently, FIR was registered under Sections 302 and 201 IPC. The accused while in police custody made disclosure statement that he had concealed his shirt and Pyjama in a heap of bricks in the verandah. He got recovered blood stained shirt and Pyjama from the heap of bricks. He also made disclosure statement that he had concealed the dead body of Raj Kumari in septic tank. Accused led police party to the septic tank. Raj Kumari was recovered from the septic tank. She was alive at that time. She was sent by the IO to Community Health Centre Sujanpur for medical treatment. Medical Officer referred Raj Kumari to Dr. RP Medical College, Tanda and she was further referred to PGI. On 24.7.2010, accused made disclosure statement about Danda (handle of axe). Thereafter he got recovered the Danda. Raj Kumari died on 25.7.2010. Investigation was completed. Challan was put up after completing all the codal formalities. Accused was convicted and sentence as noticed herein above. Hence this appeal.

3. Prosecution has examined as many as 24 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence and examined two witnesses in his defence.

4. Mr. T.S. Chauhan, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. P.M. Negi, Deputy Advocate General has supported the judgment of trial court dated 7.7.2011.

6. We have heard the learned counsel for the parties and gone through the judgment and record very carefully.

7. PW-1 Roshan Lal testified that on 21.7.2010 at about 10.15 pm, Pano Devi, his sister in law, informed on telephone that whether her sister Raj Kumari had come to his house or not. He told her that she did not come to his house. Pano Devi told that accused was enquiring about her. On 22.7.2010, he contacted accused on telephone. He inquired if Raj Kumari had returned to the matrimonial house or not. He told that she has not returned. He alongwith his wife Nirmala Kumari, Kashmiri Devi, Pano Devi, Maya Devi, Parveen Kumar and Desh Raj as well as his mother left for the house of the accused. They inquired about Raj Kumari. However, accused was not giving satisfactory reply. They got suspicious. They started searching the house. They noticed mobile and Chappal of Raj Kumari in the house. They became more suspicious. When they opened the almirah, blood stained clothes fell down on the floor. Accused told that during previous night he gave beatings to Raj Kumari for coming late and killed her by giving Danda blows. Thereafter he wrapped the body of deceased in a gunny bag and threw in the Beas river. He deputed Desh Raj to report the matter to the Pradhan. He sent Desh Raj to the police station. Police recorded his statement vide Ext. PW1/A. Blood stained bedsheet, Dupatta, one blanket in the shape of Galaf, were taken into possession vide memo Ext. PW1/B. He identified the Galaf Ext. P2, Chadar Ext. P3, Duptta Ext. P4 and blanket Ext. P5. Accused was interrogated by the police. Accused told that he has concealed his clothes underneath the heap of bricks. These were recovered vide Ext.PW1/E. He identified Shirt Ext. P7 and Trousers Ext. P8. Inquest reports Ext. PW1/F and PW1/G were prepared by the police. He denied the suggestion in his cross-examination that Raj Kumari was suffering from mental ailment.

8. PW-2 Desh Raj is brother of the deceased. According to him, Pano Devi telephoned Roshan Lal, PW-1 informing that Raj Kumari was not at home. He, Roshan Lal and Naseeb Devi, his mother, Nirmala Devi, Parveen Kumar and Kashmiri Devi went to the house of accused on 22.7.2010. They asked the accused about Raj Kumari. When police came to the house of accused, accused made confession about the murder of Raj Kumari. He was declared hostile and cross-examined by the learned Public Prosecutor. Learned trial Court noticed his demeanour. He was laughing while answering the questions. Court observed that he appeared to have consumed liquor.

9. PW-3 Parveen Kumar deposed that he had also accompanied his family members. They asked the accused about Raj Kumari. He replied that she has not returned home from Sujanpur. His Bhabhi Maya Devi opened the almirah in the room and blood stained clothes fell down from the almirah on the floor. Accused admitted that he had killed Raj Kumari and thrown body of Raj Kumari in a jute bag in Beas river. Desh Raj went to the police station.

10. PW-4 Seema Devi deposed that she accompanied Desh Raj to the police Station. Desh Raj made report Ext. PW-2/A. They returned to the spot followed by police. She went inside the room alongwith police officials and almirah was opened. Blood stained clothes were found in the same. She was also declared hostile but in her cross-examination by the learned public prosecutor, she has admitted that when accused was questioned, he told that on previous night, he had thrown body of Raj Kumari after killing her, in the river. Thereafter, she alongwith Desh Raj, had gone to the police station. Body of Raj Kumari was taken out of the septic tank by calling sweepers. She identified Danda, Ext. P9.

11. PW-5 Pawna Devi deposed that accused telephoned at their house in the evening. Call was attended by her. Accused inquired about Raj Kumari. She telephoned her brother-in-law Roshan Lal about the telephone call made by accused. She telephoned the accused and told that Raj Kumari was not at home and whether she has returned to the house by that time or not. In the morning, all the family members went to the house of accused. She denied the suggestion that Raj Kumari was suffering from giddiness or palsy.

12. PW-6 Maya Devi also deposed that she accompanied her relations to the house of the accused. When she opened almirah in the room, some clothes i.e. bed sheet, blanket, Dupatta etc. fell down from upper most shelf of the Almirah. She noticed blood on the same. She told her Jeth Roshan Lal and Nirmala Devi about it. They advised to keep the clothes as such. Then they came out in the courtyard. Roshan Lal, PW-1, asked accused about the blood on the clothes. Accused admitted that he had killed Raj Kumari and thrown the body in a gunny bag in the Beas river.

13. PW-7 Nirmala Devi deposed that on 21.7.2010, during night, Pawna alias Pano made a telephone call to her inquiring about the whereabouts of Raj Kumari. She also told her that accused was inquiring about her. She informed Roshan lal about it. In the next morning, they telephoned the accused and he told that Raj Kumari was not traceable. They all went to the house of accused. Accused was asked by them but he replied that Raj Kumari had not come home. They started searching the house. They found her mobile phone and chappal in the house. Maya Devi opened the almirah in the room in her presence. Some clothes i.e. blanket, Chuni and bed sheet fell down from almirah. They were stained with blood. Accused was asked about it. He told that he had killed his wife for not returning home on time. Desh Raj went to the police station.

14. PW-8 Onkar Chand deposed that on 21.7.2010, his father telephoned him at about 10.00 pm and informed that his mother had gone to Sujanpur in the morning on that day but had not returned. In the morning on 22.7.2010, he again telephoned the house of his maternal uncle. He suspected that there might have been some quarrel between his parents and that some untoward incident might have taken place. Accused used to quarrel with his wife. He called his father and noticed that he was under some fear and told him by that time that he had no information about mother. Then he came back from Chandigarh to his house and reached about 1.00 pm. He went to the septic tank site. Body of his mother was already lying outside the septic tank. Mother was moved to the hospital. She was shifted to Tanda and thereafter to PGI, where she died. After post-mortem, dead body was brought back for cremation.

15. PW-9 Surinder Kumar deposed that accused made disclosure statement Ext. PW-9/A that he has kept one Danda /stick concealed near his kitchen.

16. PW-10 Manoj Kumar deposed that on 22.7.2010, he received a telephonic call from the police station Sujanpur that a dead body was to be retrieved. He arranged for three sweepers. Body was recovered vide Ext. PW-1/A. He signed the same.

17. PW-11 Ranjit Singh deposed that on 22.7.2010, accused was in police custody. At about 8/8.30 pm, accused made statement and told the IO Ramesh Chand that he had concealed the body of his wife in his septic tank after killing her and he could get the same recovered. Statement was recorded vide Ext. PW11/A.

18. PW-12 Mani Ram deposed that accused led them to his septic tank and lifted the lid of the septic tank and showed body of his wife. Body was noticed in the torch light.

Stair case was arranged. He went inside the septic tank. Body was lying in the septic tank. There was knee deep water in the septic tank.

19. PW-13 Dr. Kunal Kaushal has examined the deceased Raj Kumari on 22.7.2010. According to him, injuries could be inflicted with Danda, Ext. P9.

20. PW-14, PW-15, PW-16 and PW-17 are formal in nature.

21. PW-18 Raghujeet Singh submitted that the case property was deposited with him.

22. PW-19 Ravinder Nath deposed that he took parcel to the CHC Sujanpur and produced the same before the Medical Officer. He opened one Beul Danda without axe and gave his opinion Ext. PW13/C.

23. PW-20 Asha Kumari deposed that accused has called her and asked her to milk the buffalo. She went to the house of accused. Sandla Devi tried to milk the buffalo but milk could not be collected. Raj Kumari was not present in the house.

24. PW-21 Sunita is daughter of deceased. She was residing with her maternal uncle for the last two months. She had gone to the house of her Bua at village Plahi 12/13 days prior to the incident. On 21.7.2010, accused telephoned the son of her Bua that her mother was not at home. She has gone somewhere. She was told about it next morning by her cousin Sanjeev Kumar. She alongwith her cousin sister Amita came to her house. They reached at 2.00 pm. Police had already come. She asked her father about her mother. He told her that he had killed her and thrown body in the river Beas.

25. PW-22 Dr. S.P. Mandal has conducted post mortem examination on 26.7.2010. According to him, cause of death was Oedema of brain due to head injuries. These injuries were ante mortem and caused by blunt weapon. Post-mortem report is Ext.PW-22/B.

26. PW-23 ASI Shamsher Singh deposed that at the instance of accused, body of Raj Kumari was recovered from septic tank with the help of sweepers. She was alive. She was taken to Sujanpur Hospital. She was referred to Dr. RP Medical College Tanda. On 24.7.2010, accused made disclosure statement in the presence of Manoj Kumar and Surinder Kumar, vide Ext. PW-9/A. One handle of axe, Ext. P9 was recovered. Site map was prepared. Raj Kumari was referred to PGI Chandigarh. He went to PGI and got post-mortem conducted.

27. PW-24 SI Ramesh Chand deposed that he alongwith ASI Shamsher Singh and HC Pawan Kumar went to village Tihra and inspected the house. He found blood stained clothes in one room. He recorded statement Ext. PW-1/A of Roshan Lal under Section 154 of the Code of Criminal Procedure. He also took photographs. He prepared spot map, Ext. PW24/A. Shirt Ext. P7, Trousers Ext. P8 were recovered. Accused made disclosure statement Ext. PW11/A that after killing his wife he had put dead body in septic tank and body was recovered vide Ext. PW-10/A. Body of Raj Kumari was taken out of septic tank. Sweepers told that Raj Kumari was alive when she was brought outside the septic tank. He directed ASI Shamsher Singh to shift Raj Kumari to the hospital at Sujanpur.

28. Accused has made extra-judicial confession before PW-1 Roshan Lal that he has killed his wife by giving Danda blows and after wrapping body of Raj Kumari in a gunny bag had thrown in Beas river. According to PW-2 Desh Raj, when police came to the house

of accused, accused made confession about murder of Raj Kumari. Though he was declared hostile, but his demeanour was noticed by the trial Judge. PW-8 Parveen Kumar is the brother of deceased. According to him also, accused had admitted that he has killed Raj Kumari and thrown body in Beas river. PW-4 Seema Devi though declared hostile, but in her cross-examination by the Public Prosecutor, has admitted that when accused was questioned, he told that on previous night he had thrown body of Raj Kumari after killing her, in the river. PW-6 Maya Devi deposed that PW-1 Roshan Lal asked accused about blood on clothes, then accused admitted that he has killed Raj Kumari and thrown body in a gunny bag in Beas river. PW-7 deposed that when accused was asked about blood on the clothes, he told that he has killed his wife and thrown body in a gunny bag in the river. PW-8 Onkar Chand, son of accused asked his father about the whereabouts of his mother, but he could not reply. When police was interrogating the accused, he told the police that he had killed his mother and thrown body in the river. PW-20 Asha Kumari has not seen Raj Kumari when she was asked to milk buffalo of the accused. PW-21 Sunita asked about the whereabouts of mother, then accused told her that he has killed her and thrown body in Beas river.

29. Accused has earlier told the witnesses, as noticed herein above, that he has killed his wife and thrown body in the river but he made disclosure statement vide Ext. PW-11/A to the effect that he has killed his wife and concealed the body in septic tank. Body was retrieved from the septic tank by PW-12 Mani Ram. Raj Kumari was breathing. She was sent to CHC Sujanpur. Medical Officer at Sujanpur referred her to Dr. RP Medical College Tanda and Medical Officer at Tanda further referred her to PGI Chandigarh. Danda was recovered on the basis of disclosure statement made by accused vide Ext. PW-9/A. PW-13 Dr. Kunal Kaushal has opined that injuries could be inflicted by Danda, Ext. P9. Raj Kumari has died due to ante mortem injuries inflicted with a blunt weapon as per statement of Dr. S.P. Mandal, PW-22.

30. Mr. T.S. Chauhan has argued that all the witnesses are close relations of the deceased and their statements could not be believed. However, it is settled law that statements of witnesses, who are related to the victim, can be relied upon if they inspire confidence. Statements made by the close relations of deceased are natural and believable. PW-8, son of accused and PW-21, daughter of accused, have also deposed against their father. It has come in the statement of PW-8 Onkar Chand, that his father used to give beatings to his mother. It has also come on record that the deceased had gone to Sujanpur and had come late in the evening. Accused has given beatings to the deceased with Danda and presuming her to be dead had dumped her in the septic tank. It was only a coincidence that she did not die immediately but died later on at PGI. Prosecution has recovered blood stained clothes from the house of accused (Ext. P2 to Ext P5). Shirt (Ext. P7) and Pyjama (Ext. P8) were also recovered. Blood of group 'B' was detected on quilt cover, bed sheet, blanket, Dupatta and shirt of accused. Blood was also detected as per Ext. PW24/F on Pyjama and stick/Danda. Blood was also detected on the shirt and Salwar of the deceased. Mr. Chauhan has vehemently argued that the prosecution has failed to attribute any motive against the accused and in case of circumstantial evidence, motive plays a very important role. It is settled law that when chain of events is complete, as is in the present case, motive is not that important. Prosecution has fully proved the case against the accused.

31. Their Lordships of the Hon'ble Supreme Court in **Babu Lal and others v. State of Madhya Pradesh** reported in AIR 2004 SC 846 have held that credible evidence of

witnesses could not be discarded on the ground of relationship. Their lordships have held as under:

> **"[8] The materials on record clearly established that the deceased was in mentally fit condition, though battered in the physical frame. The High Court has rightly held that presence of P.Ws. 1 and 2 did not result in any presumption of tutoring, when the FIR was recorded. Merely because there was a thumb impression on the FIR, and not the signature as stated by P.W. 1, that does not falsify the prosecution version. The same has been clarified by the High Court. It has to be noted that P.W. 16, who had scribed the FIR, stated that the contents were read over to the deceased, who had thereafter put his thumb impression. In fact the defence itself has suggested to P.W. 1 during cross-examination that the thumb impression was taken on the paper first and thereafter the writings were inserted. In other words, there was acceptance of the fact that the thumb impression was there but writings were done later which have been denied by P.W. 1. We do not find any reason to discard the dying declaration only on this ground. The High Court has also found in analysing the evidence that the plea relating to anti-dating or anti-timing of the FIR is a myth. Though some of the accused persons have been acquitted by the trial Court, the High Court has carefully analysed the evidence and have sifted the grain from the chaff and disengaged truth from falsehood. Merely because some persons have not been named in the FIR and have given the benefit of doubt, that cannot be a reason for discarding the dying declaration or the evidence of the witnesses."**

32. Their lordships of the Hon'ble Supreme Court in **Vinay Kumar Rai and another v. State of Bihar** reported in (2008) 12 SCC 202 have held that merely because eye-witnesses are family members, their evidence can not be discarded. Their lordships have held as under:

> **"11. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version.**
>
> **"5. ....Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.**
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> **[6] In Dalip Singh and Ors. v. The State of Punjab, (AIR 1953 SC 364) it has been laid down as under :-**
>
> **"26. A witness is normally to be considered independent unless he or she springs from sources which are l ikely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen**

the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is ofter a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

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

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

"25. We are unable to agree with the learned Judges of the a High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan', (AIR 1952 SC 54 at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

[9] Again in Masalti and Ors. v. State of U. P., (AIR 1965 SC 202) this Court observed :

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

To the same effect is the decisions in State of Punjab v. Jagir Singh, (AIR 1973 SC 2407); Lehna v. State of Haryana, (2002 (3) SCC 76) and Gangadhar Behera and Ors. v. State of Orissa, (2002 (8) SCC 381). The above position was also highlighted in Babulal Bhagwan Khandare and Anr. v. State of Maharashtra, (2005 (10) SCC 404) and in Salim Sahab v. State of M. P., (2007 (1) SCC 699).”

33. Their lordships of the Hon'ble Supreme Court in **Israr v. State of U.P.** reported in AIR 2005 SC 249 have held that relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Their lordships have held as under:

> **"12. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."**

34. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

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

State of Himachal Pradesh — Appellant.
Versus
Mizuta Natsuhiro — Respondent.

Cr.MP(M) No. 308 of 2015.
Date of decision: 1.5.2015

Code of Criminal Procedure, 1973- Section 378- Accused was found sitting in the Volvo Bus on seat No. 30- he got perplexed on seeing the police- conductor disclosed that luggage of the accused was inside the dickey and was marked with chalk - one bag bearing Mark seat No. 30 was taken out and during the search 190 grams of charas was recovered – accused was acquitted by the Trial Court- an application was filed seeking leave to appeal against the order passed by trial Court- independent witnesses had turned hostile- merely because, prosecution witnesses corroborated each other and link evidence was established is not sufficient when the bag was not produced before the Court- Trial Court had appreciated the facts properly- hence, leave to appeal refused. (Para- 7 to 11)

For the petitioner: Mr. M.A.Khan, Additional Advocate General with Mr. Anup Rattan, Additional Advocate General.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

Through the instant Cr.M.P(M) the appellant has sought grant of leave to appeal against the impugned findings of acquittal rendered in favour of respondent/accused by the learned Special Judge-II (Additional Sessions Judge), Kullu, in Sessions Trial No. 49 of 2014 decided on 1.1.2015.

2. The facts necessary for rendering an adjudication on the Cr.MP(M) No. 308 of 2015 are that on the evening of 13.3.2014 at about 6.30 p.m when a police party headed by PW-9 HC Vinay Kumar and consisting of Head Constable Hitesh Kumar, HHG Jagdish Chand, driver of official vehicle No. HP-34-A-9984 was on Nakabandi duty at Temporary Check Post Bajaura with Constable Mukesh Kumar, constable Naresh Kumar and Constable Vikram, then one Volvo Bus of Yak Bus Service bearing No. UP-83-T-1704 came from Manali side and was going to Delhi, was signaled to stop. Thereafter HC Vinay Kumar, HC Hitesh Kumar and Constable Naresh Kumar boarded the bus and started checking the bus and when they reached near Seat No. 30 the accused on seeing the police party got perplexed and on asking the accused he disclosed his name Mizuta Natsuhiro. The investigator asked the conductor about the luggage of the accused and the conductor disclosed that the luggage of the accused was inside the dickey of the bus where seat Nos. of the passengers have been marked with chalk. Thereafter, the investigator got the accused alighted from the bus and one bag with Mark seat No. 30 belonging to accused was taken out from the dickey of the bus by conductor of the bus and the bag as well as the accused were taken to temporary check post. Thereafter, investigator PW-9 Head Constable Vinay Kumar gave his personal search to the accused but nothing incriminating was recovered. Thereafter, the bag of the accused was checked by investigator and inside the bag one transparent polythene envelope was found in which two shoes of red coloured were kept and on checking the shoes, transparent envelopes were found which were containing black colour substance in pan cake and round shape and when the said black coloured substance was checked, it was found charas. The recovered charas was weighed with the help of an electronic scale and its weight was found 190 grams. Out of the recovered 190 grams charas, one sample of ten gram charas was taken and put in a cloth parcel and sealed with three seal of 'M'. Thereafter, investigating officer completed all the codal formalities.

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

4. In order to prove its case, the prosecution examined as many as 10 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused was given an opportunity to adduce evidence in defence and he chose not to adduce any evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused/respondent.

6. The State of H.P. is aggrieved by the judgement of acquittal, recorded by the learned trial Court. Shri M.A.Khan, ld. Additional Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that leave to appeal be granted by this Court.

7. Admittedly, accused Mizuta Natsuhiro, as proved by ticket Ext.P-1 was occupying seat No. 30 and contraband was recovered from a rucksack kept in the dickey of the bus. The accused is sought to be connected with the ownership of the rucksack on the score of and on the strength of the rucksack wherefrom a polythene bag was retrieved

wherein two shoes were found in which charas weighing 190 grams was recovered, bearing an inscription thereon compatible to the number of the seat occupied by the accused in the bus nomenclatured as Volvo Bus bearing No. UP-83-T-1704 bound from Kullu to Delhi. The prosecution has concerted to convey that the accused-respondent owned it, given the analogity qua seat No. 30 occupied by the accused and the inscription borne on the rucksack wherefrom charas weighing 190 grams was allegedly recovered.

8. Even though the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, hence, it is argued that when the prosecution case stood established, it would be legally unwise for this Court to refuse to grant leave to appeal against the impugned findings of acquittal.

9. Besides, it is contended that when the testimonies of the official witnesses unravel the fact of their being bereft of any inter se and intra se contradictions hence, consequently when they too enjoy credibility they were undiscardable.

10. However, independent witnesses PW-8 and PW-10 turned hostile and omitted to lend support to the prosecution case. The mere fact of the prosecution witnesses having deposed in corroboration with each other besides in tandem qua each of the links of the prosecution case commencing from search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL, nonetheless the aforesaid proof lent by or existing in the deposition of the official witnesses qua each of the links in the prosecution case hence having come to be substantiated does not hold good for the prosecution nor does it prod an inference that the genesis of the prosecution version as such has come to be proved, especially the preponderant fact of recovery of charas weighing 190 grams having been effectuated from 'rucksack' found in the dickey of the bus though inscribed with a seat number analogous to the one demonstrated by ticket Ext.P-1 as held by the accused besides occupied by the latter when preeminently the rucksack remained not produced in Court. Non production of rucksack in Court, in its entirety belies the factum deposed by the prosecution witnesses that on its search and seizure by the Investigating Officer charas weighing 190 grams was recovered from the pair of shoes kept inside a polythene enclosed in the rucksack. The omission of production of rucksack in Court for reiteration reinforcibly gives impetus to the formidable conclusion that the entire edifice of the genesis of the prosecution story of charas having come to be recovered in the manner alleged by the prosecution gets shattered. Besides, as a necessary sequel, the findings of acquittal rendered by the learned trial Court in favour of accused respondent suffers from no infirmity, especially when there is also no evidence on record personifying the fact that inscription, if any, of seat No. 30 on the rucksack though analogous to the seat occupied by the accused was scribed by the accused or that hence the rucksack was owned by the accused as also when there is non-existence of any germane evidence on record personifying the fact that the two shoes wherefrom charas was recovered were owned by the accused.

11. In view of the above discussion, the learned trial Court is to be concluded to have appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. Therefore, the application for leave to appeal is dismissed being

devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained.

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

United India Insurance Company Ltd. .....Appellant.
Versus
Madhvender Kuthleharia and others ...Respondents

FAO (MVA) No. 137 of 2009.
Date of decision: 1st May, 2015.

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that driver did not have a valid and effective driving licence at the time of accident- held, that it was for the insurer to plead and prove that owner had committed willful breach of the terms and conditions of the policy- insurer had not led any evidence to prove the breach of the terms and conditions of the policy and it was rightly held liable. (Para-11 to 14)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant: Mr. Rajiv Jiwan, Advocate.
For the respondents: Mr. R.L. Chaudhary, Advocate, for respondent No.1.
Mr. Suneet Goel, Advocate, for respondent No.2.
Nemo for respondent No.3.

The following judgment of the court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Insurer has questioned the judgment and award dated 29.11.2008, made by the Motor Accident Claims Tribunal-cum- Presiding Officer, Fast Track Court, Mandi, H.P., in Claim Petition. Nos. 126/02, 243/2005 titled *Madhvender Kuthleharia versus Kusum Lata Sood and others,* whereby compensation to the tune of Rs.5,37,000/- with 7.5% interest was awarded in favour of the claimant and insurer/appellant herein came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Claimant/injured, owner Kusum Lata Sood and driver Amarnath have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The insurer-United India Insurance Company has questioned the impugned award on the ground that the driver was not having a valid and effective driving licence at the time of accident. Thus, the only question to be determined in this appeal is whether the owner has committed any willful breach?

4. The claimant filed a claim petition before the Tribunal for the grant of compensation to the tune of Rs.3 lacs, as per break-ups given in the claim petition, on the ground that on 20.7.2002, he was going on his scooter towards Mandi-Pandoh, on his extreme left side of the road and when he reached at Jagar, near Pandoh, one private bus bearing registration No. HP-34-A-0925 came from Kullu side towards Mandi, hit the scooter and he sustained injuries, rendering him permanently disabled.

5. The owner, driver and insurer have filed replies to the claim petition and resisted the claim petition.

6. The Tribunal, after examining the pleadings and the documents of the parties, framed following issues:

(i) *Whether the claimant sustained injuries in the Motor Vehicle Accident caused by the Rash and Negligent driving of the respondent No.2 as alleged? OPP*

(ii) If the above issue is proved in the affirmative the quantum of compensation, the claimant is entitled and from whom? OPP

(iii) Whether the breach of the terms and conditions of the Insurance Policy was occasioned or not? OPR3.

(iv) Relief.

7. The claimant examined Dr. D.K. Arora as PW1, Prithvi Raj PW2, Pawan Kumar PW3, Narender Kumar PW4 and claimant himself stepped in to the wetness-box as PW5.

8. The owner has examined Vidya Sagar as RW1 and Amar Nath driver himself stepped into the witness-box as RW2.

9. The insurer has not led any evidence. Thus, the evidence led by the claimant, owner and driver has remained unrebutted.

10. In this appeal, the findings recorded on Issues No. 1 and 2 are not in dispute, thus upheld.

11. **Issue No.3.** It was for the insurer to discharge the onus, but it has failed to do so. However, I have gone through the statements of RW1 and RW2. The Tribunal has discussed the said statements in para 18 of the impugned award, is well reasoned, needs no interference.

12. It was for the insurer to plead and prove that the owner has committed any willful breach in terms of Sections 147 and 149 of the Motor Vehicles Act read with **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

13. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or

thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

14. Applying the test, the Tribunal has rightly recorded the findings and saddled the insurer with the liability and are upheld.

15. Viewed thus, the impugned award is upheld and appeal is dismissed.

16**.** Registry is directed to release the amount in favour of the claimants strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

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

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

Cr. Appeal No. 72 of 2012 with Cr. Appeal Nos. 46 and 126 of 2012.
Reserved on: April 30, 2015.
Decided on: May 02, 2015.

1. **Cr. Appeal No. 72 of 2012**
   Azam .....Appellant.
   Versus
   State of H.P. .....Respondent.
2. **Cr. Appeal No. 46 of 2012**
   Shamshudin .....Appellant.
   Versus
   State of H.P. .....Respondent.
3. **Cr. Appeal No. 126 of 2012**
   Sheharudin .....Appellant.
   Versus
   State of H.P. .....Respondent.

Indian Penal Code, 1860- Section 395- PW-2 had kept boxes of nose pins and other ornaments in her home- 4-5 persons entered in the room armed with pistols and darat- they searched the almirah and took away the ornaments- mobile phone and chains were also taken away- prosecution witnesses stated that door was opened after some time- it was not

believable that door could be opened from inside when it was bolted from outside- in case, door was opened by pushing it, latch would have broken but police had not seized the broken latch- further, prosecution version that accused entered the house when PW-3 used the toilet, cannot be believed- presence of witnesses to the disclosure statement was doubtful- local police was not informed about the recovery nor independent witness was associated at the time of seizure of the mobile phone- independent witnesses ought to have been joined at the time of recovery -further recovery was made from an open place which was not believable - DNA profile matched with one accused but the Medical Officer did not depose that sample was preserved by her- Medical Officer, CH, Sundernagar was not examined to prove preservation of blood sample- it was not believable that door of gold smith could be opened by pushing it inside- held, that these circumstances create doubt regarding prosecution version- accused acquitted. (Para-25 to 37)

For the appellant:	Mr. Naresh Kumar Tomar, Advocate for appellant in Cr. Appeal No. 72 of 2012. Mr. N.K.Thakur, Sr. Advocate, with Mr. Inder Sharma, Advocate, for appellant in Cr. Appeal No. 46 of 2012. Mr. Ajay Sharma, Advocate, for appellant in Cr. Appeal No. 126 of 2012.
For the respondent:	Mr. M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, all these appeals were taken up together for hearing.

2. These appeals are directed against the common judgment dated 23.12.2011/29.12.2011, rendered by the learned Addl. Sessions Judge, Mandi, H.P., in Sessions Trial No. 10 of 2010, whereby the appellants-accused (hereinafter referred to as the "accused", namely, Azam, Shamshudin and Sheharudin), who were charged with and tried for offence punishable under Section 395 IPC, have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 10,000/- each and in default of payment of fine, they were further ordered to undergo simple imprisonment for six months each. Accused Kasim was acquitted by the learned trial Court for offence under Section 395 IPC.

2. The case of the prosecution, in a nut shell, is that PW-1 Shyam Lal is running shop of Goldsmith at Sundernagar, Bhojpur. He had gone to Shimla on 8.9.2009. His wife Sushma, PW-2 and his servant Raju were present in the shop. Sushma brought boxes of nose pins containing five trays and other ornaments to her home from the shop on 8.9.2009. They were kept by her in the almirah. Shyam Lal and his family members were sleeping in the house on 9.9.2009. Somebody knocked at the door at 1:30 AM. Sushma opened the door. Krishna Devi PW-3, mother of Shyam Lal was standing on the door. 4-5 persons were accompanying her. As soon as Sushma opened the door, one person entered inside the room. He was armed with pistol. He put the pistol on the head of Shyam Lal. Other persons entered inside the room. They were also armed with the pistols. The fourth person was armed with the darat. They searched the almirah. Other family members also

arrived in the room. They were made to sit in the room. Tilak Raj, the younger brother of Shyam Lal and his wife also arrived after sometime. They were also threatened. Bag containing various ornaments was taken out of the almirah. The chains of Sushma and Krishna were snatched. Two mobile phones were also taken away. The accused left the room with all the articles. The matter was reported to the police and entry in the daily diary Ext. PW-10/A was recorded. Statement of the complainant Shyam Lal Ext. PW-1/A was recorded and sent to the Police Station. FIR Ext. PW-11/A was registered. Empty wrappers of Shikhar Gutka make Ext. P-4 and P-5, and one bottle of Godfather beer were taken into possession vide seizure memo Ext. PW-1/B. It was found that Gutka was spitted on the mat lying on the floor. Piece of mat was cut and seized vide memo Ext. PW-1/C alongwith the lock and key. These were sealed in separate parcel with seal A. Seal impression was taken on separate piece of cloth. Site plan Ext. PW-27/D was prepared. Shyam Lal produced ledger book, bill and drat, which were seized vide seizure memo Ext. PW-1/F. Accused Shehruddin was arrested on 15.11.2009. He made disclosure statement Ext. PW-6/A on 18.11.2009 that he had concealed mobile phone in the house of his sister, which he could got recovered. He got the phone Ext. P-2 recovered from an attaché kept inside the room. The mobile phone was sealed with seal 'V' and seized vide seizure memo Ext. PW-18/B. Site plan of the place of recovery Ext. PW-27/E was prepared. This mobile was sold by Vijay Kumar to Shyam Lal vide bill No. PW-26/A. Accused Shehruddin told during interrogation that Raju and Nuru met him and told him to go to Himachal and to return after committing dacoity. He, Raju, Nuru, Afzal, Islam and Azam came to Himachal in Scorpio bearing regn. No. DL-3CY-8786, being driven by Shamsuddin. Raju stayed at Kiratpur. Shehruddin, Nuru, Afzal, Islam and Azam went to the house of Mehfooz. Mehfooz brought two pistols. One pistol was with Nuru. Mehfooz handed over one pistol to Afzal and one to Islam. The vehicle was stopped at Kangu from where Nuru, Afzal, Islam, Azam and Shehrudin went on foot to the house of the complainant. Shamsuddin and Mahfoz waited in the vehicle. All of them went to Delhi after committing theft. The articles stolen during theft were distributed in Delhi. The mobile phone fell in the share of Shehrudin, which was sold by him to Kasam. Kasam returned the phone because money transaction could not be completed. Nuru, Azam and Islam had sold jewellery to Mittal Jewelers. The police seized Scorpio bearing regn. No. DL-3CY-8786 on 23.11.2009 from Ganda Nala Hajuri Khas. Visiting cards were found inside the vehicle, which were seized vide seizure memo Ext. PW-8/C. Accused Azam, Shamsuddin and Islam were arrested on 26.11.2009. Mohammad Azam made a statement on 8.12.2009 under Section 27 of the Indian Evidence Act that he could get gold recovered from Shamli Bazaar. Azam showed shop of Mittal Jewellers in Bara Bazaar, Shamli. Memo Ext. PW-24/B was prepared. Shamsudin made a statement under Section 27 of the Indian Evidence Act that he could get the gold recovered from his house, which was kept by him outside his house in a tarpaulin. Memo Ext. PW-5/B was prepared in this behalf. He led the police to his house from where one polythene bag was recovered which was opened and it was found to be containing gold nose pins. Nose pins were taken to shop No. 224 and Madan Lal owner of the shop separated artificial gold and real gold. It weighed 20.760 grams. Artificial gold and gems weighed 5.150 grams. These were seized vide seizure memo Ext. PW-24/D. The site plan was also prepared. Dr. Sanjay Pathak collected saliva samples. He also conducted their medical examination and issued MLCs Ext. PW-14/B to Ext. PW-14/E. Salvia sample and piece of mat picked up from the spot were sent to FSL, Junga for analysis vide letter Ext. PW-22/A. An application Ext. PW-15/A was moved for taking blood Sample. Dr. Babita Chaursia, PW-15 supervised taking samples. The blood samples were handed over to the police. These were sent to FSL for analysis. Report Ext. PW-20/A was issued by the FSL. Gold was also recovered from PW-23 Manoj Kumar who

was running shop at Bara Bazaar, Shamli. The statements of the witnesses were recorded. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 29 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted accused Azam, Shehrudin and Shamsudin, as noticed hereinabove. Accused Kasim was acquitted. Hence, these appeals on behalf of the accused persons.

4. M/S. N.K.Thakur, Sr. Advocate with Mr. Inder Sharma, Ajay Sharma and Naresh Kumar Tomar, Advocates, appearing on behalf of the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. AG, for the State has supported the judgment of the learned trial Court dated 23/29.12.2011.

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

6. PW-1 Shyam Lal, testified that he was running a shop of goldsmith at Sundernagar. His wife use to work with him in the shop. He had gone to Shimla on 8.9.2009. His wife and his servant Raju were present in the shop. He returned from Shimla in the evening. He and his wife slept in their room. Children slept in their room. There was a knock on his door at about 1:00 AM. He heard the muffled voice of his mother. His wife switched on the light and opened the door. As soon as she opened the door somebody pushed her. There were 2-3 persons on the door. One of the persons put the pistol on the head of his wife. She was taken to a side. He was behind her. Another person slapped him and put the pistol on his head and took him to a side. His mother was caught by two persons. A pistol was put on her head. She was also brought inside the room. They were made to sit inside the room with pistol pointing towards their heads. The children also came inside the room on hearing noise. They were also made to sit alongwith them. There were four persons who came inside their room. One was standing on the door. The wife of his younger brother Mamta also came to their room on hearing the noise. One of the person snatched her chain and brought her inside the room. She was also made to sit with them. His younger brother Tilak Raj came after her. He was also dragged inside the room. He was slapped twice-thrice. One of the persons was armed with darat. Two of the persons covered them and two went to the Almirah. One hit the lock of almirah with darat and broke it. The other started searching the almirah and the room. There were two bags inside the almirah. One was bigger and the other was smaller. The small bag was having cash and bigger was having gold. He put the smaller bag in the bigger bag. They had kept two mobiles on the TV set. They picked up the mobile phones, took away the bags and all of them came out of the room. They bolted the door from outside. He caught the door and tried to open it. It opened after some time. They went out and started shouting. They could not find out as to where those persons went. The people came after some time because their houses were at some distance. He telephoned the police. The police came and inspected the spot. His statement Ext. PW-1/A was recorded. The police also took the photographs. The police cut the piece of the mat where they had spitted. It was sealed in a parcel. The lock of the Almirah was also seized by the police vide memo Ext. PW-1/C. The police also seized the accounts book Ext. PW-1/D, bill Ext. PW-1/E and one darat vide seizure memo Ext. PW-1/F. Vijay and Mohan Lal had put their signatures on this memo. He identified darat Ext. P-1. The identification of the accused was got conducted in the month of December in Sub

Jail, Mandi. He identified three persons. The police took him to Shamli. The gold was melted and converted into a piece. The police also recovered 20 grams of nose pins. This was identified by Vijay Kumar and memo Ext. PW-1/G was prepared. It was seized vide memo Ext. PW-1/H. In his cross-examination, he deposed that he told the police that he had heard muffled voice. His mother was caught from arms by two persons. 2-3 slaps were given to his brother. One person hit the lock with the blunt side of darat. He had kept two mobiles on TV set and had pulled the door and it opened. (Confronted with Ext. PW-1/A where it is not so recorded).

7. PW-2 Sushma Devi also supported the version of PW-1 Shyam Lal. According to her, all the accused went outside the room and bolted from outside. Her husband pulled the door from inside. The door opened after sometime but the accused had left by that time.

8. PW-3 Krishna Devi, mother of PW-1 Shyam Lal also deposed the manner in which the accused entered the house. According to her, she was going to toilet at mid night. One person was standing on the door. She thought her younger son was standing. She caught him by the arm and inquired Bablu where you were going. He put his hand on her mouth and pointed a pistol on her head. He threatened to kill her in case she would shout. Two persons caught her arms. They told her that they were police officials. They made inquiry about the person who runs a shop at Sundernagar. She replied that he is her son and he was sleeping in the room. They took her inside the room. She was not allowed to make any noise. Her daughter-in-law, Sushma opened the door. They pushed her inside the room. They pointed pistol at her head and also on the head of her daughter-in-law. The person with darat and empty handed started searching the room. The lock was broken with the blunt side of the darat. The accused went away with the bag and the mobiles. They bolted the door from outside the room. Shyam Lal pulled at the door and the door opened after some time.

9. PW-4 Vijay Kumar proved cashbook Ext. PW-1/D, bill Ext. PW-1/E. According to him, one darat Ext. P-1 was seized by the police vide memo Ext. PW-1/F on 10.9.2009. One nugget of gold was produced by Manoj alias Boby owner of Mittal Jewellers. He examined it. It weighed 250 gms. He had issued certificate Ext. PW-1/G. In his cross-examination, he deposed that he did not know Manoj Kumar. The police had taken them to the shop of Manoj Kumar. The police told them that they knew about the shop of Manoj Kumar and they had to accompany the police to his shop. The police had telephoned them and told them to come to the shop of Manoj Kumar. In the cross-examination by the Advocate, appearing on behalf of accused Azam, he deposed that the shop of Manoj Kumar was open and Manoj Kumar made the statement in his presence.

10. PW-5 Const. Mohan Lal, deposed that the police recovered mat over which the assailants had spitted in his presence on 9.9.2009 vide seizure memo Ext. PW-1/C. The police also recovered one piece of broken lock and one key vide the same memo. These were sealed in separate parcels with seal 'A'. Accused Azam made a disclosure statement in his presence and in the presence of Bhinder and Sanjeev Kumar that he could show the shop and could get recover the ornaments sold by him, Islam and Noordin. Memo Ext. PW-5/A was prepared. The memo was signed by him, Binder and Sanjeev Kumar as witnesses and also by the accused. Accused Shamsudin made a disclosure statement on the same day in his presence and in the presence of Bhinder and Sanjeev Kumar that he could get recovered some ornaments concealed by him outside his house in a tarpaulin. Memo Ext. PW-5/B was prepared and it was signed by him alongwith Bhinder and Mohan Lal. In his cross-

examination, he deposed that he did not remember the time when the disclosure statement was made in the Police Station Sundernagar. However, it was day time.

11. PW-6 Puran Chand deposed that the accused Sheharudin made a statement that he had concealed a black coloured mobile with his sister. He could get it recovered. Memo Ext. PW-6/A was prepared.

12. PW-7 Binder Kumar deposed that on 8.12.2009, ASI Vijay Kumar and other police officials were present in the Police Station. Accused Azam was present in the Police Station. He made a statement that he could get the ornaments recovered from Shamli in Uttar Pradesh. Memo Ext. PW-5/A was prepared and signed by him, Sanjeev and Mohan Lal alongwith the accused. Thereafter, accused Samshudeen made the statement that he could get recovered the ornaments from a tarpaulin outside his house. Memo Ext. PW-5/B was prepared and signed by him, Sanjeev and Mohan Lal alongwith the accused. In his cross-examination, he deposed that he went to the Police Station in connection with the personal work. He did not remember the time when he visited the Police Station. He did not remember the time of making the statements or the time at which the investigation was completed. He did not remember the time at which he left the Police Station. He reached at home at 6:00 PM. He did not go to Delhi.

13. PW-8 Sant Ram, deposed that accused Sheharudin made disclosure statement that he has kept mobile in his rented accommodation at Nehru Vihar and he could get it recovered. Statement Ext. PW-8/A was recorded and signed by him, HC Chaman Lal and thumb mark by the accused was also put. They took accused Sheharudin to his rented accommodation from where he got mobile recovered which was kept by him in an attache. Memo Ext. PW-8/B was prepared and signed by him, HC Chaman Lal and thumb mark by the accused was also put. He had gone with the police party to search for the accused in Delhi, Mustafabad and Hazuirkhas. One black coloured Scorpio bearing regn. No. DL-3CY-8786 was parked near ganda nalla. It was the same vehicle wanted by the police. The key of the vehicle was attached to the lock of the front door. The door was opened. Visiting cards were found inside the vehicle and were seized by the police. The vehicle was seized by the police vide seizure memo Ext. PW-8/C. Ashwani Kumar, produced one agreement mark-B which was seized vide memo Ext. PW-8/D. In his cross-examination, he submitted that they left the Police Station on 19.11.2009 in a hired Scorpio. He alongwith Vijay Kumar and HC Chaman Lal were in that vehicle. They reached Delhi on the same day. He did not remember the time. He did not know who had hired the Scorpio vehicle. He did not remember its colour. They had stopped many times on the way to Delhi. He did not inquire the name of the driver. They went to the house of sister of accused Sharudin where his statement Ext. PW-8/A was recorded. He did not remember who were present in the house of sister of accused. The statement was recorded by ASI Vijay Kumar. Thereafter, they went to Nehru Vihar. He admitted that no person of Delhi police or resident of Delhi was associated during investigation. He did not remember the colour of the vehicle in which they went to Delhi on 22.11.2009.

14. PW-9 Subhash Bashin, JMIC-II, Amb, has recorded the statements of the accused regarding their willingness for identification vide Ext. PW-9/B to PW-9/E.

15. PW-14 Dr. Sanjay Pathak, has examined the accused and issued MLCs Ext. PW-14/B to Ext. PW-14/E.

16. PW-17 HC Krishan Chand, made the statement that the case property was deposited with him and he deposited the same in the malkhana by making appropriate entry.

17. PW-21 Ashwani Kumar deposed that he was owner of vehicle bearing regn. number DL-3CY-8786. He had purchased the vehicle from Rajender Yogi. He issued certificate Ext. PW-21/A. He proved agreement Ext. PW-21/B.

18. PW-22 Dr. Aparna Sharma, has proved report Ext. PW-20/A. According to her, Ext. 2, 3, 4 & 5 yielded degraded DNA and STR amplification through PCR was not successful despite repeated attempts. The I.O. was again asked to send fresh samples to generate the DNA profile of the accused. According to her, on the basis of analysis performed on the exhibits, it was concluded that DNA profile obtained from exhibit 1 (piece of mat having spitting of gutka) matched fully with DNA profile from exhibit 6-d (blood sample of Islam).

19. PW-23 Manoj Kumar deposed that in the month of September, 2009, 4-5 boys, one lady and children came to his shop. They asked for exchanging the gold. The accused Azam and Shehruddin were accompanying those boys. One Neeru and Islam showed the identity cards. They handed over200 grams of gold in the form of broken ornaments in the form of nose rings, rings, karas, chains and ear rings. He deducted 15% as per the conditions/quality of the ornaments. The gold was 200 grams after melting it. He handed over the ornaments, namely, 8 karas, two chains, 3-4 pair of ear rings, nose pins and Rs. 1,50,000/- as per the market price. In his cross-examination, he admitted that Mittal Jewelers is not a registered jeweler. He had maintained a copy regarding the transaction. It was a rough copy because it is not to be shown to any person. He had made entry in the rough copy regarding the transaction. They maintaind the rough copy for about 1-2 months and thereafter, they dispose of the same. They did not obtain the signatures of the person delivering the articles. Signatures of the persons who came to him were not obtained by him. He has not taken any receipt of Rs. 1,50,000/- paid to the accused. He did not pay sale tax and income tax. They were only charging labour charges.

20. PW-24 HC Chaman Lal deposed that accused Shehruddin made a statement Ext. PW-8/A that earlier statement made by him was false to mislead the police and he had kept the stolen mobile in Nehru Vihar in his tenanted house which could be got recovered from him. Memo was prepared which bears his signatures and signatures of Sant Ram. Recovery memo Ext. PW-8/B was prepared which bears his signatures and signatures of Sant Ram as witnesses. Azam, Islam and Shamsuddin were taken to Shamli on 9.12.2009. Azam pointerd out one shop Mittal Jewelers and told that the gold was sold in this shop. It was verified by Islam. The gold was sold in this shop. Memo is Ext. PW-24/B which bears his signatures and Azam put his signatures and Islam put his thumb impression. The shop was closed. Inquiry was made from Shamsuddin. He told that he could get the ornaments recovered from his house. The accused showed the place from where gold ornaments namely nose pins and nose rings were got recovered by him. The weight of gold was found to be 20.760 grams and weight of stones was found to be 5.150 grams. These were kept in piece of paper and were wrapped in a piece of cloth. These were seized vide memo Ext. PW-24/D. In his cross-examination, he could not narrate the number of days when he remained with the police during the course of investigation. He did not remember the registration number or colour of the vehicle. They had gone in Scorpio vehicle. He did not remember the registration number and colour of the same. No person accompanied them from the complainant party. He could not tell as to who had hired the jeep. He could not

tell the name of the driver. They had not associated any local police official. The local police was not associated at Shamli.

21. PW-25 Krishan Lal, has proved receipt No. 086885 vide Ext. PW-25/A. According to him, the vehicle Scorpio 8786 crossed the barrier on 8.9.2009 towards Himachal. He admitted in his cross-examination that receipt Ext. PW-25/A was not in his handwriting but in the hand writing of his employee. He could not tell the State to which vehicle bearing regn. no. 8786 belonged. The receipt was for the small vehicle. He could not narrate the description of any other vehicle mentioned in the counterfoil. He could not narrate as to how he remembered the description of Scorpio.

22. PW-27 ASI Vijay Kumar, deposed that a telephonic information was received in the police post Slapper on 9.9.2009 that a dacoity had been committed in the house of Shyam Lal. The statement of Shyam Lal was recorded. Photographs were taken. The statements of the witnesses were also recorded. Disclosure statements made by the accused under Section 27 of the Indian Evidence Act were also recorded. Recoveries were effected of the gold and telephone. In his cross-examination, he admitted that he has not associated the local police. Volunteered that local beat Constable was present but he was not cooperating them. He had not made any complaint regarding this fact because he was short of time. He also admitted that the recovery was got effected by Shamsuddin from open place underneath the tarpaulin. No local witness was associated because it was similar community inhabited by people of one community. He further deposed in his cross examination by Sh. Vikash Sharma, Advocate that Azam made a disclosure statement on 8.12.2009 in the presence of Binder Kumar and Sanjeev Kumar. They had visited the Police Station by chance in connection with their work. He could not tell the details of the work. In his further cross-examination, he admitted that there was no identification mark on the recovered gold to connect it with the stolen gold. Four revolvers could not be recovered in this case.

23. PW-28 Madan Lal, was declared hostile. He denied the suggestion by the learned Public Prosecutor that the police came to him on 9.12.2009.

24. PW-29 Shashikant Verma proved letter Ext. PW-18/A, call details Ext. PW-18/B, customers identification form Ext. PW-19/C and identity proof (election card) Ext. PW-18/D.

25. The case of the prosecution, precisely, is that the accused entered the house of PW-1 Shyam Lal, complainant when PW-3 Krishna Devi came out to use the toilet. According to PW-1 Shyam Lal, he heard the muffled noise of his mother. His wife opened the door after switching on the light. The accused were armed with pistols. They pointed the pistols on their heads and entire family was made to sit together. One of the accused opened the almirah by using darat. Jewelery and cash was removed and the accused fled away after bolting the door from outside.

26. PW-1 Shyam Lal, deposed that the door was opened after some time. Similar statement is made by PW-2 Sushma Devi and PW-3 Krishna Devi. It cannot be believed that the door could be opened from inside when it was bolted from outside. In case, the door was to be opened, even hypothetically, by pushing it, latch would have broken. The police has not recovered any broken latch or the door.

27. The manner in which the prosecution has narrated the entry of the accused to the house is also doubtful. According to PW-3, Krishna Devi, she went out to use the

toilet and accused entered their house. It is not believable that 4-5 persons, fully armed were waiting for her to come out to use the toilet in order to enter the house and that too at 1:30 AM.

28. The case of the prosecution is that accused Azam made the disclosure statement vide Ext. PW-5/A that he could show the shop and could recover the ornaments sold by him. The memo was signed by Binder and Sanjeev Kumar. Accused Shamshudin has also made the disclosure statement Ext. PW-5/B to the effect that he could recover some ornaments concealed by him outside his house in a tarpaulin. PW-5 Const. Mohan Lal, in his cross-examination, has admitted that he did not remember the time when the statement was made. Statements Ext. PW-5/A and PW-5/B were also signed by PW-7 Binder Kumar. His presence in the Police Station is doubtful. According to him, he went to the Police station in connection with some personal work. The Police requested him to sit. He reached the Police Station during day time. He did not remember the time. He did not remember the time at which he left the Police Station or making statements or investigation completed. He did not remember as to when he has taken character certificate. The report was handed over to him by MHC. He did not know whether entry was made by MHC in the daily diary or not. He produced the report in the Tehsil on the next day. He took the character certificate on 9.12.2009. His signatures were obtained by clerk of the Tehsil at the time of delivery of the character certificate. He had not seen the register of the character certificate. The character certificate has not been proved. He was supposed to know the time when he reached the Police Station and left from there.

29. According to PW-8 Const. Sant Ram, mobile phone Ext. P-2 was recovered vide memo Ext. PW-8/B. He had gone with the police party in search of the accused. One black coloured Scorpio bearing regn. No. DL-3CY-8786 was parked near gandanala. The key of the vehicle was attached to the lock of the front door. In his cross-examination, he deposed that they left for Delhi on 19.11.2009 in a hired Scorpio. They reached Delhi on the same day. However, he did not remember the colour of the vehicle. He also admitted that no person of Delhi or Delhi Police was associated in the investigation. The mobile phone has been recovered from Nehru Vihar. The police has neither informed the local police nor any independent witnesses were associated at the time of seizure of mobile phone vide seizure memo Ext. PW-8/B. Both the witnesses of Ext. PW-8/B are police officials.

30. According to the prosecution, the accused Azam has made disclosure statement on 8.12.2009 that he could get the gold ornaments recovered from Shamli town. This statement was witnessed by PW-7 Binder Kumar, Mohan Lal and Sanjeev Kumar. We have already discussed the statement of PW-7 Binder Kumar. His presence in the Police Station is doubtful. Similarly the statement of Shamshudin was recorded under Section 27 of the Indian Evidence Act that he could recover ornaments concealed by him outside his house in a tarpaulin. It was also witnessed by PW-7 Binder Kumar and Mohan Lal. The shop was got identified by accused Azam vide Ext. PW-24/B. Ext. PW-24/B has been witnessed by the official witnesses. No independent witnesses were associated at the time of preparing Ext. PW-24/B. The police has also not even informed the local police. The gold was recovered vide memo Ext. PW-24/D at the instance of accused Shamshudin. Ext. PW-24/D has also not been signed by any independent witness. It was signed by police officials Const. Chaman Lal and Baldev Singh. The reason assigned by the I.O. for not associating the independent witnesses is that the neighbor also belonged to the same community. The independent witnesses ought to have been associated at the time when Ext. PW-24/B and PW-24/D were prepared. Similarly, we have already noticed that when the mobile phone Ext. P-2 was recovered, no independent witnesses were associated by the police.

31. The case of the prosecution is that the gold was recovered from the shop of PW-23 Manoj Kumar. PW-23 Manoj Kumar in his statement has admitted that Mittal Jewelers is not a registered jeweler. He had maintained a copy regarding the transaction. It is a rough copy because it is not to be shown to any person. He used to make entry in the rough copy regarding the transaction. They maintain the rough copy for about 1-2 months and thereafter, they dispose of the same. They did not obtain the signatures of the person delivering the articles. Signatures of the persons who came to him were not obtained by him. He has not taken any receipt of Rs. 1,50,000/- paid to the accused. Local police has not been associated at Shamli and even the house of the accused was also not got identified by any person.

32. PW-27 ASI Vijay Kumar, the I.O. in the case, in his cross-examination has admitted that the recovery from Shamsuddin was made from open place underneath the tarpaulin. It is not believable that accused would have kept the gold underneath the tarpaulin which was accessible to all. PW-27 ASI Vijay Kumar in his further cross-examination has deposed that Azam has made disclosure statement. Binder Kumar and Sanjeev Kumar had visited the Police Station by chance in connection with some work. He could not narrate the details of the work. He has also admitted that there was no identification mark on the recovered gold. He has also admitted that four revolvers could not be recovered in this case. The recovery of revolvers/pistols was very important since the case of the prosecution is that the accused have threatened the family of PW-1 Shyam Lal by pointing pistols on their heads. Since the revolvers/pistols have not been recovered, it casts doubt on the entire version of the prosecution as to whether the accused were carrying revolvers/pistols at all.

33. Mr. M.A.Khan, learned Addl. Advocate General for the State has vehemently argued that the vehicle used in the case bearing registration No. DL-3CY-8786, was recovered. He further submitted that the vehicle had entered Himachal. He has also drawn the attention of the Court to Ext. PW-24/A. We have gone through Ext. PW-24/A. In Ext. PW-24/A, vehicle No. 8786 has only been recorded but the registration number allotted to a particular State is also to be pre-fixed before the number. Ext. PW-24/A has not been even signed by PW-25 Krishan Lal. Rather, Ext. PW-25/A does not bear the signatures of any person or verification of any person.

34. Mr. M.A.Khan, learned Addl. Advocate General for the State has further argued that the prosecution has obtained the DNA profile of the accused. PW-22 Dr. Aparna Sharma has proved report Ext. PW-20/A. The following observations have been made in Ext. PW-20/A:

> **"Observations:**
>
> i). Exhibits P-1, 6a, 6b, 6c & 6d yielded good quality DNA and it was possible to amplify all the fifteen autosomal STR loci and amelogenin (X & Y) using AmpF/STR Identifier PCR Amplification Kit.
>
> ii). The genotype profile of the source of exhibit 6d (Sh. Islam) matched fully with the genotype profile obtained from exhibit-1 (source: piece of mat having spitting with Gutka) at all the fifteen STR loci.
>
> **Conclusion:**
>
> On the basis of the above analysis performed on the aforesaid exhibits, it was concluded that the DNA profile obtained from exhibit-1 (piece

of mat having spitting of gutka) matched fully with DNA profile from exhibit 6-d (Blood sample of Sh. Islam)."

35. The DNA profile matched fully with DNA profile from blood sample of Islam only. The report qua other accused is not conclusive that the DNA profile matched with their blood samples. The blood samples of the accused have been obtained by PW-15 Dr. Babita Chaursia. It has come in the statement of PW-22 Dr. Aparna Sharma that the I.O. was asked to provide fresh samples to generate the DNA profile of the accused. PW-15 Dr. Babita Chaursia has not deposed that the Medical Officer has kept the samples of blood preserved by the Medical Officer, CH Sundernagar. The Medical Officer, CH Sundernagar, has not been examined to establish that he had preserved the blood samples of the accused. According to the conclusion of Ext. PW-20/A, the DNA profile obtained from exhibit-1 matched fully with DNA profile from exhibit 6-d, the blood sample of Sh. Islam and not of the accused.

36. Mr. M.A.Khan, learned Addl. Advocate General has also drawn the attention of the Court to Ext. PW-24/A to establish that the Medical Officer, CH Sundernagar has preserved the blood samples, however, in the absence of examination of Medical Officer, CH Sundernagar, it cannot be conclusively said that he had preserved the blood samples.

37. PW-1 Shyam Lal is goldsmith and thus the doors of his house are bound to be strong and the same could not be opened by pushing it from inside and that too, when the door was bolted from outside by the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 395 IPC.

38. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 23/29.12.2011, rendered by the learned Addl. Sessions Judge, Mandi, H.P., in Sessions Trial No. 10 of 2010, is set aside. Accused persons 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.

39. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

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

Deepak Arora and another ...Decree-Holders

Versus

Vijay Khanna ...Applicant/Judge-Debtor

OMP No. 44 of 2015 In
Ex. Petition No. 10 of 2013
Reserved on 23.4.2015
Date of decision: 2.5.2015

Code of Civil Procedure, 1908- Sections 144 - Judgment debtor claimed that he had deposited an amount of Rs. 4,68,25,228/-, whereas he is liable to pay only Rs. 3,70,49770.80- he sought the refund of the excess amount - Decree holder contended that judgment debtor had not objected to attachment of the property and the principle of res-judicata will apply to the present case- held, that amount of Rs. 63,11,334/- was not awarded to the decree holder - the Court can only recover the amount, which is awarded under the decree- decree holder cannot be allowed to enrich himself unjustly and to retain the amount what was not awarded to him - petition allowed and the excess amount ordered to be refunded to the J.D. (Para 9 to 22)

Cases referred:

Rajkishore Mohanty and another Vs. Kangali Moharana and others AIR (59) 1972 Orissa 119

Barkat Ali and others Vs. Badrinarain AIR 2001 Rajasthan 51

The Sale Tax Officer, Banaras and others Vs. Kanhaiya Lal Makund Lal Saraf, AIR 1959 SC 135,

Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644:

Indian Council for Enviro-Legal Action Vs. Union of India and others (2011) 8 SCC 161

State Bank of India and others Vs. S.N. Goyal (2008) 8 SCC 92

For the Decree Holders:	Mr.R.L. Sood, Senior Advocate with Mr.Ashwani K. Sharma and Mr.Arjun Lal, Advocate.
For the Applicant/Judgment Debtor:	Mr.Ajay Mohan Goel and Mr.Rajesh Mandhotra, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

By medium of this application under Section 151 read with Section 144 C.P.C, the applicant/judgment debtor has sought refund of the excess amount deposited by him with a further direction to recall the order dated 24.2.2015 (mentioned as 23.2.2015), whereby this Court had directed to release of the amount deposited by the judgment debtor in favour of the decree holder.

2. It is alleged by the judgment debtor that as against the amount of Rs.2,84,25,372/- along with proportionate interest, he has deposited a sum of Rs.4,68,25,228/-, whereas the total amount due to the Decree Holder as per the award is as follows:-

"a)	*Amount due as on 26.5.208:*	*Rs.1,84,58,030/-*
b)	*Interest from 26.5.2008 @: Rs.12% p.a.*	*Rs. 99,67,342/-*
	Total:	*Rs.2,84,25,372/-*
c)	*Cost as awarded by Ld. Arbitrator:*	*Rs.15,00,000/- and interest on the amount of Rs.1,84,58,030/- @ 18% per annum from 1.1.2013 till date of deposit i.e. 21.2.2015.*

d)	*Interest of two years 1.1.2013: to 31.12.2014.*	*Rs.66,44,490.80*
e)	*Interest of 52 days*	*Rs.4,79,908.00*
	Grand total a) to e)	*Rs.3,70,49,770.80"*

3. It is in this background that the present application has been preferred for claiming refund of the excess amount.

4. The application has been vehemently opposed by the Decree Holders by filing reply, wherein preliminary objections have been taken to the effect that the application is not maintainable, as the same seeks to raise issues, which stand already decided or are deemed to be decided and therefore, cannot again be permitted to be raised. It has been alleged that these orders have obtained finality and operate as resjudicata between the parties. In support of their allegations, the Decree Holders have made the following averments:-

> "(a) That the Judgment Debtor/applicant was served in the execution petition as well as in the application for attachment of his properties being OMP No. 262 of 2013. Both in the execution petition and OMP No. 262 of 2013, details of the amounts due from the Judgment Debtor to the Decree Holders were clearly spelt out item-wise alongwith the interest claimed separately. Therefore, the total amount due was also indicated. The Judgment Debtor appeared in the present proceedings on 10.7.2013. He specifically prayed for and was granted time to file objections to the execution petition as well as OMP No. 262 of 2013.
>
> (b) That on 2.8.2013 the judgment debtor was again granted time to file objections to execution petition and reply to OMP No. 262 of 2013 subject to costs of Rs.2000/-
>
> (c) On 27.8.2013, this Hon'ble Court closed the right of the Judgment Debtor to file objections to the execution petition. It also closed his right to file a reply to OMP No. 262 of 2013.
>
> (d) On 27.8.2013, the Court further proceeded to order the Decree Holder to take necessary steps for the attachment of the property, the means of which were detailed in the said order.
>
> (e) The aforesaid order is an order under Order 21 Rule 22 and is dated 27.8.2013, that is a decree unto itself. One stage of the execution proceedings culminated with the said order, which is to be treated as a decree. Thereafter, the Court proceeded to the next stage by passing an order under Order 21 Rule 23 CPC. Once the Judgment Debtor, with open eyes failed to file any objections having appeared pursuant to the notice issued to him, and the Court closed his right to do so, in law, it will be deemed that while ordering the attachment of his property, after closing his right to file objections, this Court had adjudicated and determined the amount to be recovered from the Judgment Debtor. J.D. had as such agreed with the calculations put forth by the Decree Holders, both in the execution petition as also in the application. The said order dated 27.8.2013, is a

decree unto itself and if the Judgment Debtor was not satisfied with the same, the only course left open to him was to file an appeal against the same. Since no appeal was filed, and the said decree dated 27.8.2013 has attained finality. The Judgment Debtor is barred in law from filing the present application in order to question the amount that is claimed by the Decree Holders and which has not only been deposited by the Judgment Debtor, but his no objection to the release of the amount in favour of the Decree Holder stands recorded in Order dated 24.2.2015 by this Court. The Decree Holders are supported by the law as laid down by the Hon'ble Apex Court, the Full Bench and Division Benches of various High Courts, which shall be furnished to this Hon'ble Court in the form of a compilation at the time of arguments.

(f) That the application is also not maintainable for the reason that after the property was attached for recovery of the amount claimed and detailed in the execution petition (to which no objections have been filed), this Hon'ble Court proceeded to pass an order dated 25.3.2014, thereby allowing OMP No. 69 of 2014 and ordering the sale of the attached property of the Judgment Debtor at Dharamshala to be sold by way of public auction to recover the amount detailed and indicated in the execution petition. The Judgment Debtor did not file any objections to the said application nor did he challenge the said order in appeal. The same has also attained finality.

(g) That thereafter the Judgment Debtor filed an OMP No. 196 of 2014, under Section 151 CPC for recalling the order. In the said application, the Judgment Debtor has admitted in para-4 thereof the amount claimed in the execution petition in the following words: "The learned Arbitrator has come to the conclusion that the non-applicants/judgment holders are entitled for an amount of Rs.3,82,06,988/- (this is amount detailed and claimed in the Execution Petition). At no stage, the Judgment Debtor questioned the correctness of this amount that had been claimed by the Decree Holders. The said application was also dismissed by this Hon'ble Court vide its order dated 9.7.2014. The appeal filed against the Order was dismissed as withdrawn.

(h) That thereafter, the proclamation for sale was ordered to be drawn up and was drawn up and, at that stage also, (although, in law he could not have raised any objection), the Judgment Debtor failed to raise any objections regarding the correctness of the amount for which the decree was being executed.

(i) That the Judgment Debtor then filed an application being OMP No. 457 of 2014. He raised several objections therein, but he did not question the amount claimed in the execution petition."

5. It is thereafter averred that this Court has become functus officio after passing of order dated 24.2.2015 and the application, therefore, deserves to be dismissed. It is also contended that the Arbitrator has specifically held that the Judgment Debtor had withdrawn an amount of Rs.67,44,947/- before the dissolution of the Firm and therefore, this amount had infact been awarded in favour of the Decree Holder.

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

6. The Decree Holder in the application under Order 21 Rule 1 C.P.C. has claimed the following amounts:-

"7.	Amount with interest due up to the decree or other relief granted thereby together with particulars of any cross decree.	(a) Original amount as awarded vide award dated 1.12.2012, i.e. amount due as on 26.05.2008 Rs.1,84,58,030/- and interest thereupon @12% from 26.11.2012 as awarded by the arbitrator i.e Rs.99,67,342/-	2,84,25,372.00
		(b) Interest @18% p.a. on Rs.1,84,58,030/- from 01.12.2012 till 30.04.2013.	13,84,352.00
		(c) Amount awarded in favour of the Decree Holders after dissolution of the partnership firm as payable by the Judgment Debtor.	63,11,334.00
		(d) Interest @ 18% p.a. on Rs.63,11,334/- from 01.12.2012 till 30.04.2013	4,73,350.00
		Total (a) to (d)	**3,65,94,408.00**
8.	Amount of costs, if any awarded.	**Cost awarded**	**Rs.15,00,000/-**
		Interest @18% p.a. on Rs.15,00,000/- from 01.12.2012 till 30.04.2013	**Rs.1,12,500/-**

The Decree in total i.e. amounts mentioned in para 7(a) to (d) and para 8 (as on 30.04.2013).	**Rs.3,82,06,908/-**
N.B. The Judgment Debtor is also liable to pay interest @18% p.a. on the aforesaid amount from 01/05/2013 till date of payment of the entire decreetal amount to the Decree Holders	

7. Therefore, the main question which arises for determination is as to whether the Decree Holder is entitled to the amount of Rs.63,11,334/- along with the interest thereon.

8. The relevant portion of the award passed by the learned Arbitrator reads thus:-

> "From the close scrutiny of this post-dissolution accounts maintained in different Banks, a casual chart of amounts transferred from SHR Account to and in the name of Shri Vijay Khann's personal account referred to below read with the record in the form of Compilation of Provisional Income and Expenditure Account of SHR, it is evident that the Respondent has grained huge profits by carrying on the business by using the partnership property for his personal gains since the date of dissolution till date. The Hotel business has monetarily gained grounds day by day and Respondent is having thriving business as is apparent from the Statement of amount(s) withdrawn by him (Respondent) from the account of SHR with ICICI Branch Office Dharamshala for his personal use after dissolution of partnership firm i.e. 26.5.2008 and other Banks. From the CHART prepared by this forum based on the entries of the accounts of different Bank read with Provisional Income and Expenditure Account of SHR and entries detailed therein CHART Annexure MARK "Y" Respondent has withdrawn an amount of Rs.67,44,947/- before dissolution and an amount of Rs.63,11,334 after dissolution. It is to be seen that the cash withdrawals by Respondent and by his family, ATM withdrawals, Car Loan payments when compared with the Provisional Income and Expenditure Account of M/s SHR as compiled by the above-said Chartered Accountants does not find mention therein as much as no such personal Ledger Account of Respondent Vijay Khanna has been opened under any Head as are detailed in any of the said Compilation of Provisional Income and Expenditure Account(s) of aforesaid SHR. As such it

is not possible to conclude the financial status of the parties to the instant lis even for the purposes of settlement of accounts in the winding up process of the instant case from the above said Provisional Income and Expenditure Account of SHR as produced by Respondent without the concerned papers indicated for the purpose of withdrawal, payment or expenditure so incurred. Huge amount towards legal and professional charges have been indicated in the said compiled accounts but other withdrawals through ATM etc do not find place therein. Therefore, it is not possible to seek help and rely upon the entries of the said Compilation of Provisional Income and Expenditure Account of M/s SHR aforesaid after dissolution of the partnership firm on 26.3.2008.

Even otherwise Respondent from the very inception of receipt of notice adopted a stubborn attitude to defy the claim of the Claimants. Rather the Respondent filed a Counter Claim on untenable, contradictory and inconsistent pleas which have been proved to be not only destructive of each other but on false grounds as well.

Admittedly this is a Commercial Industry/business. Thus this forum deems it just and proper to adopt the procedure of awarding interest from the date of dissolution in accordance with sub-section 7(a) and (b) of the Arbitration & Conciliation Act, 1996 on the whole of the amount found to be due as per the terms and conditions of the partnership deed @ 12% per annum. Thus the total payable amount (as of today) by the Respondent to the Claimants comes to

a) Amount due as on 26.5.2008	Rs.1,84,58,030/-
b) Interests from 26.5.2008 to 26.11.212 @12% p.a.	Rs. 99,67,342/-
Total	**Rs. 2,84,25,372/-**

In case the amount found due is not paid within one month from the date of receipt of the copy of the duly signed award, the Respondent shall be further bound to pay interest in accordance with Section 17(7) (b) of the Act 26 of 1996 i.e. @ 18% per annum on the amount of Rs.1,84,58,030/- till the date of its payment."

9. Now a bare perusal of the award would show that nowhere has the learned Arbitrator awarded a sum of Rs.63,11,334/- in favour of the Decree Holders.

10. However, the learned Counsel for the Decree Holder has vehemently argued that not only at any stage of proceeding did the Judgment Debtor ever file any objections against the decree, but he has also not objected at the time when notice of attachment of his property had been issued. He did not object even when his property was attached and thereafter when attached property was in fact ordered to be sold. He further argued that the Judgment Debtor while filing OMP No. 196 of 2014 for recalling of order, had clearly admitted in para 4 regarding the amount claimed in the execution in the following words:

"4. That after sometime partnership was dissolved and decree holder/non-applicant has filed a case and matter was referred to Ld. Single

Arbitrator. The Ld. Arbitrator has come to the conclusion that the non applicants/judgment holders are entitled for an amount of Rs.3,82,06,988/-"

11. Learned counsel for the Decree Holders has argued that if after receiving notice of the execution application under Rule 22 of Order 21 C.P.C., the Judgment Debtor does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court is bound to order that the decree be executed. Such an order passed by the Court is not automatic, but involves an implied adjudication that the Decree Holder has a right to execute the decree and the Judgment Debtor is liable to satisfy the decree. He further contended that the principle of constructive resjudicata is applicable to the execution proceedings, where in response to the notice under Order 21 Rule 22 or Order 21 Rule 23 sub Rule 1 and 2 of the Civil Procedure Code, the Judgment Debtor either does not appear in the Court or having appeared does not object to the execution on any grounds and the Court thereupon orders that the execution to proceed then by application of explanation IV to Section 11 of the Civil Procedure Code, it would be deemed that the plea as sought to be raised now had been raised and rejected and consequently the judgment debtor would not be permitted at a later stage of the same execution proceedings to again raise the plea.

12. In support of his contention, the learned counsel for the Decree Holder has relied upon Full Bench decision of Orissa High Court in ***Rajkishore Mohanty and another Vs. Kangali Moharana and others*** *AIR (59) 1972 Orissa 119,* a Division Bench Judgment of Rajasthan High Court in ***Barkat Ali and others Vs. Badrinarain*** *AIR 2001 Rajasthan 51*, which in turn has been upheld by the Hon'ble Supreme Court in *(2008) 4 SCC 615.*

13. There can be no quarrel with the proposition of law as canvassed by learned counsel for the Decree Holder more particularly in teeth of the judgment passed by Hon'ble Supreme Court in Barkat Ali's case (supra). The relevant portion whereof reads as under:-

"9. Order 21 Rule 22 CPC culminates in end of one stage before attachment of the property can take place in furtherance of execution of decree. The proceedings under Order 21 Rule 23 can only be taken if the executing court either finds that after issuing notice under Order 21 Rule 21 (sic Rule 22) the judgment-debtor has not raised any objection or if such objection has been raised, the same has been decided by the executing court. Sub-rule (1) as well as sub-rule (2) under Order 21 Rule 22, operate simultaneously in the same field. Sub-rule (1) operates when no objection is filed. Then the court proceeds and clears the way for going to the next stage of the proceedings, namely, attachment of the property and if the court finds objections on record then it decides the objections in the first instance and thereafter clears the way for taking up the matter for attachment of the property if the objections have been overruled."

14. But question which still remains to be adjudicated is as to whether the Decree Holders are entitled to the amount of Rs.63,11,334 along with interest, despite the fact that, this amount has not been awarded in their favour by the learned Arbitrator.

15. It cannot be disputed that the provision of Order 21 makes reference to a 'decree'. Would 'decree' in this context mean the award passed by the learned Arbitrator or

would it mean the amount claimed unilaterally by the Decree Holders in their application preferred under Order 21 Rule 1 C.P.C.

16. Indisputably it is the award of the Arbitrator, which is required to be enforced, as if it was a decree. It is borne in mind that the executing Court is duty bound to give effect to the decree in its substance and ought not to pass an order rendering in the judgment and decree as futile one. It is a trite that the executing Court must take the decree according to its tenor and it cannot go beyond the decree. The executing Court cannot sit in appeal over the decree passed by the Court nor is it entitled to pass an order, which will virtually result in effecting the rights of the parties already settled under the decree. The executing Court can neither add nor subtract anything in the decree.

17. If that be so, then the excess amount deposited by the Judgment Debtor, at best can be termed to be a deposit made under a mistake.

Section 72 of the Contract Act provides:-

> "***72. Liberty of person to whom money is paid, or thing delivered, by mistake or under coercion.***---*A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."*

18. The Hon'ble Supreme Court in ***The Sale Tax Officer, Banaras and others Vs. Kanhaiya Lal Makund Lal Saraf,*** *AIR 1959 SC 135,* while construing the provisions of Section 72 of Contract Act, has held that the term "mistake" used in Section 72, Contract Act has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as a mistake of fact. It has further been held that there is no warrant for ascribing any limited meaning to the word "mistake" as has been used therein. Lastly, it has been held that the true principle is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise, that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving it.

19. Confronted with this position, the learned counsel for the Decree Holder would still argue that the principle of constructive resjudita would apply to both the factual and legal aspects of the matter and therefore, Judgment Debtor cannot raise this plea at this stage.

20. The learned counsel for the Decree Holder would probably have been right in his submission, in case there would have been some ambiguity in the award passed by the learned Arbitrator or alternatively if the Decree Holders would be in a position to convince the Court that the amount now claimed by the Judgment Debtor had in fact been awarded to the Decree Holders. That not being so, this Court cannot shut its eyes or else the same would amount to Decree Holder being unduly enriched.

20. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. This was so held by the Hon'ble Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Co.*** *1994 Supp (1) SCC 644:-*

> *"98. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the*

expense of another person. It provides the theoretical foundation for the law governing restitution. The principle has, however, its critics as well as its supporters. In the words of Lord Diplok: "…there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system that is based upon civil law." (See: Orakpo V. Manson Investments Ltd. 1978 AC, 104). In The Law of Restitution by Goff and Jones, it has, however, been stated "that the case-law is now sufficiently mature for the courts to recognize a generalized right of restitution" (3rd Edn., P. 15). In Chitty on Contracts, 26th Edn., Vol. I, p. 1313, para 2037, it has been stated that "the principle of unjust enrichment is not yet clearly established in English law". The learned editors have, however, expressed the view:

> *"Even if the law has not yet developed to that extent, it does not follow from the absence of a general doctrine of unjust enrichment that the specific remedies provided are not justifiable by reference to the principle of unjust enrichment even if they were originally found without primary reference to it." (pp. 1313-1314, para 2037)."*

The issue regarding undue enrichment thereafter came up before the Hon'ble Supreme Court in ***Indian Council for Enviro-Legal Action Vs. Union of India and others*** *(2011) 8 SCC 161* and it was held as follows:-

> ***"UNJUST ENRICHMENT***
>
> ***151****. Unjust enrichment has been defined as:*
>
> > *"Unjust enrichment.---A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."*
>
> *See Black's Law Dictionary, 8th Edition (Bryan A. Garner) at page 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."*
>
> ***152****. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*
>
> ***153****. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant*

retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A.2d 217, 232-33 (Delaware. 1999). USA)

***154**. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of Fibrosa v. Fairbairn, [1942] 2 All ER 122, Lord Wright stated the principle thus :*

> ***"... .Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."***

***155**. Lord Denning also stated in Nelson v. Larholt, [1947] 2 All ER 751 as under:-*

> ***"..... It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."***

***156**. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.*

Restitution and compound interest

***157**. American Jurisprudence 2d. Volume 66 Am Jur 2d defined Restitution as follows:*

> ***"The word `restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another. As a general principle, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law,***

independently of express contract, will compel restitution or compensation."

158. *While Section (') 3 (unjust enrichment) reads as under:*

"The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly."

159. *Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*

160. *While the term `restitution' was considered by the Supreme Court in South-Eastern Coalfields 2003 (8) SCC 648 and other cases excerpted later, the term `unjust enrichment' came to be considered in Sahakari Khand Udyog Mandal Ltd vs Commissioner of Central Excise & Customs ((2005) 3 SCC 738). This Court said:*

"31. ...'unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. `Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."

161. *The terms `unjust enrichment' and `restitution' are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders.*

162. *We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e.,*

pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the Court's own process, along with time delay, to do injustice.

***163**. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether.*

***164**. This view of law as propounded by the author Graham Virgo in his celebrated book on "The Principle of Law of Restitution" has been accepted by a later decision of the House of Lords (now the UK Supreme Court) reported as 136 Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another [2007] UKHL 34 = [2007] 3 WLR 354 = [2008] 1 AC 561 = [2007] All ER (D) 294.*

***165**. In similar strain, across the Altantic Ocean, a nine judge Bench of the Supreme Court of Canada in Bank of America Canada vs Mutual Trust Co. [2002] 2 SCR 601 = 2002 SCC 43 (both Canadian Reports) took the view :*

> ***"There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff should have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest. Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid."***

This view seems to be correct and in consonance with the principles of equity and justice.

***166**. Another way of looking at it is suppose the judgment- debtor had borrowed the money from the nationalised bank as a clean loan and paid the money into this court. What would be the bank's demand.*

***167**. In other words, if payment of an amount equivalent of what the ledger account in the nationalised bank on a clean load would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been : (1) failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-*

compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money. In other words, it is this is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefitted is what justice requires.

21. In so far as the contention raised by the Decree Holder that this Court has become functus officio is concerned, it needs to be noticed that no final decision has been taken in the Execution Petition and the same is still pending. It is only when a Court decides a question brought before it finally that it becomes functus officio and cannot review its own decision. In observing so, this Court draws support from the following observations of the Hon'ble Supreme Court in ***State Bank of India and others Vs. S.N. Goyal*** *(2008) 8 SCC 92*:-

> *"**25**. The learned counsel for respondent contended that the Appointing Authority became functus officio once he passed the order dated 18.1.1995 agreeing with the penalty proposed by the Disciplinary Authority and cannot thereafter revise/review/modify the said order. Reliance was placed on the English decision VGM Holdings Ltd, Re (1941) 3 All. ER 417 wherein it was held that once a Judge has made an order which has been passed and entered, he becomes functus officio and cannot thereafter vary the terms of his order and only a higher court, tribunal can vary it. What is significant is that decision does not say that the Judge becomes functus officio when he passes the order, but only when the order passed is 'entered'. The term 'entering judgment' in English Law refers to the procedure in civil courts in which a judgment is formally recorded by court after it has been given.*
>
> ***26**. It is true that once an Authority exercising quasi judicial power, takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review. But the question is as to at what stage, an Authority becomes functus officio in regard to an order made by him. P. Ramanatha Aiyar's Advance Law Lexicon (3rd Edition, Vol. 2 pp. 1946-47) gives the following illustrative definition of the term 'functus officio' :*
>
> *"Thus a Judge, when he has decided a question brought before him, is functus officio, and cannot review his own decision."*
>
> ***27**. Black's Law Dictionary (Sixth Edition Page 673) gives its meaning as follows:*
>
> *"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore, of no further force or authority".*
>
> ***28**. We may first refer to the position with reference to civil courts. Order XX of Code of Civil Procedure deals with judgment and decree. Rule 1 explains when a judgment is pronounced. Sub-rule (1) provides that the Court, after the case has been heard, shall pronounce judgment in an open court either at once, or as soon thereafter as may be practicable, and when the judgment is to be pronounced on some future day, the court shall fix a day for that purpose of which due notice shall be given to the parties or their pleaders. Sub-rule (3)*

provides that the judgment may be pronounced by dictation in an open court to a shorthand writer (if the Judge is specially empowered in this behalf). The proviso thereto provides that where the judgment is pronounced by dictation in open court, the transcript of the judgment so pronounced shall, after making such corrections as may be necessary, be signed by the Judge, bear the date on which it was pronounced and form a part of the record. Rule 3 provides that the judgment shall be dated and signed by the Judge in open court at the time of pronouncing it and when once signed, shall not afterwards be altered or added to save as provided by section 152 or on review. Thus where a judgment is reserved, mere dictation does not amount to pronouncement, but where the judgment is dictated in open court, that itself amounts to pronouncement. But even after such pronouncement by open court dictation, the Judge can make corrections before signing and dating the judgment. Therefore, a Judge becomes functus officio when he pronounces, signs and dates the judgment (subject to section 152 and power of review). The position is different with reference to quasi judicial authorities. While some quasi judicial tribunals fix a day for pronouncement and pronounce their orders on the day fixed, many quasi judicial authorities do not pronounce their orders. Some publish or notify their orders. Some prepare and sign the orders and communicate the same to the party concerned. A quasi judicial authority will become functus officio only when its order is pronounced, or published/notified or communicated (put in the course of transmission) to the party concerned. When an order is made in an office noting in a file but is not pronounced, published or communicated, nothing prevents the Authority from correcting it or altering it for valid reasons. But once the order is pronounced or published or notified or communicated, the Authority will become functus officio. The order dated 18.1.1995 made on an office note, was neither pronounced, nor published/notified nor communicated. Therefore, it cannot be said that the Appointing Authority became functus officio when he signed the note on dated 18.1.1995."

22. In view of the aforesaid discussion, it can safely be concluded that the Decree Holders are only entitled to what has been awarded to them in terms of the award of the learned Arbitrator and this Court while executing the award cannot go behind the award by adding or subtracting anything from it. The Judgment Debtor having deposited the excess amount under mistake is entitled to refund of the same or else the same would amount to undue enrichment of the Decree Holder. Therefore, the Decree Holder is held entitled only to an amount of Rs.3,70,49770.80 and the remaining amount is required to be refunded to the Judgment Debtor and accordingly the order dated 24.2.2015 directing release of the amount in favour of the Decree Holders is modified to that extent.

In view of the aforesaid discussion, the present application is allowed and the Judgment Debtor is held entitled to excess amount deposited by him.

****

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

Uma Akash Agro Pvt. Ltd. and others Petitioners.
Versus
State of H.P. and others Respondents.

Cr.MMO No.4127 of 2013.
Reserved on : 21.04.2015.
Date of decision: 02.05.2015

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition seeking quashing of FIR as well as order passed by JMIC, Kasauli and Sessions Judge, Solan- it was alleged that respondent No. 2 had sold 11,170 apple boxes to respondent No. 3- respondent No. 3 had paid amount of Rs. 20 lacs and remaining amount was not paid- 11,170 apple boxes were stored in the cold store owned by petitioner No. 1- held, that respondent No. 3, purchaser of the goods, had acquired title from respondent No. 2- mere non-payment of part of sale consideration cannot constitute an entrustment- thus, no offence punishable under Section 406 of IPC was made out against the respondent No. 3 or respondent No. 1- further, petitioner was not liable to pay the sale consideration and it cannot be held liable for the non- payment of the sale consideration- accordingly, FIR ordered to be quashed- however, the order regarding the sale of the apples cannot be challenged on behalf of petitioner No. 1 who is merely a bailee. (Para-3)

For the petitioners: Mr. Vinay Kuthiala, Sr. Advocate with Mr. Gaurav Sharma, Advocate.
For the respondents: Mr. Vivek Singh Attri, Dy. A.G. for respondent No.1.
Mr. Sudheer Thakur and Mr. Anirudh Sharma, Advocate, for respondents No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The petitioners herein through this petition filed under Section 482 Cr.P.C. seek the indulgence of this Court for quashing of F.I.R. No. 94 of 2013 registered at Police Station Parwanoo, District Solan under Sections 406 and 420 IPC and also seek quashing of orders of 13.11.2013 rendered by the learned Judicial Magistrate 1st Class, Kasauli, District Solan besides orders of 16.12.2013 rendered by the learned Sessions Judge, Solan.

2. The petitioner No.1 is a private limited company and owns a cold storage for storing farm/horticultural produce. Respondent No. 2 is the owner of an apple orchard. The factum of respondent No.2 having sold apple boxes to respondent No.3 is perse evident from a perusal of the averments contained in paragraph 3 of Cr.MP No. 708 of 2014 in Cr.MMO No. 4127 of 2013. Besides, the factum of respondent No. 2 having sold his apple boxes carrying a value of Rs.1.32 crore to Rakesh @ Rajender Prasad @ Rajan Sharma is forthcoming from a perusal of a detailed report submitted by the Investigating Officer, SHO Police Station, Parwanoo. Therefore, the factum of passing of title in the apple boxes numbering 11,117 by respondent No.2 in favour of respondent No. 3 stands clinched. However, it is also evident from an incisive reading of the comprehensive report submitted

by the SHO, Police Station, Parwanoo, that the buyer of goods inasmuch, as, respondent No.3 had paid to the seller who is respondent No. 2 only a sum of Rs. 20 lacs and the remaining price of apple boxes aforesaid remains unpaid to respondent No. 2 by respondent No. 3. On respondent No. 3 purchasing the goods from respondent No.2 he came to as portrayed by Annexure P-8 deposit them in the cold storage owned by the petitioner No.1. Since the entire sale consideration for 11,117 apple boxes purchased by respondent No.3 from respondent No.2 stood not paid and theirs having come to be stored in the cold storage owned by petitioner No.1, the respondent No.2 took to institute a complaint against the petitioners herein averring therein that the latter in connivance with the respondent No.3 had deprived him of the entire sale consideration qua apple boxes numbering 11,117 owned by respondent No.2, as such, they had committed offences constituted under Section 420 and 406 IPC.

3. The uncontroverted factum as is evident from the aforesaid discussion is of title qua 11,117 of apple boxes having passed in favour of respondent No. 3 from respondent No.2, its hitherto owner. Consequently, the aforesaid factum cannot obviously constitute the factum of the goods purchased by respondent No.3 from respondent No.2 to be hence entrusted to respondent No.2 nor also when title in the goods was transferred or alienated by respondent No.2 in favour of respondent No.3, the recipient of the goods, who is the petitioner No.1, besides petitioners No. 2 and 3 its employees, cannot also be in any manner concluded to have connived or colluded with respondent No.3, in the latter having purportedly committed the offence of criminal breach of trust. The respondent No.3 who is the purchaser of the goods from respondent No.2, constituted by the act of his uncontrovertedly receiving goods from respondent No.3, had acquired title qua them from respondent No.2. It is obvious that when respondent No.3 became the owner of the contentious goods, he cannot be construed to have been entrusted their custody by respondent No.2. Besides, the mere fact that the entire sale consideration qua contentious goods had not come to be passed by respondent No.3 in favour of respondent No.2 even the said fact cannot imbue the fact of their possession gained by respondent No.3 on payment of part of sale consideration to be an entrustment thereof to him. In aftermath, for reiteration the owner of goods cannot be construed to have when they stood purchased by him from its owner received them by way of entrustment from the seller. Consequently, when the respondent No.2 lost control or title over the goods, he cannot claim to have, when he possesses no title qua them as owner, that hence he had entrusted them to the buyer. Obviously, when there is no element of entrustment of goods by respondent No.2 to respondent No.3 especially in the event of respondent No.3 having purchased or acquired title over 11,117 number of apple boxes from its seller, who is respondent No.2, then prima facie no offence of criminal breach of trust is constituted against respondent No.3. The petitioners, who are the recipient of goods from respondent No.2 cannot, also be by the act of theirs receiving goods from a lawful buyer, by the mere fact of theirs receiving them from the latter, be construed to have also in continuity committed the offence of criminal breach of trust enshrined in Section 406 of the Indian Penal Code. An incisive reading of the detailed report furnished by the SHO, as also of the record of the case unfolds that respondent No.2 hitherto owner of 11,117 apple of boxes was aggrieved by the act of respondent No.3, constituted by the latter not paying the entire sale consideration to him qua 11,117 apple boxes sold by him to respondent No.3. The complainant alleges that the petitioners and the respondent No.3 colluded and connived with each other. The said fact is attempted or concerted to be ingrained in the act of the petitioners, who when sought to be conversed over landline and mobile phone by respondent No.2 having transferred calls to the mobile number of respondent No.3. The aforesaid fact does not perse constitute nor convey

the fact that there was collusion or connivance interse the petitioners and respondent No.3 especially in the act of respondent No.3 having not paid the entire sale consideration to respondent No.2 qua the 11,117 of apple boxes purchased by him from respondent No.2. The collusion or connivance interse the petitioners and respondent No.3 was cullable only from the evident fact comprised in payments qua the goods purchased by respondent No.3 from respondent No.2 having emanated from the petitioners. However, no such forthright evidence exists on record portraying that the petitioner No.1 was a buyer or a hidden buyer and that the respondent No. 3 was merely a benamidar and that hence the liability for defraying the entire sale consideration to respondent No.2 was fastenable, upon the petitioners and theirs having omitted to part with the entire sale consideration for goods purchased by respondent No. 3 from respondent No.2, they are rendered amenable for penal liability envisaged in Section 420 of the IPC. However, when the above fact is not forthcoming, on a deep and incisive scanning of the file, consequently no inference other than the one that the respondent No.3 was the actual and not an obscure buyer of the petitioner company hence he alone was liable to defray to the respondent No. 2, the entire sale consideration for goods purchased by him from the latter. The aforesaid discussion constrains this Court to conclude that the complaint with the allegations against the petitioners is misconceived, it constitutes abuse of process of law and tantamounts to harassing the petitioners and as such it deserves to be quashed and set-aside. Moreso, when the liability, if any of the respondent No.3 to the respondent No.2 arising from his purported act of not defraying to the latter the entire sale consideration for 11,117 apple boxes, is a civil liability. Besides, when it stands mitigated by the orders rendered by the Judicial Magistrate 1st Class, Kasauli, District Solan, wherein the said Court ordered for the release of apple boxes in favour of respondent No.2 as also of appropriation by him of their sales turn over, it looses tinge if any of criminality. Accordingly, the petition is allowed to the extent that the F.I.R. is quashed and set-aside. However, since the orders rendered by the Judicial Magistrate have attained finality and are rendered qua perishable goods and appear to have been rendered to recompense the respondent No.2 the owner of goods for his having come to be not defrayed by the respondent No.3 the entire sale consideration, as such, when respondent No.3, the person who may have been aggrieved by the said orders, may then proceed to impeach the said orders before the competent Court. Consequently, the assailing of the orders of the Judicial Magistrate 1st Class, Kasauli, comprising in Annexure P-5 at the instance of the petitioner No.1 is wholly unwarranted, who is merely a bailee of goods who rather may be entitled to claim rent from respondent No.2 or respondent No.3 for the period the apple boxes stood stored in its premises and which stands tendered before the Sessions Court, Solan and is comprised in FDR in the sum of Rs.21 lacs, as is evident from the reading of the impugned orders rendered by the learned Sessions Judge, Solan comprised in Annexure P-7. Consequently, it is not deemed fit to interfere with the orders of the learned Sessions Judge. It rather is deemed fit, just and appropriate that the petitioners herein approach the learned Sessions Judge, Solan for laying or staking a claim for the release of rent amount for storing apple boxes in its premises comprised in the FDR amounting to Rs.21 lacs, which application if and when stands instituted shall be decided in accordance with law.

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

Ateek Ahmed son of Shaeed Ahmed ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 357 of 2015
Order Reserved on 23rd April, 2015
Date of Order 4th May, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Section 11(D) of Prevention of Cruelty to Animals Act and Section 8 of Prohibition of H.P. Cow Slaughter Act- co-accused are yet to be arrested- cruelty to animal is a heinous offence- Courts are under legal obligation to protect the lives of animals because animals cannot protect themselves- investigation is at initial stage and it would not be expedient to release the petitioner on anticipatory bail- application dismissed. (Para-6 to 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the Applicant: Mr. Deepak Kaushal, Advocate
For the Non-applicant: Mr. J.S. Rena, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 307 of 2014 dated 31.8.2014 registered under Section 11(D) of Prevention of Cruelty to Animals Act and Section 8 of Prohibition of H.P. Cow Slaughter Act P.S. Paonta Sahib District Sirmaur (H.P.)

2. It is pleaded that applicant is only bread earner of his family and is a labourer and is agriculturist. It is further pleaded that applicant is innocent and he does not have any connection in the case. It is pleaded that bail application was filed before learned Additional Sessions Judge Nahan District Sirmaur vide bail application No. 122 of 2015 which was rejected on dated 4.4.2015. It is pleaded that applicant has been falsely implicated in present case. It is pleaded that owner of vehicle and main accused Irshad already stood released by the Court of learned JMIC Paonta Sahib. It is further pleaded that applicant is not owner of the cattle nor is the owner of vehicle. It is also pleaded that applicant will not tamper with prosecution evidence and will abide by terms and conditions imposed by Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. There is recital in police report that on dated 31.8.2014 ASI Mohar Singh along with HC Jagir Singh, C. Ayub Khan, C. Jaagar Singh were posted in check post Bahral and HHC Sewa Singh and C. Ishwar Singh were on patrolling

duty at about 6 AM. There is recital in police report that vehicle having registration No. HR-55F-3717 came and same was stopped for checking purpose. There is recital in police report that driver of vehicle told that ice-cream was loaded in the vehicle. There is further recital in police report that some voices came from inside the vehicle and on suspicion driver was directed to produce the documents of vehicle. There is recital in police report that two persons were travelling in the vehicle and one person boarded down from the vehicle and ran towards the forest. There is recital in police report that driver of vehicle disclosed his name as Mohammad Hussain @ Mausim Khan son of Raiees Khan resident of Akbarabad, P.O. Dariyal Tehsil Swar P.S. Tanda District Rampur U.P. There is recital in police report that driver of vehicle disclosed the name of another person who fled away at the time of checking as Raoop son of Poona Chaudhary resident of VPO Dariyal Tehsil Swar P.S. Tanda District Rampur U.P. There is further recital in police report that vehicle was checked in presence of Ranbir Singh and Kedar Singh. There is also recital in police report that nine ox were kept in the vehicle. There is recital in police report that seizure memo was prepared. There is further recital in police report that site plan was prepared and statements of witnesses recorded. There is recital in police report that owner of animals and another person who was travelling in the vehicle have concealed themselves. There is further recital in police report that Ateek Ahmad filed the anticipatory bail application but he did not appear before the Court and thereafter his anticipatory bail application was dismissed. There is further recital in police report that co-accused Ateek Ahmad is to be arrested and other co-accused Naushad and Raoop are also to be arrested. There is recital in police report that co-accused Ateek Ahmad, Naushad and Raoop are resident of another State and they were carrying the animals for slaughter purpose in vehicle No. HR-55F-3717. There is recital in police report that religious sentiments of Hindus have been damaged and there is resentment in the Hindu community. Prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?

2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that any condition imposed by Court will be binding upon applicant and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case as per police report co-accused Naushad and Raoop are still to be arrested. Court is of the opinion that cruelty to animal is a heinous offence. Courts are under legal obligation to protect the life of animals because animals cannot

protect themselves. There are serious allegations against the applicant that applicant along with other co-accused was carrying nine ox in the vehicle which was closed from all sides. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case Court is of the opinion that for proper investigation custodial interrogation of applicant is essential. Court is of the opinion that if applicant is released on anticipatory bail at this stage then investigation of case will be adversely affected. In view of the fact that investigation is at the initial stage of case it is not expedient in the ends of justice to release the applicant on anticipatory bail at this stage.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if applicant is released on anticipatory bail at this stage then applicant will induce and threat the prosecution witnesses is accepted for the reasons mentioned hereinafter. There is apprehension in the mind of Court that if applicant is released on bail at this stage then applicant will threat and induce the prosecution witnesses which would adversely effect the case. In view of above stated facts, point No.1 is answered in negative.

Point No.2 (Final order)

9. In view of my findings on point No.1 anticipatory bail application filed by applicant under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 438 of Code of Criminal Procedure 1973. Pending application(s) if any also disposed of. Application filed under Section 438 of Code of Criminal Procedure is disposed of.

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

Cr. Appeal Nos. 392, 206, 211 & 393 of 2011.
Reserved on: May 01, 2015.
Decided on: May 04, 2015.

1. **Cr. Appeal No. 392 of 2011**.
Deep Bahadur .....Appellant.
Versus
State of H.P. .....Respondent.
2. **Cr. Appeal No. 206 of 2011**.
Bal Bahadur .....Appellant.
Versus
State of H.P. .....Respondent.
3. **Cr. Appeal No. 211 of 2011**.
Deep Bhadur & anr. .....Appellant.
Versus
State of H.P. .....Respondent.

4. **Cr. Appeal No. 393 of 2011**.

Asha Devi .....Appellant.

Versus

State of H.P. .....Respondent.

N.D.P.S. Act, 1985- Section 20- Accused 'P' was carrying a boru on his shoulder- accused 'P' and 'A' were holding a pithu bag from each side- they tried to run away on seeing the police but were apprehended- their search was conducted- boru contained 24 kg. of charas and pithu contained 8 kg. of charas- prosecution witnesses admitted that police officials prepared the documents together by sitting in the police station- no entry was made in the malkhana register regarding taking out of the property for sending it to FSL for analysis- further, there is no entry regarding the re-deposit or taking the case property to the Court or deposit in malkhana after it was brought from the Court- no independent witness was associated- held, that in these circumstances, case of the prosecution was not proved- accused acquitted. (Para-19 to 25)

For the appellant(s): Mr. Anup Chitkara, Advocate, for appellant(s) in Cr. Appeals No. 392 & 393 of 2011.
Mr. M.L.Sharma, Advocate, for appellant in Cr. Appeal No. 206 of 2011.

For the respondent(s): Mr. M.A.Khan, Addl. AG, with Mr. P.M.Negi, Dy. AG and Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, all these appeals were taken up together for hearing, except Cr. Appeal No. 211 of 2011, titled as Deep Bhadur & anr. Vrs. State of H.P. It is made clear that accused Deep Bahadur has infact filed two Cr. Appeals bearing No. 392 of 2011 through Sh. Anoop Chitkara, Advocate and Cr. Appeal No. 211 of 2011 as Jail Appeal.

2. These appeals are directed against the common judgment dated 4/5.1.2011, rendered by the learned P.O. Fast Track Court, Mandi, H.P., in Sessions Trial No. 16 of 2009, whereby the appellants-accused (hereinafter referred to as the "accused"), who were charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act) have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 1,00,000/- each and in default of payment of fine, they were further ordered to undergo rigorous imprisonment for six months each under Section 20(ii)(C) of the ND & PS Act.

3. The case of the prosecution, in a nut shell, is that on 2.9.2008, police party headed by Insp. Hemant Kumar Thakur, I.O. Police Station, SV & ACB, Mandi, H.P., set up a naka at Pansara bridge, a secluded place. At about 9:30 PM, the accused persons were seen coming from the area of Bhadoli-Kullu side. Accused Bal Bahadur was carrying a "Boru" on his shoulder. Accused Deep Bahadur and Asha Devi were carrying a "Pithu bag". Accused Deep Bahddur was holding that Pithu bag from one side while accused Asha Devi

was holding that bag from the other side. The accused tried to turn back. The accused persons were nabbed. The Insp. Hemant Kumar Thakur, I.O. and other police officials gave their personal search to the accused vide memo Ext. PW-1/B. The accused persons were informed of their legal right to be searched by a Magistrate or a Gazetted Officer vide memo Ext. PW-1/A. The accused persons consented to be searched by the Police party. The boru carried by the accused Bal Bahadur was searched. It was found to be containing charas in the shape of chapattis, wrapped in polythene. The bag carried by accused Deep Bahadur and Asha Devi was found to be containing charas in the shape of sticks. The recovered stuff on smelling was found to be charas. The charas, so recovered from boru was weighed. It weighed 24 kgs whereas the charas, so recovered from Deep Bahadur and Asha Devi weighed 8 kgs. Out of the charas recovered from boru, two samples of 50 gms. each were drawn which were separately parceled and sealed with three seals of seal-S each. The bulk charas was put in that very boru which was parceled and sealed with six seals of seal-S. The sample parcels were marked as mark A-1 and mark A-II. The parcel containing balance charas was marked as mark P-1. Two samples of 50 gms. each were drawn from the charas recovered from the pithu bag carried by accused Deep Bahadur and Asha Devi. These were separately parceled and sealed with three seals of seal-S each. The bulk charas was put in that very pithu bag, which was parceled and sealed with six seals of seal-S. The sample parcels were marked as mark A-III and mark A-IV. The parcel containing balance bulk charas was marked as mark P-II. NCB form in triplicate was filled in on the spot. The recovered charas was taken into possession by the police vide memo Ext PW-1/C. Rukka Ext. PW-3/A was scribed and sent to the Police Station through Const. Pankaj Kumar, on the basis of which FIR No. 9/2008 Ext. PW-4/A was registered at PS SV & ACB, Mandi, H.P. The case property was brought before the SI Om Verma for resealing, who resealed each parcel with three seals of "C" and prepared the reseal memo Ext. PW-4/E. Thereafter, he deposited the case property alongwith sample seals and other related documents with MHC. The sample parcels Mark A-I and A-III were sent for chemical analysis. The report of FSL is Ext. PW-4/D. During the pendency of the trial, the prosecution sent the parcels containing balance charas to the Laboratory for chemical examination and the report is Ext. PX. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 14 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted and sentenced the accused persons, as noticed hereinabove. Hence, these appeals on behalf of the accused.

5. M/S. Anup Chitkara and M.L.Sharma, Advocates, appearing on behalf of the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. AG, for the State has supported the judgment of the learned trial Court dated 4/5.1.2011.

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

7. PW-1 LC Chandra Thakur deposed that on 22.9.2008, she was associated by Insp. Hemant Kumar, in the raiding party. They all went in the official vehicle to Pansara bridge of Aut area of District Mandi. The police laid naka at Pansara bridge at 9:30 PM. In the meantime, two male persons and one lady came from Bhadyoli Kullu side. They were coming towards Pansara bridge. One male person was carrying jute bag on his left

shoulder. The other male and lady were holding pithunuma bag of black and blue colour, in which the word "Alpine" was written. The lady was holding that bag from one side and the male was holding it from the other side. The accused disclosed their identity. The place where the accused were intercepted, was lonely place. The I.O. informed the accused persons of their legal right vide written option memo Ext. PW-1/A as to whether they intend to give personal search and of the articles in their possession, to a Gazetted Officer or to the police. The accused persons opted to give their personal search to the police. In this regard, memo Ext. PW-1/A was prepared. Hemant Kumar I.O. gave his personal search and that of the raiding party. Thereafter, Insp. Hemant got checked the jute bag (boru) after calling the accused Bal Bahadur to bring down the jute bag from his shoulder. The said bag was opened. It was found containing charas in the shape of chapatinuma and aitakar which was wrapped with polythene. It weighed 24 kgs. Thereafter, the bag which was carried by accused Deep Bahadur and Asha Devi was checked. It found containing charas. It weighed 8 kgs. The samples were drawn. The same were put in polythene bags. Thereafter, they were packed and sealed in separate cloth parcels. The charas was also put in the same jute bag i.e. 23.900 kgs and thereafter, it was packed and sealed in a cloth parcel. The sample parcels were marked as A-1 and A-2 and sealed with three seals of "S" on each parcel and the enclosure of the parcels were also signed by her, Rajender, Const. Lal Singh as well as by the accused. The parcel of Boru was marked as P-1 and six seal impressions were affixed on it on different places. Thereafter, the cloth parcels of sample were marked as A-3 and A-4 and sealed with the seal impression of "S" and three seals were affixed on the parcel and thereafter the parcel of Pithu bag was marked as P-2 and six seal impressions of seal "S" were affixed thereon. The I.O. has also taken the impression of seal on NCB form in triplicate. The sealed articles were taken into possession vide recovery memo Ext. PW-1/D. In her cross-examination, she admitted that Pansara is a big village.

8. PW-2 Const. Rajinder Singh also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot. In his cross-examination, he admitted that it was the duty of the I.O. to associate some independent witnesses from Pansara and none of the member of the raiding party including the senior officer had tried to join any independent witness nor they reminded the I.O. to do so. The National Highway was just half a kilometer away from the Pansara bridge. On the National Highway, hundreds of vehicles, motor cycles, car and three wheelers used to ply day and night. No hukamnama was issued to any of the member of the raiding party to bring independent witnesses from the nearby locality. In his further cross-examination, he admitted that there were houses between NH 21 which leads to Kullu-Manali and the Pansara bridge.

9. PW-3 Const. Pankaj Kumar, also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot. In his cross-examination, he admitted that there were residential houses within a span of 300 meters of village Badyawali and 700 meter at village Dalashani, where people do reside. He also admitted that village Dalshani is a big Panchayat where Panchayat Pradhan and other members were available. He further admitted that village Pansara is also a big village on National Highway 21, where Panchayat Pradhan and other members of the Panchayat were available. He did not remember that any member of the raiding party was instructed by the I.O. to bring local respectable members from nearby vicinity of villages Dalshani, Badayawali and Pansara.

10. PW-4 Om Parkash, deposed that Const. Pankaj Kumar produced rukka at about 2:15 AM in the PS, ACB, Mandi, on the basis of which, FIR Ext. PW-4/A was registered and its endorsement bears his signature. On 23.9.2008, at about 7:15 AM, Insp. Hemant Thakur produced the contraband before him. The resealing process was completed. He also filled in column No. 11 of the NCB form vide Ext. PW-4/D. He also prepared the certificate of resealing vide Ext. PW-4/E.

11. PW-5 HC Kuldeep Singh deposed that SI Om Prakash has deposited the case property with him. He made the entries in the malkhana register vide Ext. PW-5/A. He sent Const. Rajinder Singh vide RC No. 24/08 to deposit the samples at FSL Junga for chemical analysis. The copy of RC is Ext. PW-5/B. On 17.11.2008, Const. Brijesh Kumar took the report the chemical analysis alongwith the sample A-1 and A-3 from FSL Junga which were sealed with seals of FSL and deposited with him. He kept the aforesaid case property in the malkhana intact. In his cross-examination, he admitted that the malkhana register Ext. PW-5/A does not find mention regarding deposit of NCB forms. He also admitted that the sample was sent to FSL Junga after a delay of 72 hours. He categorically admitted that all the police officials prepared the documents together by sitting in the Police Station. He also admitted that in the report of FSL, Junga, it does not find mention of RC number through which samples were allegedly sent to the laboratory. Column No. 12 in the NCB-1 form was filled up by him. He admitted that the said column does not find mention of the name of the laboratory where the sample was allegedly sent by him. He also admitted that column No. 12 was not stamped by him.

12. PW-7 Const. Som Dev, also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot.

13. PW-9 HC Brajesh Kumar, deposed that on 16.6.2008, he was deputed to collect the report from FSL, Junga. He went to FSL Junga on 16.11.2008 and collected the report and handed over the same to the MHC.

14. PW-11 HC Vinod Kumar, MHC deposed that on 17.6.2010, he received order from the Court that two parcels of this case were allowed to be sent to the laboratory for chemical examination. On 19.6.2010, both the parcels of this case sealed with the court seal were sent to the laboratory through HC Yog Raj vide R/C No. 40/10. According to him, so long as the case property remained in his custody, he did not do any tampering nor did he allow anybody to tamper with it. The FSL report was received on 6.7.2010. When the parcels were sent to the laboratory an entry was made to this effect in the malkhana register at Sr. No. 45/19.

15. PW-12 HC Yog Raj, deposed that on 19.6.2010, MHC handed over to him two parcels of this case sealed with the court seal vide R/C No. 40/10 for being taken to FSL Junga. He deposited the same after obtaining the receipt and returned the R/C and receipt to the MHC on his return.

16. PW-13 Const. Som Dev, deposed that on 6.7.2010, he went to FSL Junga to collect the case property of this case. He brought two parcels of this case vide Ext. PW-10/A and PW-10/B alongwith the FSL report Ext. PX. He handed over the same to MHC PS SV and ACB Mandi on 6.7.2010.

17. PW-14 Insp. Hemant Kumar deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on

the spot. He filled up the NCB form. He sent the rukka to the Police Station. In his cross-examination, he admitted that village Bashing was at a distance of 4 kms. from Kullu towards Manali. He did not send any police official to call any independent person. He could not assign any special reason for not sending any police official to call any independent person. He also admitted that Pansara is a big village but not thickly populated. He also admitted that he did not associate any independent witness in the raiding party. Voluntarily deposed that there were various reasons for it like witnesses turn hostile and witnesses do not come forward to join the raiding party. He also admitted that he did not make any efforts to associate any independent witnesses.

18. The case of the prosecution, precisely, is that the accused were nabbed on 22.9.2008 carrying charas in boru and pithu. The samples were drawn and these were sealed. The bulk was also sealed. NCB forms were filled up in triplicate. Rukka was sent to the Police Station, on the basis of which, FIR was registered.

19. According to PW-5 Kuldeep Singh, the samples were sent for analysis to FSL Junga through Constable Rajinder Singh to be deposited in the FSL vide RC No. 24/08. The copy of RC is Ext. PW-5/B. On 17.11.2008, Const. Brijesh Kumar took the report of the chemical analysis alongwith the sample A-1 and A-3 from FSL Junga which were sealed with seals of FSL and deposited with him. He kept the aforesaid case property in the malkhana intact. In his cross-examination, he has categorically admitted that all the police officials prepared the documents together by sitting in the Police Station, though the documents are required to be completed, including filling up of NCB forms, on the spot. Initially, two parcel samples Ext. A-1 and A-3 were sent for chemical analysis to FSL Junga. Thereafter, the Court sent the bulk charas for chemical analysis as per the trial Court order dated 16.6.2010. The samples were sent by PW-11 HC Vinod Kumar to laboratory through HC Yog Raj, PW-12 vide RC No. 40/10. The FSL report was received on 6.7.2010. When the parcels were sent to the laboratory, the entry to this effect was made in the malkhana register at Sr. No. 45/19. Parcels Ext. PW-10/A and PW-10/B were taken by HC PW-12 Yog Raj through RC No. 40/10 to FSL Junga. The samples were brought back with the report Ext. PX by Const. Som Dev (PW-13).

20. The case property was produced before the Court while recording the statement of PW-14 Insp. Hemant Kumar. He identified the case property. We have gone through Ext. PW-5/A malkhana register, carefully. The entry at Sr. No. 45/19 has been made to the effect that the case property was deposited by PW-4 Om Prakash on 23.9.2008. The samples A-1 and A-3 were sent for chemical analysis vide RC No. 24/08 through Const. Rajender Singh to Junga. These were received back through Brijesh Kumar on 17.11.2008 carrying seal of the FSL.

21. PW-11 MHC Vinod Kumar, as noticed by us hereinabove, stated that on 19.6.2010, both the parcels of this case sealed with the court seal were sent to the laboratory through HC Yog Raj vide R/C No. 40/10. Surprisingly, RC No. 40/10 has not been proved. According to him, when the parcels were sent to the laboratory an entry was made to this effect in the malkhana register at Sr. No. 45/19. There is no corresponding entry of the bulk charas being taken out from the malkhana on 19.6.2010. The malkhana register is not on the prescribed proforma and the case property when deposited, entry is required to be made and when the same is taken out corresponding entry is also required to be made. PW-12 HC Yog Raj, deposed that he was handed over two parcels of this case, PW-10/A and PW-10/B, sealed with the court seal vide R/C No. 40/10 for being taken to FSL Junga. He deposited the same after obtaining the receipt and returned the R/C and receipt

to the MHC on his return. These samples were brought from FSL Junga by PW-13 Const. Som Dev alongwith the report of the FSL Ext. PX. He handed over the same to MHC PS SV and ACB Mandi on 6.7.2010. There is no corresponding entry of re-deposit of Ext. PW-10/A and PW-10/B in the malkhana register Ext. PW-5/A. Thus, there is no entry in the malkhana register when the bulk was taken out for analysis and when it was re-deposited by PW-13 Const. Som Dev. The case property was produced in the Court but there is no entry in the malkhana register when it was taken out. The necessary entry was to be made in the malkhana register when Ext. PW-10/A and PW-10/B were taken out from the malkhana to be produced in the Court alongwith the DDR report. Similarly, when the case property after its production in the Court was to be brought back in the malkhana, the entry was required to be made alongwith the DDR. The case property when taken out from the malkhana is entrusted to police official/officer, for its safe custody from malkhana to the Court and to be brought back. Since the case property, as per the procedure duly established, has neither been deposited nor taken out from the malkhana as per law, it casts serious doubt whether it was the same contraband/case property, which was seized from the accused and sent for chemical analysis at FSL, Junga. It has caused serious prejudice to the accused persons.

22. The accused were nabbed on 22.9.2008 at about 9:30 PM, when the police had laid down naka at Pansara bridge. PW-2 Rajinder Singh, in his cross-examination has admitted specifically that it was the duty of the I.O. to associate some independent witnesses from Pansara and none of the member of the raiding party including the senior officers have tried to join any independent witnesses nor they reminded the I.O. about the same. The National Highway was just half a kilometer away from the Pansara bridge. According to him, on the National Highway, hundreds of vehicles, motor cycles, car and three wheelers used to ply day and night. No hukamnama was issued to any of the member of the raiding party to bring independent witnesses from the nearby locality. In his further cross-examination, he admitted that there were houses between NH 21 which leads to Kullu-Manali and the Pansara bridge. PW-3 Const. Pankaj Kumar has admitted that there were residential houses within a span of 300 meters of village Badyawali and 700 meter at village Dalashani, where people do reside. He further admitted in his cross-examination that village Dalshani is a big Panchayat where Panchayat Pradhan and other members were available. He further admitted that village Pansara is also a big village on National Highway 21 where Panchayat Pradhan and other members of the Panchayat were available. He did not remember that any member of the raiding party was instructed by the I.O. to bring local respectable members from nearby vicinity of villages Dalshani, Badayawali and Pansara. PW-7 Const. Som Dev also admitted that Pansara is a big Panchayat having Panchayat Pradhan and its members. It is a thickly populated village.

23. PW-14 Insp. Hemant Kumar, in his cross-examination, has admitted that village Bashing was at a distance of 4 kms. from Kullu towards Manali. He did not send any police official to call any independent person. He could not assign any special reason for not sending any police official to call any independent person. He also admitted that Pansara is a big village but not thickly populated. He also admitted that Pansara Panchayat was headed by Pradhan. He did not send any police official to associate any independent person. However, he stated that there were various reasons, when cross-examined by the learned Advocate appearing on behalf of accused Bal Bahadur and Deep Bahadur, that at times, witnesses turn hostile and witnesses do not come forward to join the raiding party. He further admitted that he did not make any efforts to associate any independent witnesses. It is proved on the basis of the statements, as discussed, hereinabove, that the independent

witnesses, though available from villages Dalshani, Badayawali and Pansara, were not associated. PW-14 Insp. Hemant Kumar has not even made any efforts to associate independent witnesses. No hukamnama was issued to the police party to bring the independent witnesses.

24. The accused were nabbed at village Pansara at about 9:30 PM. The National Highway was nearby, where hundreds of vehicles ply day and night. Thus, it cannot be presumed that it was a secluded place, where independent witnesses were not available. The purpose of joining independent witnesses at the time of arrest, search and sealing process is to inspire confidence that all the codal formalities were completed on the spot at the time of arrest, search and sealing process.

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.

27. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

Cr. Appeal No. 211 of 2011.

28. In view of the judgment rendered in Cr. Appeal No. 392 of 2011, no orders are required to be passed in this appeal.

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

General Manager, Northern Railway, ...Appellant.
Versus
Ramesh Chand and others. .....Respondents.

CMP(M) No. 1295 & 1296 of 2014 in
RFA No. 4104 of 2013.
Decided on: 4th May, 2015

Land Acquisition Act, 1894- Section 18- One of the petitioners had died during the Reference Petition before the trial Court- this fact was not brought to the notice of trial Court- held, that in case award was passed in ignorance of death of the sole petitioner, award has to be set aside - in case of more than one petitioner, death of one of the

petitioners does not make the award a nullity and the legal representatives can be brought on record in appeal. (Para-2 and 3)

Case referred:
Collector Land Acquisition NHPC versus Khewa Ram and others, Latest HLJ 2007 (HP) 270

For the appellant:	Mr. Prince Chauhan, Advocate vice Mr. Rahul Mahajan, Advocate.
For the respondents:	Mr. Dheeraj K. Vashisth, Advocate for respondents No. 1, 3 to 5 and for proposed LRs No. 2(a) and 2(b). Mr.D.S.Nainta, Addl. A.G with Mr. Pushpinder Jaswal, Dy. A.G for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Respondent No. 2, Shri Raj Kumar (one of the petitioner in the trial Court) in the main appeal has expired on 02.10.2010 i.e. during the pendency of the reference petition in the trial Court. The factum of his death was neither brought to the notice of the trial Court either by the surviving petitioners or legal representatives of the said respondent nor any steps for his substitution taken. To the contrary, the reference petition filed by said Sh. Raj Kumar and his brothers S/Sh. Ramesh Chand, Pawan Kumar, Arun Kumar and Pardeep Kumar came to be decided along with batch of petitions vide award dated 30.04.2012, under challenge in the present appeal, without taking notice of his death and substitution of his legal representatives.

2. The question for adjudication as arisen in these applications is as to what is the impact of death of deceased respondent Raj Kumar and non-substitution of his legal representatives in these proceedings. The law in this regard is no more *res-integra* as this Court in **Collector Land Acquisition NHPC** versus **Khewa Ram and others, Latest HLJ 2007 (HP) 270**, after taking into consideration the provisions contained under the Land Acquisition Act and also under Order 22 of the Code of Civil Procedure, has held that a reference petition under Section 18 has to be answered by the Court and in case the claimant does not appear despite notice, he do so at his own risk. In the event of the sole claimant died during the course of proceedings and the Court unaware of his death answered the reference on the basis of the material available on record, in an appeal either filed by his legal representatives or the acquiring authority, the award has to be set aside and the proceedings deem to have been abated, of course subject to the consideration of the question of setting aside the abatement on condonation of delay, however, only by the reference Court and not by the appellate Court. In a case where there are more claimants or where more than one petition (a batch of petitions) decided by a common award, death of one of the claimants during the course of proceedings do not render the award passed on common evidence led by all the parties a nullity and the legal representatives can even be brought on record during the pendency of the appeal also. The relevant portion of the judgment supra reads as follows:

> "13. The question that next arises is as to what happens if the claimant has died during the proceedings. This can also happen

under various circumstances, some of which are being dealt with hereunder:

a. In case there is only one claimant in an isolated case of land acquisition and the claimant dies, then obviously if the court is unaware about the death of the claimant, it will proceed to decide the reference on the material placed on record before it. In such a case, if either the legal representatives of the claimant or the acquiring authority files an appeal, then the award of the District Judge will have to be set aside and the reference proceedings deemed to have been abated. The questions whether abatement should be set aside and whether the delay, if any, should be condoned are questions to be decided by the District Judge alone and not by the appellate court.

b. However even in the aforesaid situation, the award cannot be said to be nullity since the reference court is bound by law to answer the reference. In case none of the parties is aggrieved, the legal representatives can execute the award in accordance with law.

c. In cases where there are more than one claimants and each is owner of a separate share, then the death of one of the claimants can never render the award to be a nullity. The award is answered in favour of all the claimants. Therefore, in an appeal filed either by the claimants or by the acquiring authority, the legal representatives of the deceased claimant can be brought on record even during the course of the appeal and it is not necessary to refer the matter back to the reference court.

d. Where there are more than one petitions and they are decided by a common award and the sole claimant in one of the petitions has died during the pendency of the reference proceedings, the entire award cannot be termed a nullity. Since the award is a common award based on common evidence led by all the parties, the legal representatives of the deceased can be brought on record during the pendency of the appeal also.

e. In cases(c) and (d) above, the abatement, if any, will be qua the deceased and the entire proceedings will not abate. In both these cases the legal representatives can be brought on record even during the pendency of the appeal.

3. The present is a case which is covered by (b) and (c) of para 13 of the judgment supra, as Raj Kumar was not the only petitioner in the reference petition but his brother S/Sh. Ramesh Chand, Pawan Kumar, Arun Kumar and Pardeep Kumar being co-

owners of the acquired land were also the petitioners with him. Above all, the reference petition, they preferred has been decided by a common award passed in a batch of petitions on the basis of common evidence available on record. Therefore, irrespective of the death of deceased respondent Raj Kumar during the course of the proceedings in the reference petition in the trial Court, the question of abatement of the appeal and substitution of his legal representative can be gone into by this Court in the present appeal. Since his brothers, petitioners No. 1, 3, 4 and 5 were their on record to represent the estate of the deceased petitioner-respondent and to pursue the petition, therefore, the question of abatement does not arise. The proposed legal representatives of deceased respondent Raj Kumar named in para 3 of the application [CMP(M) No. 1295 of 2014] are otherwise also required to be brought on record being entitled to receive the compensation in respect of the acquired land to the extent of their share and also to straighten the record.

4. The application, no doubt, has been filed beyond the period of limitation. The delay, however, stands explained from the contents of another application [CMP(M) No. 1296 of 2014] filed under Section 5 of the Limitation Act.

5. I, therefore, allow both the applications and on setting aside the abatement of the proceedings, order to substitute the proposed legal representatives named in para 3 of the application,[CMP(M) No. 1295 of 2014] as respondents No. 2(a) and 2(b) in the main appeal. Necessary corrections be made in the records accordingly. Amended memo, in terms of this order be also filed within two weeks. Both the applications stand disposed of.

An authenticated copy of this order be sent to learned trial Court for making necessary corrections in the records in terms of this order.

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

Kameshwar son of late Sh. Parma Ram ....Applicant

Versus

State of H.P. ....Non-applicant

Cr.MP(M) No. 359 of 2015
Order Reserved on 23rd April,2015
Date of Order 4th May, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for commission of offences punishable under Sections 430, 504 and 506 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- Court are under an obligation to maintain balance between human rights and a criminal cases- considering that investigation is complete and no recovery is to be effected from the accused, bail granted to the accused.(Para-7 and 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Applicant: Mr. G.C.Gupta, Sr. Advocate with Ms. Meera Devi, Advocate
For the Non-applicant: Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 20 of 2015 dated 21.3.2015 registered under Sections 430, 504 and 506 Part-B of IPC at P.S. New Shimla.

2. It is pleaded that applicant has not committed any offence as alleged and further pleaded that applicant will abide by terms and conditions imposed by Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. There is recital in police report that applicant intentionally uprooted public water tap from sehan of complainant and placed the public water tap in his house and stopped the water supply to the house of complainant. There is recital in police report that accused did not allow the complainant and his children to use the public water tap since six months and when complainant went to take the water from water tap accused abused the complainant and told the complainant that if he would again come to take the water from public water tap then he would kill him. There is further recital in police report that site plan was prepared and statements of witnesses recorded under Section 161 Cr.P.C. There is also recital in police report that no further investigation is to be conducted from applicant and no recovery is to be effected from the applicant. There is recital in police report that accused is quarrelsome person and another FIR No. 46 of 2014 dated 1.10.2014 registered under sections 336, 504 and 427 IPC against the applicant. There is further recital in police report that applicant would induce and threat the prosecution witnesses in case applicant is released on bail and prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the non-applicant and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether the anticipatory bail application filed under Section 438 Cr.P.C. by applicable is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is completed and no recovery is to be effected from applicant and on this ground anticipatory bail application filed by applicant be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. In view of the fact that investigation is complete and in view of the fact that no recovery is to be effected from applicant Court is of the opinion that it would be in the interest of justice if applicant is released on bail because trial will be concluded in due course of time.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to applicant and condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail strictly in accordance with law. It is well settled law that Courts are under legal obligation to keep equal balance between criminal case and human rights of individual. In view of the fact that investigation is complete and in view of the fact that no recovery is to be effected from applicant it is expedient in the ends of justice to allow the application. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

9. In view of my findings on point No.1 bail application filed by applicant under Section 438 Cr.P.C. is allowed and interim order dated 9.4.2015 is made absolute. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

Nishant Sharma son of Sh. Desh Raj Sharma ....Applicant

Versus

State of H.P. ....Non-applicant

Cr.MP(M) No. 360 of 2015
Order Reserved on 23rd April,2015
Date of Order 4th May, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commissions of offences punishable under Sections 341, 323, 395, 367, 147, 148, 149, 120-B IPC- petitioner pleaded that he is a student and his career would be spoiled in case he is not permitted to appear in the last semester of final examination- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- release of the petitioner will not affect the investigation adversely- bail granted.

(Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Applicant: Mr. Jitender P. Ranote, Advocate.
For the Non-applicant: Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 28 of 2015 dated 5.3.2015 registered under Sections 341, 323, 395, 367, 147, 148, 149, 120-B IPC at P.S. Nadaun, District Hamirpur (H.P.)

2. It is pleaded that applicant is not directly connected with criminal offence and applicant has been implicated in false case. It is pleaded that age of applicant is 20 years and applicant is studying in the last semester at Government Industrial Training Institution Rail District Hamirpur and his final examination scheduled to be held in the month of July 2015. It is pleaded that if applicant is not released on bail then applicant will not be in position to appear in examination and career of applicant would be ruined. It is pleaded that learned Sessions Judge Hamirpur has rejected the bail application of applicant. It is further pleaded that investigation is complete and no recovery is to be effected from applicant and applicant would not tamper with prosecution witnesses in any manner and would abide by terms and conditions imposed by Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report, FIR No. 28 of 2015 dated 5.3.2015 registered under Sections 341, 323, 395, 367, 147, 148, 149 and 120-B of Indian Penal Code at Nadaun District Hamirpur (H.P.) against the applicant. There is recital in police report that on dated 4.3.2015 at about 10.10 PM information received that one person was brought for his medical treatment in CHC Sujanpur. There is recital in police report that Deep Sharma is taxi driver by profession and owner of vehicle No. HP-01-H-1316. There is recital in police report that on dated 4.3.2015 when Deep Sharma reached outside his house then two boys aged 20-25 years told him that they would go to Chabutra. There is recital in police report that Deep Sharma took those two boys to Chabutra in his vehicle and thereafter accused persons told Deep Sharma to take them to Karot in his vehicle. There is

further recital in police report that thereafter Deep Sharma brought the accused persons to Karot and thereafter accused persons told Deep Sharma to take them to Jihan in his vehicle. There is recital in police report that thereafter when Deep Sharma and accused persons reached at Bhou road accused persons directed Deep Sharma to stop his vehicle. There is further recital in police report that thereafter Deep Sharma was dragged outside from vehicle and was beaten with sticks and fist blows. There is also recital in police report that Rs. 10,000/- (Rupees ten thousand only) of Deep Sharma could not be traced out. There is recital in police report that matter was investigated and Deep Sharma was medically examined and as per report Deep Sharma had sustained fifteen injuries on his body. As per further police report the site plan was prepared and statements of prosecution witnesses recorded under Section 161 Cr.P.C. There is further recital in police report that two sticks were also recovered as per Section 27 of Indian Evidence Act and Rs.1000/- (Rupees one thousand only) were also recovered as per disclosure statement given by accused. There is recital in police report that Gurdev Singh raised alarm and thereafter when Gurdev Singh raised alarm accused persons fled away. There is further recital in police report that as per MLC report Deep Sharma had sustained simple injuries. There is recital in police report that in case applicant is released on bail then applicant would threat the prosecution witnesses. Prayer for dismissal of bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the non-applicant and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by applicable is liable to be accepted as mentioned in memorandum of grounds of bail application?

2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that any condition imposed by Court will be binding upon the applicant and applicant is student and his career would be spoiled in case he would not be in position to appear in last semester of final examination and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held

that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. In view of the fact that applicant is student and in view of the fact that applicant would appear in examination of last semester Court is of the opinion that it is expedient in the ends of justice to allow the bail application filed by applicant. It is held that if applicant is released on bail then investigation of case will not be adversely effected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to applicant and condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail in accordance with law under Section 439(2) of Code of Criminal Procedure 1973. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

9. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 1 lac (Rupees one lac only) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will join the investigation of case whenever and wherever directed by Investigating Officer in accordance with law. (ii) That applicant will attend the proceedings of learned trial Court regularly till conclusion of trial of case. (iii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That the applicant will not leave India without the prior permission of the Court. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court so that applicant can be located in short notice. (vi) That applicant will not commit similar offence qua which he is accused. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of.

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

Partap Singh .....Petitioner.

Versus

Kanwar Singh .....Respondent.

CMPMO No. 25 of 2015.
Reserved on: 28.4.2015.
Decided on: 04.5.2015.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed an application for seeking amendment in the plaint- application was filed after the issues were framed and it was

belated - the amendment would change the nature of the suit- it was not pleaded in the application that in spite of due diligence, amendment could not have been made earlier, therefore, application is liable to be dismissed.(Para-4 to 6)

Cases referred:
State of Madhya Pradesh vrs. Union of India and another, (2011) 12 SCC 268
J.Samuel and others vrs. Gattu Mahesh and others, (2012) 2 SCC 300

For the petitioner: Mr. Raman Prashar, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The respondent was served but there is no representation on his behalf.

2. This petition is instituted against the order dated 14.10.2014, rendered by the learned Civil Judge (Jr. Divn.), Arki, Distt. Solan, H.P. in CMA No. 200/6 of 2012.

3. Key facts, necessary for the adjudication of this petition are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has instituted a civil suit for permanent prohibitory injunction under Section 38 of the Specific Relief Act, for restraining the petitioner-defendant (hereinafter referred to as the defendant) from carrying out digging, construction activities and from interfering into the land shown in the plaint. The written statement was filed by the defendant on 15.1.2010. The plaintiff did not file any replication, despite numerous opportunities granted to him. The issues were framed by the learned trial Court on 10.8.2010. The plaintiff also led his evidence on 2.1.2012. The plaintiff moved an application under Order 6 Rule 17 CPC, seeking amendment of the plaint. The application was resisted by the defendant by filing detailed reply. The learned trial Court allowed the application on 14.10.2014. Hence, this petition.

3. I have heard Mr. Raman Prashar, Advocate, for the petitioner and gone through the impugned order dated 14.10.2014, carefully.

4. In the present case, the written statement was filed on 15.1.2010 and issues have already been framed by the learned trial Court on 10.8.2010. The application has been filed belatedly and it is an afterthought. The description of the suit land was already within the knowledge of the plaintiff at the time of instituting the suit. The amendment of the plaint would definitely change the basic nature of the suit causing serious prejudice to the defendant. The amendment sought for was not necessary for the final adjudication of the suit. The plaintiff has not specifically stated in the application filed under Order 6 Rule 17 CPC that inspite of due diligence, such amendment could not have been sought earlier.

5. Their lordships of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh vrs. Union of India and another,*** reported in ***(2011) 12 SCC 268***, have held that when application is filed after the commencement of the trial, it must be shown that inspite of due diligence, such amendment could not have been sought earlier. Their lordships have held as under:

“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."

6. Their lordships in the case of ***J. Samuel and others vrs. Gattu Mahesh and others,*** reported in ***(2012) 2 SCC 300,*** have held that omission of specific plea mandatorily amounts to negligence and lack of due diligence. Their lordships have explained the term "due diligence". It has been held as under:

"15) In this legal background, we have to once again recapitulate the factual details. In the case on hand, Suit O.S. No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. We have already mentioned that Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential ingredient of Section 16(c) and the form prescribes for the due performance. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

18) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states 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."

19) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term `Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

7. Accordingly, the petition is allowed. Impugned order dated 14.10.2014, rendered by the learned Civil Judge (Jr. Divn.), Arki, Distt. Solan, H.P. in CMA No. 200/6 of 2012, is quashed and set aside.

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

Cr. Appeal No. 452/2012
with Cr. Appeal no. 39/2013
Reserved on: 1.5.2015
Decided on: 4.5.2015

1. Cr. Appeal No. 452/2012

Sashi Kumar and another ...Appellants

Versus

State of Himachal Pradesh ...Respondent

2. Cr. Appeal No. 39/2013

State of Himachal Pradesh ...Appellant

Versus

Shashi Kumar and another ...Respondents

N.D.P.S Act, 1985- Section 20- Search of the vehicle was conducted during which 500 grams of charas was recovered – when parcel Ex. P1 was opened in the Court, it was containing another parcel Ex. P2 sealed with seal impression 'P'- seal impression 'P' was put on the parcel when the contraband was seized- parcel was opened for analysis at FSL, Junga and the seals were bound to be removed at FSL- no entry was made in the Malkhana register regarding taking out of the property for production before the Court- case property was to be taken out after making entry in the Malkhana register and after recording the same in the daily dairy – case property was to be re-deposited in malkhana register and entry in the daily dairy was to be recorded- held, that these circumstances make it doubtful that case property remained intact- hence, accused acquitted. (Para-13 to 16)

For the Appellant(s) : Mr. Lakshay Thakur and Mr. Abhi Raj Guleria, Advocates, in Cr. Appeal No. 452/2012.
Mr. M.A. Khan, Additional Advocate General, in Cr. Appeal No. 39/2013.

For the Respondent(s): Mr. Lakshay Thakur and Mr. Abhi Raj Guleria, Advocates, in Cr. Appeal No. 39/2013.
Mr. M.A. Khan, Additional Advocate General, in Cr. Appeal No. 452/2012.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since both the appeals have arisen out of the same judgment, the same were taken together and are being disposed of vide this common judgment.

2. These appeals are instituted against Judgment dated 8.10.2012 rendered by learned Special Judge, Kullu, Himachal Pradesh in Sessions Trial No. 29 of 2012, whereby appellants in Criminal Appeal No. 452/2012 (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for

convenience sake), were convicted and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.20,000/-, in default of payment of fine, to further undergo simple imprisonment for three months. The State has come in appeal bearing No. 39/2013, for enhancement of the sentence dated 8.10.2012.

3. Case of the prosecution in a nutshell is that on 4.5.2011, PW-7 SHO Tenzin (IO) alongwith HC Bala Ram was on patrolling duty near Larji. At about 4.00 am, a vehicle bearing No. HP01H-6009 came from Larji side. It was signalled to stop. Driver of the vehicle and other occupants disclosed their identification. Search of the vehicle was taken. One packet kept in the dashboard was recovered. On checking Charas was recovered and it weighed 500 gms. It was wrapped in the same manner in the packet and sealed with six seals of impression 'P'. Samples of seals were prepared on separate piece of cloth. IO filled NCB form at the spot. Possession memo was prepared. Rukka was prepared at the spot and sent to the police station, Bharari through HHC Bala Ram alongwith case property alongwith NCB form. NCB form in triplicate, sample seal 'P' and copy of seizure memo were handed over to SHO Balbir Singh. He lodged FIR. SHO Balbir Singh resealed case property with 5 impressions of seal 'W'. He also filled up column Nos. 9 to 11 of the NCB form and deposited case property with PW-5 Parkash Chand. Case property was entered in the Malkhana register at Sr. No. 46. He sent the sealed parcels vide RC Ext. PW-1/B to FSL Junga through PW-1 Bala Ram. He deposited the same in laboratory and obtained receipt. Thereafter, codal formalities were completed and challan was put up in the Court.

4. Prosecution, in all, examined 7 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. According to them, they were innocent and were falsely implicated. Accused were convicted and sentenced as noticed above. Hence, these two appeals, one by the accused against their conviction bearing Cr. Appeal No. 452/2012, and another by the State bearing Cr. Appeal No. 39/2013, for enhancement of sentence.

5. Mr. Lakshay Thakur, Advocate has vehemently argued that the Prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General has also argued that accused should have been given maximum punishment of 10 years being in possession of Charas.

7. We have heard the learned counsel for the parties and also gone through the judgment and record carefully.

8. PW-1 Bala Ram has deposed that on 4.5.2011, he alongwith SHO Tenzin and team was on patrolling and excise duty. They reached near Larji. At about 4.00 am, one vehicle came from Larji side which was stopped by the police and checked. Identities of the occupants of the vehicle were established. Search of the vehicle was conducted. During search, one pack kept on dashboard was recovered. It contained 500 gms charas. IO prepared Rukka and handed over to him for registration of case vide Ext. PW-1/A. On 5.5.2011, MHC handed over to him case property alongwith record of the case vide RC No. 30/11 Ext. PW-1/B. He deposited the same with FSL Junga and handed over receipt to MHC.

9. PW-2 and PW-3 are formal witnesses.

10. PW-4 deposed that he lodged FIR Ext. PW-4/B on the same day. Bala Ram produced/ handed over case property alongwith documents. He resealed the parcel with 'W'

and affixed 5 seals over parcel vide Ext. PW-4/D. Sample of seal is Ext. PW-4/E. He filled up columns No. 9 to 11, which is Ext. PW-4/F and affixed three impressions of seal 'W'. MHC thereafter handed over case property to MHC Parkash Chand.

11. PW-5 Parkash Chand deposed that on 4.5.2011 SI Balbir Singh handed over case property i.e. one parcel resealed with five seals of 'W', which he entered in the Malkhana register at Sr. No. 46. He proved abstract of Malkhana register Ext. PW-5/A. On 5.5.2011, sealed parcel alongwith other record was sent to FSL Junga through PW-1 HC Bala Ram.

12. PW-6 ASI Rajesh Kumar deposed the manner in which accused were apprehended, search and sealing process was completed at the spot. Case property was produced in the Court. While recording statement of PW-6 Rajesh Kumar, the trial Court has observed as under:

> **"On opening the parcel Ex. P1, it contains another sealed parcel Ex. P2 sealed with seal P six in numbers. Seals are intact. On opening Ex. P2, it contains charas Ex. P3, cello tape and polythene wrappers Ex. P4 are the same which were taken in possession from the vehicle of the accused."**

13. PW-7 SHO Tenzin was leading the patrol party. He also deposed the manner in which vehicle was stopped, accused were apprehended and vehicle was searched. He prepared NCB form. He also prepared Rukka Ext. PW-1/A. He sent the same through HHC Bala Ram alongwith case property, NCB form, sample seal 'P', copy of seizure memo to Police Station Bharari. He also prepared rough spot map.

14. Mr. Lakshay Thakur has drawn the attention of the court to Ext. PW-5/A i.e. Malkhana Register. According to PW-5, he entered in the Malkhana Register at Sr. No. 46 property deposited on 4.5.2011. He sent the same to FSL Junga through PW-1 HC Bala Ram. Bala Ram carried case property to FSL Junga vide RC Ext. PW1/B. According to Ext. PX, the report was signed by Assistant Director on 11.5.2011. After examination of the extract, original cloth parcel containing remnants of the exhibit were resealed. Case property was produced before the Court. While recording statement of PW-6, on opening of parcel Ext. P1, it contained another sealed parcel Ext. P2, sealed with seal impression 'P' six in number. Seals were intact. Seal 'P' six in number were put when the contraband was seized and thereafter 5 seals of 'W' were put by the PW-4 Balbir Singh. Parcel was supposed to be reopened for the purpose of analysis by FSL Junga. Five seals of 'W' and six seals of 'P' were bound to be removed in order to take the contraband out for the purpose of analysis from the pocket. Analysis was carried and thereafter property was put in the same parcel and sealed with FSL seals. However, when the property has been produced before the Court all the 6 seals of 'P' were found intact. The trial Court has not noticed whether seals of FSL were on the packet when produced before the Court. There is no entry also in the malkhana register Ext. PW-5/A when the property was taken out from Malkhana for production before the Court. Case property was to be taken out after making entry in Malkhana and after recording same in daily diary report. Case property was to be re-deposited in the Malkhana register and daily diary was to be prepared. Thus, it casts doubt whether the case property, which was sent to FSL Junga and the property produced before the Court, was the same which was seized from the accused coupled with the fact that six impression of 'P' were found intact as per the observations made by the Court, while recording statement of PW-6 when the case property was produced before the Court and opened. These seals were bound to be removed when the sample was examined as alleged. It creates doubt in the version of

the prosecution and, thus, prosecution has failed to prove case against accused beyond reasonable doubt. There is no reference of FSL seals. Statement of PW-6 was recorded on 21.8.2012 and as noticed by us, Ext. PX is dated 11.5.2011.

15. In Punjab Police Rules, applicable to the State of Himachal Pradesh, Malkhana registered is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

16. In this case, there is no evidence who has brought the case property from Malkhana at the time of production before the Court and who has taken it back to the Malkhana. Generally, case property is taken from the Malkhana after recording entry. It is sent by MHC through some Constable and handed over to Naib Court and returned in the same manner to be deposited back in the Malkhana/Store Room.

17. Accordingly, Cr. Appeal No. 452/2012 preferred by the accused is allowed. Judgment dated 8.10.2012 rendered by learned Special Judge, Kullu, Himachal Pradesh in Sessions Trial No. 29 of 2012 is set aside. Accused be released forthwith, if not required in any other case by the Police. Fine amount, if already deposited, be also refunded to them. Registry is directed to prepare the release warrant of the accused and send them to the Superintendent of Jail concerned immediately.

18. In view of above, Cr. Appeal No. 39/2013 preferred by the State is dismissed being without any merits. Pending applications, if any, in both the appeals are disposed of.

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

Tulsi Ram. ....Petitioner.

Versus

HPSEB & another. ....Respondents.

CWP No. 5074 of 2011
Decided on: 4.5.2015

Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel for the petitioner submitted that he did not want to continue with the present petition and same be dismissed as withdrawn- In view of statement of the Learned Counsel, petition is dismissed as withdrawn

For the petitioner : Mr. R.D. Kaundal, Advocate, vice counsel.
For the respondents : Mr. Raj Pal Thakur, Advocate.

The following judgment of the Court was delivered:

P.S. Rana Judge (Oral)

Learned Advocate appearing on behalf of the petitioner submitted that petitioner does not want to continue the present petition and the same be dismissed as

withdrawn. In view of the submission of learned Advocate appearing on behalf of the petitioner petition is dismissed as withdrawn. No order as to costs. For fresh cause of action petitioner would be at liberty to file fresh petition. Petition is disposed of. Pending applications if any also disposed of.

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

Gopal Chauhan. .....Applicant.
Versus
State of Himachal Pradesh. .....Non- applicant.

Cr.MP(M) No. 367 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5, 2015.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 465 and 471 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- police had not claimed that custodial interrogation is necessary in the present case- interests of the State or general public will not be affected by keeping the accused inside the jail- therefore, bail granted. (Para-6 to 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Ravinder Singh Jaswal, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 26 of 2014 dated 10.7.2014 registered under Sections 420, 465 and 471 of the Indian Penal Code at Police Station Jubbal District Shimla Himachal Pradesh.

2. It is pleaded that applicant is an agriculturist and apple merchant. It is further pleaded that service of complainant namely Bhupinder Singh son of Late Sh Roop Chand resident of Mandhol Tehsil Jubbal District Shimla HP was hired for transportation of 130 boxes of apples from Matasa (Jubbal) to Solan in the month of July and August, 2014. It is further pleaded that apple boxes transported in the vehicle were found lying on the road

between Kharapathar and Kaina Kenchi road due to loosing of rope of the truck. It is further pleaded that boxes were further re-loaded in the same vehicle. It is further pleaded that as the apple boxes were got damaged the parties arrived into a compromise that complainant would compensate applicant to the extent of damage caused to the applicant. It is further pleaded that complainant just to avoid the liability towards applicant filed a false criminal complaint against applicant. It is further pleaded that allegations leveled by the complainant against the applicant are without any basis. It is further pleaded that applicant is innocent. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. There is recital in police report that applicant Gopal Chauhan has also filed counter FIR No.61 of 2012 dated 5.10.2012 under Section 407 IPC against complainant. There is further recital in police report that applicant Gopal Chauhan has also submitted carbon copy of G.R builty during investigation of FIR No.61 of 2012 and thereafter cancellation report was submitted before learned Judicial Magistrate Ist Class Jubbal which was accepted by learned Judicial Magistrate Ist Class Jubbal. There is recital in police report that carbon copy of G.R.builty was sent to FSL Junga for comparison of signatures and it was found that complainant Bhupinder Thakur had not signed in the carbon copy of G.R. builty and his signatures were obtained through some other persons. There is further recital in police report that applicant had joined investigation in the present case. There is further recital in police report that applicant will threaten the prosecution witness. Prayer for rejection of anticipatory bail application sought.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 438 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that custodial investigation of the applicant is not essential in the present case and on this ground anticipatory bail application filed by applicant be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered such as (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of

bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. In the present case there is no recital in police report that custodial investigation of the applicant is essential in the present case. It is well settled law that accused is presumed to be innocent till proven guilty by the competent Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected because there is no recital in police report that custody of the applicant is necessary for investigation in present case.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not induce or threat prosecution witnesses. If applicant will flout terms and conditions of bail order then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail in accordance with law. Point No.1 is decided in affirmative.

Point No.2 (Final order).

9. In view of my above findings on point No.1 anticipatory bail application filed by applicant is allowed and interim order dated 10.4.2015 is made absolute with all terms and conditions mentioned in interim order dated 10.4.2015. Observation made hereinabove is strictly for the purpose of deciding the present anticipatory bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Jatinder Singh .....Applicant.

Versus

State of Himachal Pradesh. .....Non-applicant.

Cr.MP(M) No. 370 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5, 2015.

Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail.

(Para-6 to 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Naresh Verma, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No.180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 of the Indian Penal Code at Police Station Jawalamukhi District Kangra Himachal Pradesh.

2. It is pleaded that investigation of the present case is completed and recovery has been effected. It is further pleaded that there is no direct evidence against the applicant and he is innocent. It is further pleaded that applicant will not induce or threat prosecution witness in any manner and will abide by the terms and conditions imposed by the Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 IPC at Police Station Jawalamukhi District Kangra HP. There is recital in police report that statement of co-accused Jitender Singh was recorded under Section 27 of the Indian Evidence Act and as per disclosure statement of co-accused Jitender Singh site plan of location was prepared where cash chest of ATM machine was kept. There is further recital in police report that broken locks of shutter which were thrown in the bushes by accused persons were also recovered as per disclosure statement given by co-accused Jitender Singh. There is further recital in police report that one CD and bank statement dated 26.9.2014 and statement of cash kept in the ATM machine also took into possession vide seizure memo. There is further recital in police report that on dated 26.9.2014 the ATM machine kept by PNB Bank Kaloh Tehsil Rukker District Kangra HP was broken and Rs.6,24,200/-(Six lac twenty four thousand two hundred) was stolen from cash chest of ATM machine by accused persons. There is further recital in police report that one spray bottle, cash chest of ATM machine and cash to the tune of Rs.5,97,700/- (Five lac ninety seven thousand seven hundred) and car having registration No. HR-51E-6011 were also took into possession vide seizure memo. There is further recital in police report that investigation is complete and challan is filed in the competent Court of law on dated 2.12.2014.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after completion of investigation and after filing of challan in competent Court of law as alleged?.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in competent court of law and criminal case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered.(i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. As per police report investigation is complete and challan already stood filed in Court in the present case and criminal case will be disposed of in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent of Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not induce or threaten prosecution witness and if applicant will induce or threaten prosecution witness after grant of bail then prosecution will be at liberty to file application for cancellation of bail in accordance with law. It is not expedient in the ends of justice to keep applicant in jail because investigation is complete and challan stood filed in competent Court of law. Point No.1 is answered in affirmative.

Point No.2 (Final order).

9. In view of my findings on point No.1 bail application filed by applicant is allowed. It is ordered that applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court (i) That applicant will join investigation as and when called for by the Investigating Officer in accordance with law.

(ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner so that applicant can be located after giving short notice. (vi) That applicant will attend the proceedings of learned trial Court regularly. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. Bail application disposed of. All pending application(s) if any also disposed of.

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

Malkiyat Singh son of Chiman Singh .....Applicant.

Versus

State of Himachal Pradesh. .....Non- applicant.

Cr.MP(M) No. 371 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5, 2015.

Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Naresh Verma, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

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5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in competent court of law and criminal case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit***

Singh. It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. As per police report investigation is complete and challan already stood filed in Court in the present case and criminal case will be disposed of in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent of Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not commit similar offence in future. If applicant commits similar offence in future then prosecution will be at liberty to file application for cancellation of bail in accordance with law. It is not expedient in the ends of justice to keep applicant in jail because investigation is complete and challan stood filed in competent Court of law. Point No.1 is answered in affirmative.

Point No.2 Final order.

9. In view of my findings on point No.1 bail application filed by applicant is allowed. It is ordered that applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court (i) That applicant will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner so that applicant can be located after giving short notice. (vi) That applicant will attend the proceedings of learned trial Court regularly. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Criminal Appeals No.331 & 453 of 2009
Reserved on : 8.4.2015
Date of Decision : May 5, 2015

1. Cr. Appeal No.331 of 2009

Nand Lal and others ...Appellants.

Versus

State of H.P. ...Respondent.

2. Cr. Appeal No. 453 of 2009

State of HP ...Appellant.

Versus

Nand Lal and others ...Respondents

Indian Penal Code, 1860- Sections 304-II and 506-I read with Section 34- Complainant party wanted the accused to remove the obstruction caused on the passage commonly used by the villagers - accused failed to remove such obstruction - when she tried to remove the obstruction, accused pelted the stones- one stone hit 'V' who sustained injuries- he was taken to PGI where he succumbed to the injuries- Medical Officer opined that there was fracture of skull and death was caused on account of shock caused due to extra dural haemorrhage - presence of the deceased was duly proved by the complainant party- testimonies of the witnesses corroborated each other- it was duly proved that accused had hurled abuses and had proclaimed to settle the matter – they caused injuries to the complainant party- all the accused were together and shared their common intention- hence, conviction of the accused was justified. (Para-12 to 30)

Cases referred:

K. Ravi Kumar v. State of Karnataka, (2015) 2 SCC 638

Murllidhar Shivram Patekar and another v. State of Maharashtra, (2015) 1 SCC 694

Balu s/o Onkar Pund and others v. State of Maharashtra, (2015) 3 SCC 409

Virsa Singh v. State of Punjab, AIR 1958 SC 465

For the Appellant(s) : Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj Vashist, Advocate, in Cr.A No.331/2009; and Mr. Ashok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General in Cr.A No.453/2009.

For the Respondent(s) : Mr. Ashok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General in Cr.A No.331/2009, and Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj Vashist, Advocate, in Cr.A No.453/2009.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Since both these appeals arise out of the same judgment of the trial Court; hence, they are being decided by a common judgment.

2. Appellants-convicts Nand Lal, Dayala Ram, Smt. Neelam Kumari and Smt. Geeta Devi, hereinafter referred to as the accused, have filed Criminal Appeal No.331 of 2009, assailing the judgment dated 30.7.2009/ 31.7.2009, passed by Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P., in Sessions Trial No.20/7 of 2006, titled as *State of H.P. Vs. Nand Lal and others*, whereby accused Nand Lal stands convicted for having committed offences, punishable under the provisions of Sections 304-II and 506-I/34 of the Indian Penal Code, and accused Dayala Ram, Neelam Kumari and Geeta Devi stand convicted for

having committed offence, punishable under the provisions of Section 506-I/34 of the Indian Penal Code, and sentenced as under:

Name of accused	Sections	Sentence
Nand Lal	304-II IPC	Simple Imprisonment for a period of three years and eight months and to pay a fine of Rs.5000/-, and in default of payment thereof to further undergo simple imprisonment for a period of six months.
	506-I IPC	Simple Imprisonment for a period of 20 days and pay fine of Rs.500/- and in default of payment thereof to further undergo simple imprisonment for a period of seven days.
Dayala Ram, Neelam Kumari and Geeta Devi	506-I IPC	Each of the convicts to undergo simple imprisonment for a period of 20 days and pay fine of Rs.500/- each and in default of payment thereof to further undergo simple imprisonment for a period of seven days.

3. Cr. Appeal No.453 of 2009 stands filed by the State.

4. The issue which arises for consideration in the present appeals is as to whether findings returned by the Court below, holding accused Nand Lal to have committed an offence, punishable under the provisions of Section 304-II and Section 506-I read with Section 34 of the Indian Penal Code and co-accused Dayala Ram, Neelam Kumari and Geeta Devi, having committed an offence, punishable under the provisions of Section 506-I read with Section 34 of the Indian Penal Code, are based on correct appreciation of evidence on record or not? Primarily what needs to be considered is as to whether the prosecution has been able to prove that Nand Lal committed an offence of murder or not? Correctness, legality and perversity of all findings are to be adjudged.

5. In relation to FIR No. 196 of 2005 dated 1.12.2005 (Ex.PW13-/A), registered under the provisions of Sections 307, 336, 504, 506, 34 of the Indian Penal Code, prosecution filed challan against all the accused persons, namely Dayala Ram, his wife Geeta Devi, son Nand Lal and daughter-in-law Neelam Kumari, for having committed offences, punishable under the provisions of Sections 302 and 504, both read with Section 34 IPC. Finding no evidence, all the accused persons were discharged in relation to an offence, punishable under the provisions of Section 504 read with Section 34 IPC. Also, accused Dayala, Neelam Kumari and Geeta Devi stand discharged for having committed an offence, punishable under the provisions of Section 302 and 504, both read with Section 34 IPC. However, accused Nand Lal was charged for having committed an offence, punishable under Section 302 of the IPC as also section 506 read with Section 34 of IPC, and accused persons, namely Dayala Ram, Neelam Kumari and Geeta Devi, were charged for having committed an offence, punishable under Section 506 read with Section 34 of IPC.

6. As per prosecution story, the incident took place in village Kularu (District Bilaspur), between accused Dayala Ram and his family on one side, and the complainant party, including Chaman Lal on the other side. Complainant party wanted the accused to remove the obstruction so caused on the passage commonly used by the villagers. Houses

of the complainant party and the accused are just adjoining to each other. Despite intervention of the Panchayat, accused failed to remove such obstruction. The accused were insistent of not doing so, for the reason that the alleged obstruction, in the form of stairs-case was not on public passage, but on their own land. On 1.12.2005, at 7.30 am, after convening meeting of the villagers, when Chaman Lal tried to remove the obstruction, accused threw stones at the villagers. One such stone, so pelted by accused Nand Lal hit Vijay Ram, as a result of which, he sustained injuries and was taken to the Civil Hospital, Ghumarwin, where he was attended to by Dr. Rakesh Dhiman (PW-10). Prakash Chand (PW-1) telephonically informed the police of the incident and entry (Ex.PW-12/A) was recorded by HC Rakesh Kumar (PW-16) in this regard. Shiv Chaudhary (PW-14) and Gian Chand (PW-17) conducted investigation, which revealed that the accused persons, with a guilty intent, pelted stones, with an object of committing murder, and also criminally intimidated Prakash Chand (PW-1) and other villagers present on the spot (witnesses examined in the court).

7. Finding condition of Vijay Ram to be serious, he was referred for further treatment to PGI, Chandigarh, where unfortunately he succumbed to the injuries. Since he remained unconscious, police could not record his statement. Postmortem of the dead body was conducted by Dr. Savita Mehta (PW-11), who issued report (Ex.PW-11/B). Upon receipt of report of the Chemical Examiner (Ex.PW-13/C) from the Forensic Science Laboratory, Junga, final opinion of the doctor was obtained, who issued report (Ex. PW-11/B). With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

8. Accused persons, who were charged, as aforesaid, did not plead guilty and claimed trial. Significantly, State did not assail the order of discharge of some of the accused persons in relation to certain offences.

9. In order to establish its case, prosecution examined as many as seventeen witnesses. Statements of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded, in which accused Nand Lal took the following defence:-

> "We had dismantled out house 12 years back. Thereafter, we started constructing a new house after three years. When the land was vacant, Chaman Lal, used to cross there from. Thereafter, we constructed pillars of the house slowly and put a lintel there over and constructed walls. Thereafter, followed the work of second storey. We had kept space between two pillars to facilitate transportation of articles of construction of the upper storey of the house. The wall in such gape had been constructed 4-5 days before the incident., again started that I am not aware when the wall was constructed as I had come to the house a day before the incident and was working in connection with 'Bee Keeping at Haryana. However, on the wall being given Chaman Lal gave an application to the Panchayat, at which we were asked to open the wall for the way but we refused. On the panchayat being convened, we refused to open the way. On 1.12.2005, while we were involved in daily routine, some people started coming in the house of Chaman Lal with Dandas etc. and started proclaiming that they shall eliminate use that day. At this, I went inside my house. When such persons started stoning our house, when I have a ring to the police at about 7.15-7.30AM. Thereafter, I took snaps of such persons with my camera from the

roof of my house. While I was taking photographs, one stone hit me on the forehead at which I fell down. Thereafter, I do not know as to what happened and I regained consciousness in the hospital and at that time I saw my father Dayala Ram lying near me on the bed with bandage on his head. Thereafter, I was taken to police station at about 2.30-3.00 PM and was put behind the bars. My mother and wife were also put behind the bar at 9.00-9.30 PM by the police. I did not throw any stone. I do not know now as to what has happened to the wall. Had we been inside the wall we would have been killed by those present outside at the spot on that day."

10. While taking similar defence, remaining accused further elaborated that the villagers, who were armed with hammers and Darat, had criminally intimidated them. In order to probablize their defence, accused examined three witnesses.

11. Appreciating the testimony of the witnesses and the material placed on record, trial court found all the accused persons guilty and sentenced them, as aforesaid.

12. We have heard Mr. Ajay Kumar, Sr. Advocate, assisted by Mr. Dheeraj Vashisht, Advocate, learned counsel, on behalf of the appellants-accused, as also Mr. Ashok Chaudhary and Mr. V.S. Chauhan, learned Additional Advocates Geneal, and J.S. Guleria, learned Assistant 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 to the extent so held by the trial Court, beyond reasonable doubt. The sentences imposed cannot be said to be disproportionately less.

13. Correctness of the decision is subject matter of these appeals, so filed by the convicts and the State.

14. Can it be said that defence of the accused stands probablized through the testimonies of their witnesses and cross-examination of the prosecution witnesses? Having minutely examined the same, we are of the opinion it to be not so.

15. The fact that dispute in relation to the obstruction caused on the passage was going on between the parties is not only admitted by the accused, but also established on record through the testimony of Prakash Chand (PW-1) and Chaman Lal (PW-3). The matter was also taken to the Panchayat. Accused Nand Lal admits that his brother, at the relevant time, was posted at the Police Station, Sadar. It be observed that in relation to the complaint so filed by this accused, none from the village came forward to support him and, as such, cancellation report was filed by the police. What happened thereafter is not evident from the record. Defence of this accused that he was hit with a stone, as a result of which, he fell down and became unconscious, does not inspire confidence. There is no material on record to substantiate such fact. One cannot lose sight of the fact that Nand Lal himself appeared as a defence witness. Medical record pertaining to treatment, which he undertook, was in his possession. Assuming that the police, despite his brother being in the police force and posted in the very same district, was not extending help, he could have himself produced such material in support of his case. But, then it was not so done. The

photographs, so taken by him on the spot, cannot be said to have been proved in accordance with law. Krishan Lal (DW-1), who claims to be a Photographer, has categorically deposed that the photographs (Ex.P-1 to Ex.P-5) were not developed by him. Also, no date/time is reflected in these photographs. Similarly, factum of telephonic conversation between the accused party and the police cannot be said to have been established on record, despite the testimony of Ramesh Kumar (DW-2), who admits not to have produced the original record pertaining to the person in whose name the said telephone was installed. Thus, the defence cannot be said to have been probablized.

16. From the conjoint reading of testimonies of Parkash Chand, Banti Devi, Chaman Lal and Ram Kumar, it is apparent that the incident took place on 1.12.2005, sometime between 7-7.30 am. It appears that Vijay Ram was immediately rushed to Civil Health Centre, Ghumarwin, where he was attended to at 8.45 am by Dr. Rakesh Dhiman (PW-10), who found the patient to be unconscious. On physical examination, the doctor found the patient to have sustained the following injuries:-

1. There was swelling and abrasion on scalp extending from forehead to occipital region vertically placed and was 3.5 cm. wide.

2. A small abrasion on right hand. Dorsal portion with fresh blood present on the wound."

17. Despite application moved by the police, his statement could not be recorded as he was found not fit to do so. This doctor also admits to have examined Dayala Ram, who was also brought by the police for having suffered a lacerated would on the left side of the parietal region.

18. Dr. Savita Mehta, who conducted the postmortem of the deceased, has categorically opined that there was fracture of scull just above the right eye from frontal point going back to parietal bone linear (there in extra dural haemorrhage). According to the doctor, death took place on account of shock caused due to extra dural haemorrhage due to head injury. These experts as is so deposed by them in the court are of the considered view that injury, which was fatal, could be as a result of blow received with a stone (Ex.P-8).

19. Presence of the accused, the deceased and the complainant party (prosecution witnesses) at the time of occurrence of the incident cannot be disputed. This fact not only stands established on record, but also admitted by the accused.

20. We shall now deal with the testimonies of spot witnesses. Chaman Lal states that in relation to obstruction so caused by the accused party, he had moved an application with the Panchayat and other authorities. A compromise was arrived at and the accused agreed to dismantle the stairs so constructed by them. In fact, some portion of the stairs was removed, which was re-erected by the accused party. This was so done on 30.11.2005. On 01.12.2005, he called a meeting of the villagers, in relation to the same. He, Vijay Ram, Rakesh Chand, Sarwan Kumar, Bhrami Devi and 2-3 other villagers went to the house of accused, where he found all the accused persons standing on the lintel of the house, which was on the higher side. Vijay Ram asked the accused to come down for talks, which was opposed by them as they had wanted to decide the matter only from the place where they were standing. Thereafter, the accused started abusing and pelting stones on all the persons who were standing below. One stone thrown by accused Nand Lal hit Vijay Ram, as a result of which, he fell down. He was taken to the hospital. From the cross-examination, we find

that the dispute, *inter se* the parties, was pending for more than 2- 2½ years. This witness, however, does not probablize the defence, so taken by the accused that either or the other villagers had assembled with hammers/sickles for the purpose of removing the obstruction.

21. We find testimony of this witness to have been corroborated by Ram Kumar (PW-4), who has also deposed that Nand Lal refused to come down for talks, but "proclaimed that the decision shall be made from the upper side".

22. Prakash Chand (PW-1) further corroborates the version of these two witnesses by stating that hearing noise coming from the courtyard of Chaman Lal, he went and saw the accused throwing stones at Chaman Lal and Vijay Ram from the second storey of their house. He also saw the stone so thrown by accused Nand Lal hit Vijay Ram. Also accused extended threats of killing the persons present on the spot. The witness does state that he had seen Chaman Lal with a hammer in his hand, but then he does not state that the hammer belonged to Chaman Lal. This witness does not state that Chaman Lal had started breaking the wall for removing the obstruction and Vijay Ram was hit by the debris.

23. We find that on the complaint so lodged by Prakash Chand (PW-1), Rakesh Kumar (PW-16) made entry in the police record and went to the Community Health Centre, Ghumarwin, where he moved an application (PW-10/B) for recording statement of Vijay Ram. Since the patient was certified not fit, needful could not be done. Thereafter, he recorded the statement of Prakash Chand under the provisions of Section 154 of Code of Criminal Procedure (Ex.PW-1/A), which was sent to the Police Station for registration of FIR. Shiv Chaudhary (PW-14), SHO of the Police Station reached on the spot and conducted the investigation. He collected some of the stones (Ex.P-8 to Ex.P-15) lying on the spot vide a memo (Ex.PW-1/B). The spot map (Ex.PE-5/A) was prepared and necessary investigation conducted.

24. "Criminal intimidation" is defined in Section 503 of the Indian Penal Code. To constitute an offence of Criminal intimidation, prosecution is to prove the following essential ingredients:-

1. Threatening a person with any injury.
   (i) to his person, reputation or property; or
   (ii) to the person or reputation of any one in whom that person is interested.
2. The threat must be with intent
   (i) to cause alarm to that person, or
   (ii) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat; or
   (iii) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

25. It is a settled principle of law that the threat must be to the person with an intent to cause harm. Threat has to be real and not artificial. It must have an effect on the complainant party. It has to be specific and not vague.

26. Now in the instant case, Parkash Chand (PW-1), Banti Devi (PW-2), Chaman Lal (PW-3) and Ram Kumar (PW-4) are clear and consistent in their version with regard to not only presence of the accused on the spot, but also having hurled abuses and proclaimed of settling the matter, causing injury to the complainant party. Their intent being their

preparedness of pelting stones. All the accused persons were together and shared common intention of having intimidated the complainant and the other persons present on the spot. In this view of the matter, it cannot be said that the Court below erred in convicting the accused for having committed an offence, punishable under the provisions of Section 506 read with Section 34 of the Indian Penal Code.

27. It has come on record that despite Chaman Lal having taken the matter before the Panchayat, there was no animosity or hostility inter se the parties and more specifically between Nand Lal and deceased Vijay Ram. In fact, Banti Devi widow of deceased Vijay Ram admits that relations between her family and that of the accused are cordial.

28. That deceased was hit with the stone, so pelted by Nand Lal, stands evidently established and proved through the testimony of Prakash Chand, Banti Devi, Chaman Lal and Ram Kumar. Stone (Ex.P-8), so recovered by the police, was shown to the doctors, who were of the view that injury No.1, found on the body of the deceased, could have been caused with the same. Intent of Nand Lal, in killing the deceased, cannot be inferred from the testimony of the prosecution witnesses. After all, all the accused persons were throwing stones on the persons, who had gathered on the spot. Nand Lal did not, however, has any animosity against Vijay Ram, who happened to be there only on the asking of Chaman Lal, who, in fact, had filed a complaint with the Panchayat. The main dispute appears to be with Chaman Lal and not Vijay Ram. None of the prosecution witnesses has deposed that Nand Lal, with an intent of committing murder, threw the stone at Chaman Lal. Intent, if at all, could have been for causing bodily injury to Chaman Lal and not Vijay Ram. But then this is not the prosecution case. As such, the stone, with which Vijay Ram was hit, cannot be said to have been thrown with an intent of murdering Vijay Ram. However, the fact that stone weighing 1 Kg., which is so deposed by the doctor, would have caused injury is only reflective of the knowledge that in all probability and likelihood, death of the recipient could have been caused. The Court is aware of the fact that stone was pelted from a height with Nand Lal being in an advantageous position, as he was standing on the lintel of his house, which is two storeys above the courtyard of Chaman Lal.

29. From the record, it cannot be said that there was premeditation of mind in the commission of crime. Also, motive or animosity to commit the same is absent. Provocation, if at all, on the part of the accused, was one day prior to the occurrence of the incident. It stands established, through the testimonies of the prosecution witnesses that it was Chaman Lal, who had taken the villagers to the spot for talks. It is not the other way round. To us, it appears to be a case of sudden quarrel and in the heat of moment, the accused started pelting stones. The assailants cannot be said to have taken undue advantage or acted in a premeditated manner.

30. It is a settled principle of law that the cause of quarrel or the wounds caused is not a factor, on the basis of which accused can be held guilty or let off for having committed an offence, punishable under Section 302 of the Indian Penal Code. (*K. Ravi Kumar v. State of Karnataka,* (2015) 2 SCC 638; and *Murllidhar Shivram Patekar and another v. State of Maharashtra,* (2015) 1 SCC 694).

31. In *Balu s/o Onkar Pund and others v. State of Maharashtra,* (2015) 3 SCC 409, the Hon'ble Supreme Court of India, has reiterated the principles of law laid down by it in *Virsa Singh v. State of Punjab,* AIR 1958 SC 465 and other decisions, as under:

“16 The learned Judge Vivian Bose in his distinctive style of writing and speaking for the Court succinctly stated as under: (*Virsa Singh v. State of Punjab,* AIR 1958 SC 465)

"11. In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that "twelve good men and true" could readily appreciate and understand.

12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly":

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further, and

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two).

It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or

reasonably deduced, that the injury was accidental or otherwise unintentional."

17 Relying on the aforesaid principle of law, recently this Court in Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh, 2006 11 SCC 444, again examined the issue as to what relevant factors should be kept in consideration while deciding the question as to whether case in hand falls under Section 302 or 304 Part-I or Part-II. Justice Raveendran speaking for the Court held in para 29 as under:

> "29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not [pic] converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."”

32. Thus, in our considered view, prosecution has been able to establish guilt of the accused, beyond reasonable doubt, to the extent so held by the trial Court, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative in the shape of recovery of weapon of offence.

33. 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/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed.

34. From the material placed on record, it stands established by the prosecution witnesses that the accused are guilty of having committed the offences, they stood convicted 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. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that accused is innocent or not guilty or that he has been 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.

35. Thus, Criminal Appeal No.331 of 2009, so filed by the accused-convicts is dismissed.

36. Findings of conviction can also not be assailed on the ground so urged by the State. Noticeably, State never challenged the initial order of discharge of some of the convicts.

37. Now coming to the appeal filed by the State for enhancement of sentence, we are of the considered view that, in the facts and circumstances of the present case, sentences imposed by the trial Court are adequate and no enhancement is required. Hence, Criminal Appeal No.453 of 2009 is also dismissed. Both the appeals stand disposed of, so also pending application, if any.

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

Roop Chand …Petitioner.

Versus

Union of India & others …Respondents.

CWP No. 278 of 2010-A
Reserved on: 28.04.2015
Decided on: 05.05.2015

Gramin Dak Sevak (Conduct and Employment) Rules, 2001- Rule 10- Petitioner was involved in indiscipline and forgery- Inquiry was conducted against him- Inquiry Officer found that all the charges were proved – Disciplinary Authority imposed the penalty of the removal – record established that petitioner had forged the signatures of the Head of Village on many occasions- he was involved in indiscipline and had undermined the authorities and

had disgraced them - a person who indulges in illegal activities and commits fraudulent or frivolous acts by deceitful means, is to be dealt with iron hands – Writ Court cannot re-appreciate the evidence- considering the gravity of the accusations, the punishment cannot be said to be disproportionate or shocking - Writ petition dismissed. (Para-11 to 38)

Cases referred:

R. Vishwanatha Pillai versus State of Kerala and others, AIR 2004 Supreme Court 1469
U.P. State Road Transport Corporation versus Suresh Chand Sharma *with* Suresh Chand Sharma versus State of U.P. and Anr., 2010 AIR SCW 3859
U.P. State Road Transport Corporation, Dehradun versus Suresh Pal, 2006 AIR SCW 4903
S.R. Tewari versus Union of India & Anr., with S.R. Tewari versus R.K. Singh & Anr., reported in 2013 AIR SCW 3338
G.M. (Operation) S.B.I. & Anr. versus R. Periyasamy, 2015 AIR SCW 455
State Bank of India & Ors. versus Ramesh Dinkar Punde, 2006 AIR SCW 5457
Nirmala J. Jhala versus State of Gujarat and another, 2013 AIR SCW 1800
Union of India and others versus P. Gunasekaran, 2014 AIR SCW 6657
State of Punjab and others versus Ram Singh Ex-Constable, (1992) 4 SCC 54
The Management of Tournamulla Estate versus Workmen, (1973) 2 SCC 502
Lalla Ram versus D.C.M. Chemical Works Ltd. and another, (1978) 3 SCC 1
Union of India and others versus Narain Singh, (2002) 5 Supreme Court Cases 11
M.P. Electricity Board versus Jagdish Chandra Sharma, (2005) 3 Supreme Court Cases 401

For the petitioner: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in this writ petition is to the judgment and order, dated 13.08.2009, made by the Central Administrative Tribunal, Chandigarh Bench (Circuit at Shimla) (for short "the CAT"), whereby O.A. No. 682/HP/2007, titled as Shri Roop Chand versus Union of India and others, filed by the writ petitioner came to be dismissed (for short "the impugned judgment").

2. Writ petitioner was employee of respondents-department, was found involved in indiscipline and forgery, thus, has committed a misconduct. The respondents, after noticing the conduct, actions and the fact of forgery, decided to conduct departmental inquiry against him. Preliminary inquiry was conducted by the appointing authority and memorandum of charge sheet containing three article of charges was issued to him on 14.10.2005 (Annexure P-1), details of which have been given in the opening para of the impugned judgment.

3. Writ petitioner denied the charges, Inquiry Officer & Presenting Officer were appointed on 25.10.2005, and inquiry under Rule 10 of the Gramin Dak Sevak (Conduct and Employment) Rules, 2001 (for short "the Rules") was conducted. The Inquiry Officer submitted his report on 30.10.2006, who, after concluding the inquiry, came to the conclusion that all the charges were proved against the writ petitioner. Writ petitioner was

asked to file representation vide letter, dated 24.11.2006, who filed representation on 04.12.2006. Thereafter, the disciplinary authority, vide order, dated 03.01.2007 (Annexure P-3) awarded the penalty of removal from service upon the writ petitioner.

4. Writ petitioner, feeling dissatisfied with the said order of the disciplinary authority, i.e. order of removal from service, filed an appeal before the Appellate Authority, i.e. Superintendent of Post Offices, Rampur Bushahr Division, Rampur, on 22.01.2007 (Annexure P-4), was dismissed by the said authority vide order, dated 13.03.2007 (Annexure P-5).

5. Writ petitioner also invoked the jurisdiction of the revisional authority by filing revision petition before the Director Postal Services, HP Circle, Shimla on 16.05.2007 (Annexure P-6), which too was dismissed vide order, dated 10.09.2007 (Annexure P-7). All the said orders are the subject matter of the writ petition.

6. Writ petitioner has assailed all the said orders on the grounds taken in the writ petition, particularly, in paras 7 (a) to 7 (m) of the writ petition.

7. The respondents have filed reply and resisted the writ petition on the grounds taken in the memo of objections.

8. Learned counsel for the writ petitioner argued that the Inquiry Officer came to the conclusion that the charges are partly brought home to the writ petitioner, which is not correct as per the findings recorded by the Inquiry Officer. He has also questioned the proportionality of the punishment.

9. Learned Assistant Solicitor General of India argued that the writ petitioner has committed a grave misconduct, i.e. forgery, indiscipline, arrogance and was also giving names to his superiors as *'Shakuni, Duryodhan and Dhritrashtra',* thus, was disrespectful towards his superiors.

10. Learned counsel for the writ petitioner was asked to show as to how the writ petitioner was not involved in forgery as it is established on record that on so many occasions, he had forged the signatures of the Head of Village, was not able to demolish the said evidence and the findings recorded by the Inquiry Officer, Disciplinary Authority, Appellate Authority and the Revisional Authority. Virtually, the learned counsel for the writ petitioner was not able to satisfy the Court that the writ petitioner was not involved in forgery.

11. Learned counsel for the writ petitioner was also asked to show as to whether the Writ Court can appreciate the evidence and whether the writ petitioner has carved out a case for appreciating the evidence, which already stands appreciated by the authorities supra. He tried to argue, but was not able to, *prima facie,* carve out a case.

12. It is not a case of perversity or a case of mis-appreciation or misreading of the evidence.

13. While going through the record, it appears that the writ petitioner was involved in indiscipline and has acted in such a way, which amounts to undermining the authorities and disgrace them, to whom he was subordinate. If an employee is found committing forgery, to us, only on this count, the employee can be dismissed from service, as it is a grave misconduct.

14. The Apex Court in a case titled as **R. Vishwanatha Pillai versus State of Kerala and others,** reported in **AIR 2004 Supreme Court 1469,** held that if an employee has acted unfairly and has managed the documents, which are fictitious, by fraud or has committed forgery, is not entitled to any relief and cannot be even heard.

15. It is beaten law of land that a person, who claims equity, must do equity. A person, who is not fair, cannot claim equity. It is apt to reproduce para 19 of the judgment in **R. Vishwanatha Pillai's case (supra)** herein:

> *"19. ..... A person who seeks equity must come with clean hands. He, who comes to the Court with false claims, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practising fraud.*
>
> *(Emphasis added)"*

16. In another case titled as **U.P. State Road Transport Corporation versus Suresh Chand Sharma** with **Suresh Chand Sharma versus State of U.P. and Anr.,** reported in **2010 AIR SCW 3859,** fare was recovered from the passengers but they were not issued tickets by the bus conductor, charge was proved, he was dismissed from service. The Apex Court, while upholding the punishment of dismissal from service, held that misappropriating the public money is a grave misconduct. It is apt to reproduce para 20 of the judgment herein:

> *"20. We do not find any force in the submissions made by Dr. J.N. Dubey, learned Senior counsel for the employee that for embezzlement of such a petty amount, punishment of dismissal could not be justified for the reason that it is not the amount embezzled by a delinquent employee but the mens rea to mis-appropriate the public money."*

17. It is a duty of the State/Government/Department to weed out the dead wood. A person who indulges in illegal activities and commits fraudulent or frivolous acts by deceitful means, is to be dealt with iron hands and is to be weeded out.

18. The Apex Court in a case titled as **U.P. State Road Transport Corporation, Dehradun versus Suresh Pal,** reported in **2006 AIR SCW 4903,** held that misconduct should be dealt with iron hands and not leniently. It is apt to reproduce paras 7 to 9 of the judgment herein:

> *"7. Short question for our consideration in the present case is whether the punishment which has been modified by the learned Single Judge is justified or not? The learned Single Judge found that the punishment awarded in the present case is disproportionate to the guilt of the delinquent. So far as, the guilt of the petitioner is concerned, in the domestic enquiry it has been found that the*

petitioner is guilty of not issuing tickets to the twenty passengers and the same finding of the domestic enquiry has been upheld by the Labour Court & High Court. The petitioner was a conductor and holding the position of trust. If incumbent like the petitioner starts misappropriating the money by not issuing a ticket and pocketing the money thereby causing loss to the Corporation then this is a serious misconduct. It is unfortunate that the petitioner was appointed in 1988 and in the first year of service he started indulging in mal practice then what can be expected from him in the future. If this is the state of affair in the first year of service and if such persons are allowed to let off to the light punishment then this will be a wrong signal to the other persons similarly situated. Therefore, in such cases the incumbent should be weeded out as fast as possible and same has been upheld by the Labour Court. We are firmly of the view that such instances should not be dealt with lightly so as to pollute the atmosphere in the Corporation and other co-workers.

8. Normally, courts do not substitute the punishment unless they are shockingly disproportionate and if the punishment is interfered or substituted lightly in the punishment in exercise of their extra-ordinary jurisdiction then it will amount to abuse of the process of court. If such kind of misconduct is dealt with lightly and courts start substituting the lighter punishment in exercising the jurisdiction under Art. 226 of the Constitution then it will give a wrong signal in the Society. All the State Road Transport Corporations in the country have gone in red because of the misconduct of such kind of incumbents, therefore, it is the time that misconduct should be dealt with iron hands and not leniently.

9. Learned counsel for the appellant invited our attention to a decision of this Court in the case of Regional Manager, U.P. SRTC, Etawah & Ors. V/s. Hoti Lal & Anr., reported in [2003 (3) SCC 605] wherein, this Court has very categorically held that a mere statement that it is disproportionate would not suffice to substitute a lighter punishment. This Court held as under :

> *"The court or tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment was not commensurate with the proved charges. The scope for interference is very limited and restricted to exceptional cases. In the impugned order of the High Court no reasons whatsoever have been indicated as to why the punishment was considered disproportionate. Failure to give reasons amounts to denial of justice. A mere statement that it is disproportionate would not suffice. It is not only the amount involved but the mental setup, the type of duty performed and similar relevant circumstances which go into the decision-making process while considering whether the punishment is proportionate or disproportionate. If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of*

> *functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court are not proper."*

19. In **S.R. Tewari versus Union of India & Anr.,** with **S.R. Tewari versus R.K. Singh & Anr.,** reported in **2013 AIR SCW 3338,** the Apex Court held that judicial review in the cases of disciplinary proceedings is very limited and the Courts cannot substitute its findings for the findings recorded by the disciplinary authority. It is apt to reproduce para 22 of the judgment herein:

> *"22. The role of the court in the matter of departmental proceedings is very limited and the court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. In the matter of imposition of sentence, the scope for interference by the court is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court, cannot be subjected to judicial review. The court has to record reasons as to why the punishment is disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice. (Vide: Union of India & Ors. v. Bodupalli Gopalaswami, (2011) 13 SCC 553 : (2011 AIR SCW 5331) and Sanjay Kumar Singh v. Union of India & Ors., AIR 2012 SC 1783 : (2012 AIR SCW 2361)."*

20. It is also apt to reproduce para 9 of the judgment rendered by the Apex Court in the case titled as **G.M. (Operation) S.B.I. & Anr. versus R. Periyasamy,** reported in **2015 AIR SCW 455,** herein:

> *"9. It is not really necessary to deal with the judgment of the learned Single Judge since that has merged with the judgment of the Division Bench. However, some observations are necessary. The learned Single Judge committed an error in approaching the issue by asking whether the findings have been arrived on acceptable evidence or not and coming to the conclusion that there was no acceptable evidence, and that in any case the evidence was not sufficient. In doing so, the learned Single Judge lost sight of the fact that the permissible enquiry was whether there is no evidence on which the enquiry officer could have arrived at the findings or whether there was any perversity in the findings. Whether the evidence was acceptable or not, was a wrong question, unless it raised a question of admissibility. Also, the learned Single Judge was not entitled to go into the question of the adequacy of evidence and come to the conclusion that the evidence was not sufficient to hold the respondent guilty."*

21. The Apex Court in a case titled as **State Bank of India & Ors. versus Ramesh Dinkar Punde,** reported in **2006 AIR SCW 5457,** after discussing the facts in

paras 10 to 13, which are similar to the case in hand, has taken note of the principles and the ratio laid down in a series of judgments, reproduced in paras 14 to 19. It is apt to reproduce para 21 of the judgment herein:

> *"21. Confronted with the facts and the position of law, learned counsel for the respondent submitted that leniency may be shown to the respondent having regard to long years of service rendered by the respondent to the Bank. We are unable to countenance with such submission. As already said, the respondent being a bank officer holds a position of trust where honesty and integrity are inbuilt requirements of functioning and it would not be proper to deal with the matter leniently. The respondent was a Manager of the Bank and it needs to be emphasised that in the banking business absolute devotion, diligence, integrity and honesty needs to be preserved by every bank employee and in particular the bank officer so that the confidence of the public/depositors is not impaired. It is for this reason that when a bank officer commits misconduct, as in the present case, for his personal ends and against the interest of the bank and the depositors, he must be dealt with iron hands and he does not deserve to be dealt with leniently."*

22. It is established principle of law that High Courts or other Courts cannot act as Appellate Court while dealing with the writ petitions or appeals, outcome of disciplinary proceedings, and cannot substitute their own views unless the view expressed by the disciplinary authority shocks the conscience or is not supported by record.

23. It is apt to reproduce para 6 (III) of the judgment rendered by the Apex Court in a case titled as **Nirmala J. Jhala versus State of Gujarat and another,** reported in **2013 AIR SCW 1800,** herein:

> *"6. .....*
>
> *III. Scope of Judicial Review :*
>
> *(i) It is settled legal proposition that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority. The only consideration the Court/Tribunal has in its judicial review, is to consider whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence. The adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings. (Vide: State of T.N. & Anr v. S. Subramaniam, AIR 1996 SC 1232; R.S. Saini v. State of Punjab, (1999) 8 SCC 90; and Government of Andhra Pradesh & Ors. v. Mohd. Nasrullah Khan, AIR 2006 SC 1214).*
>
> *(ii) In Zora Singh v. J.M. Tandon & Ors., AIR 1971 SC 1537, this Court while dealing with the issue of scope of judicial review, held as under:*
>
> *"The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable,*

its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior Court would not interfere if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for certiorari the superior Court does not sit in appeal, but exercises only supervisory jurisdiction, and therefore, does not enter into the question of sufficiency of evidence." (Emphasis added)

(iii) The decisions referred to hereinabove highlights clearly, the parameter of the Court's power of judicial review of administrative action or decision. An order can be set-aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The Court does not sit as a Court of Appeal but, it merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from malafides, dishonest/corrupt practice. In other words, the authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the Court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision-making process, the Court must exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene."

24. The Apex Court in a recent judgment in the case titled as **Union of India and others versus P. Gunasekaran,** reported in **2014 AIR SCW 6657,** has held that in disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal, the High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re- appreciation of the evidence and laid down certain tests as to when findings of the disciplinary authority can be interfered by the High Court and what is the scope of the High Court. It is apt to reproduce para 13 of the judgment herein:

"13. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the

disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge no. I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re- appreciation of the evidence. The High Court can only see whether:

a. the enquiry is held by a competent authority;

b. the enquiry is held according to the procedure prescribed in that behalf;

c. there is violation of the principles of natural justice in conducting the proceedings;

d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;

h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

i. the finding of fact is based on no evidence.

Under Article 226/227 of the Constitution of India, the High Court shall not:

(i). re-appreciate the evidence;

(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii). go into the adequacy of the evidence;

(iv). go into the reliability of the evidence;

(v). interfere, if there be some legal evidence on which findings can be based.

(vi). correct the error of fact however grave it may appear to be;

(vii). go into the proportionality of punishment unless it shocks its conscience."

25. The Apex Court in para 24 of the judgment rendered in **S.R. Tweari's case (supra)** held that 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. It is apt to reproduce para 24 of the judgment herein:

> *"24. 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 Administration, AIR 1984 SC 1805; Kuldeep Singh v. Commissioner of Police & Ors., AIR 1999 SC 677: (1999 AIR SCW 129); Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary, AIR 2010 SC 589 : (2009 AIR SCW 7158) and Babu v. State of Kerala, (2010) 9 SCC 189 : (2010 AIR SCW 5105).*
>
> *Hence, where there is evidence of malpractice, gross irregularity or illegality, interference is permissible."*

26. In order to claim perversity, writ petitioner has to establish how it is perverse, which the writ petitioner, has miserably failed to do so, thus, cannot raise question of perversity.

27. The standard of proof in disciplinary inquiry and in criminal proceedings is on different footing. In disciplinary inquiry, the charge is to be proved by preponderance of probabilities and not proved beyond reasonable doubt, which is *sine qua non* in a criminal trial.

28. It is apt to reproduce para 10 of the judgment rendered by the Apex Court in **R. Periyasamy's case (supra)** herein:

> *"10. It is interesting to note that the learned Single Judge went to the extent of observing that the concept of preponderance of probabilities is alien to domestic enquiries. On the contrary, it is well known that the standard of proof that must be employed in domestic enquiries is in fact that of the preponderance of probabilities. In Union of India Vs. Sardar Bahadur, 1972 4 SCC 618], this Court held that a disciplinary proceeding is not a criminal trial and thus, the standard of proof required is that of preponderance of probabilities and not proof beyond reasonable doubt. This view was upheld by this Court in State Bank of India & ors. Vs. Ramesh Dinkar Punde, 2006 7 SCC 212]. More recently, in State Bank of India Vs. Narendra Kumar Pandey, 2013 2 SCC 740], this Court observed that a disciplinary authority is expected to prove the charges leveled against a bank-officer on the preponderance of probabilities and not on proof beyond reasonable doubt. Further, in Union Bank of India Vs. Vishwa Mohan, 1998 4 SCC 310], this Court was confronted with a case which was similar to the present one. The respondent therein was also a bank employee, who was unable to demonstrate to the Court*

> *as to how prejudice had been caused to him due to non-supply of the inquiry authorities report/findings in his case. This Court held that in the banking business absolute devotion, diligence, integrity and honesty needs to be preserved by every bank employee and in particular the bank officer. If this were not to be observed, the Court held that the confidence of the public/depositors would be impaired. Thus in that case the Court set-aside the order of the High Court and upheld the dismissal of the bank employee, rejecting the ground that any prejudice had been caused to him on account of non-furnishing of the inquiry report/findings to him."*

29. Learned counsel for the writ petitioner seriously argued that the punishment is not proportionate. We are of the considered view that in the given circumstances of the case, the punishment cannot be said to be disproportionate because the department has to come down heavily and also to show door to an employee, who is involved in indiscipline, mudslinging and forgery, which is a grave misconduct.

30. The punishment can be questioned on proportionality if it shocks the conscience of the Court, as held by the Apex Court in its judgment rendered in **S.R. Tewari's case (supra)**, which is lacking in the present case.

31. It would also be profitable to reproduce paras 20 and 24 of the judgment rendered by the Apex Court in **P. Gunasekaran's case (supra)** herein:

> *"20. The impugned conduct of the respondent working as Deputy Office Superintendent in a sensitive department of Central Excise, according to the disciplinary authority, reflected lack of integrity warranting discontinuance in service. That view has been endorsed by the Central Administrative Tribunal also. Thereafter, it is not open to the High Court to go into the proportionality of punishment or substitute the same with a lesser or different punishment. These aspects have been discussed at quite length by this Court in several decisions including B.C. Chaturvedi v. Union of India and others, 1995 6 SCC 749, Union of India and another v. G. Ganayutham, (1997) 7 SCC 463, Om Kumar and others v. Union of India, (2001) 2 SCC 386, Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Association and another, (2007) 4 SCC 669, Chairman-cum- Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others, (2009) 15 SCC 620 and the recent one in Chennai Metropolitan Water Supply (AIR 2014 SC 1141) (supra).*
>
> *21. .....*
>
> *22. .....*
>
> *23. .....*
>
> *24. The Central Administrative Tribunal, in the order dated 01.02.2001 in O.A. No. 521 of 2000, after elaborately discussing the factual as well as the legal position, has come to the conclusion that the punishment of compulsory retirement is not outrageous or shocking to its conscience, it was not open to the High Court to*

interfere with the disciplinary proceedings from stage one and direct reinstatement of the respondent with backwages."

32. One of the charges against the writ petitioner is that he was calling the officers by nick names and was also involved in mudslinging, is indiscipline and that stands proved during the departmental inquiry, is itself a misconduct.

33. The Apex Court in a case titled as **State of Punjab and others versus Ram Singh Ex-Constable,** reported in **(1992) 4 Supreme Court Cases 54,** defined the word 'misconduct' in para 5 of the judgment. It is apt to reproduce para 6 of the judgment herein:

"6. Thus it could be seen that the word 'misconduct' though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order."

34. The Apex Court in the cases titled as **The Management of Tournamulla Estate versus Workmen,** reported in **(1973) 2 Supreme Court Cases 502,** and **Lalla Ram versus D.C.M. Chemical Works Ltd. and another,** reported in **(1978) 3 Supreme Court Cases 1,** held that misbehave towards superiors is misconduct, which justifies dismissal. It is apt to reproduce relevant portion of para 9 of the judgment reported in **Lalla Ram's case (supra)** herein:

"9. Though it is true that private quarrel between an employee and a stranger with which the employer is not concerned as in Agnani's case (supra) (1963-1 Lab LJ 684) (SC) falls outside the categories of misconduct, it cannot be reasonably disputed that acts which are subversive of discipline amongst employees or misconduct or misbehaviour by an employee which is directed against another employee of the concern may in certain circumstances constitute misconduct so as to form the basis of an order of dismissal or discharge. It cannot also be disputed that the extent of jurisdiction exercisable by an approving authority under S. 33 (2) (b) of the Act is very limited as has been clearly and succinctly pointed out by this Court in a number of decisions....."

35. The Apex Court in the case titled as **Union of India and others versus Narain Singh,** reported in **(2002) 5 Supreme Court Cases 11,** held that disobeying the lawful commands, directions or orders of the superior officer is misconduct.

36. The Apex Court in a case titled as **M.P. Electricity Board versus Jagdish Chandra Sharma,** reported in **(2005) 3 Supreme Court Cases 401,** held that social order for the promotion of welfare of the State and role of discipline in general and especially at the workplace is *sine qua non* and its cardinality for the prosperity of the organization as well as of the employees is must and if an employee commits breach, is a misconduct and is to be dismissed from service.

37. Applying the test to the instant case, order of removal from service is reasoned one and cannot be said to be harsh or disproportionate.

38. While going through the findings recorded by the Inquiry Officer, Disciplinary Authority, Appellate Authority and the Revisional Authority read with the impugned judgment, it is crystal clear that the writ petitioner has not made out a case for any interference and has failed on all counts.

39. Having said so, the impugned judgment is upheld and the writ petition is dismissed alongwith all pending applications.

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

Sandeep Singh son of Jagdish Singh. .....Applicant.

Versus:

State of Himachal Pradesh. .....Non- applicant.

Cr.MP(M) No. 373 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5,2015.

Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Naresh Verma, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No.180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 of the Indian Penal Code at Police Station Jawalamukhi District Kangra Himachal Pradesh.

2. It is pleaded that investigation of the present case is completed and recovery has been effected. It is further pleaded that there is no direct evidence against the applicant and he is innocent. It is further pleaded that applicant will not induce or threat prosecution witness in any manner and will abide by the terms and conditions imposed by the Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 IPC at Police Station Jawalamukhi District Kangra HP. There is recital in police report that statement of co-accused Jitender Singh was recorded under Section 27 of the Indian Evidence Act and as per disclosure statement of co-accused Jitender Singh site plan of location was prepared where cash chest of ATM machine was kept. There is further recital in police report that broken locks of shutter which were thrown in the bushes by accused persons were also recovered as per disclosure statement given by co-accused Jitender Singh. There is further recital in police report that one CD and bank statement dated 26.9.2014 and statement of cash kept in the ATM machine also took into possession vide seizure memo. There is further recital in police report that on dated 26.9.2014 the ATM machine kept by PNB Bank Kaloh Tehsil Rukker District Kangra HP was broken and Rs.6,24,200/-(Six lac twenty four thousand two hundred) was stolen from cash chest of ATM machine by accused persons. There is further recital in police report that one spray bottle, cash chest of ATM machine and cash to the tune of Rs.5,97,700/- (Five lac ninety seven thousand seven hundred) and car having registration No. HR-51E-6011 were also took into possession vide seizure memo. There is further recital in police report that investigation is complete and challan is filed in the competent Court of law on dated 2.12.2014.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after completion of investigation and after filing of challan in competent Court of law as alleged?.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in competent court of law and criminal case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. As per police report investigation is complete and challan already stood filed in Court in the present case and criminal case will be disposed of in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent of Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not commit similar offence in future. If applicant commits similar offence in future then prosecution will be at liberty to file application for cancellation of bail in accordance with law. It is not expedient in the ends of justice to keep applicant in jail because investigation is complete and challan stood filed in competent Court of law. Point No.1 is answered in affirmative.

Point No.1 (Final order).

9. In view of my findings on point No.1 bail application filed by applicant is allowed. It is ordered that applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court (i) That applicant will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner so that applicant can be located after giving short notice. (vi) That applicant will attend the proceedings of learned trial Court regularly. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

State of Himachal Pradesh ...Appellant.

Versus

Durgu Ram and another ...Respondents.

Criminal Appeal No.495 of 2007
Reserved on : 7.4.2015
Date of Decision: May 5, 2015

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased left his house to bring some articles but did not return - his dead body was found by his wife-it was revealed during the investigations that accused had consumed alcohol with the deceased and they had killed the deceased due to animosity- accused 'D' confessed to commission of crime before 'Y'- wife of the deceased and PW-2 admitted that there was no enmity between the deceased and the accused- there was no evidence that deceased was last seen with the accused- extra judicial confession made by the accused that they had sent the deceased 'Upar' (Abode of God) cannot be construed to be an admission of guilt- statement of witness to recovery was not inspiring confidence- deceased was under heavy influence of liquor- Doctor had not ruled out the possibility of sustaining injury by way of fall- held, that in these circumstances, acquittal of the accused was justified. (Para-16 to 30)

Cases referred:

Prandas v. The State, AIR 1954 SC 36
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Padala Veera Reddy v. State of Andhra Pradesh and others, 1989 Supp (2) SCC 706
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259
Harishchandra Ladaku Thange v. State of Maharashtra, (2007) 11 SCC 436
State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant : Mr. Ashok Chaudhary, Additional Advocate General and Mr. J.S. Guleria, Assistant Advocate General.
For the Respondents : Mr. Javed Khan and Ms Kanta Thakur, Advocates.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 6.9.2007 of the Presiding Officer, Fast Track Court, Mandi, Himachal Pradesh, passed in Sessions Trial No.4/2007,

titled as *State of Himachal Pradesh v. Durgu Ram & another,* challenging the acquittal of respondents Durgu Ram and Mukti Ram (hereinafter referred to as the accused), who stand charged for having committed an offence punishable under the provisions of Section 302 read with Section 34 of the Indian Penal Code.

2. It is the case of prosecution that on 8.9.2006, Puran Chand (deceased) left his wife Geeta Devi (PW-1) for buying certain articles from the shop of Kaltu Ram (PW.4). Since he did not return home, following day she asked her *Devar* Raj Kumar to search for him. She also went to the shop of Kaltu Ram and made inquiries. On way, she found dead body of her husband lying alongside the path near the Temple of Sehali Dev. Information was given by her to Smt. Bimla Devi, Pradhan of the Panchayat, who, in turn, informed the police. SHO Kapoor Chand (PW-18), upon receiving telephonic information, rushed to the spot, where he prepared inquest report (Ex. PW-18/C), after taking photographs (Ex. PW-8/A1 to PW-8/A4). He sent the dead body for postmortem. Statement of Geeta Devi (Ex. PW-1/A), under the provisions of Section 154 of the Code of Criminal Procedure, was also recorded, on the basis of which FIR No.219/06, dated 9.9.2006 (Ex. PW-14/B), under the provisions of Section 302 of the Indian Penal Code, was registered at Police Station, Joginder Nagar, District Mandi, Himachal Pradesh. Postmortem was conducted by Dr. Vishwajeet (PW-8), who opined the cause of death to be injury to the vital organ of brain.

3. Investigation revealed that on 8.9.2006, deceased Puran Chand had consumed chicken and liquor in the company of Prem Lal (PW-2), Bhupinder and Raj Kumar. This was at about 8 p.m. After some time, accused Mukti Ram joined them, who in the company of the deceased left to the house of Dharam Chand (PW-3), from whom they purchased illicit liquor and after consuming the same left together. Investigation further revealed that the accused persons harboured animosity, as a result of which they killed Puran Chand with an axe. Thereafter, accused Yadav Singh (juvenile) and Durgu Ram confessed of having committed the crime with Kaltu Ram. During the course of investigation, accused Durgu Ram and Yadav Singh made disclosure statements, on the basis of which they got recovered weapon of offence (Ex. P-3), in the presence of Mahinder Singh (PW-7) and Tej Singh (not examined). Reports of the Forensic Science Laboratory, Junga (Ex. PW-18/N and PW-18/O) were obtained and taken on record. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

4. Both the accused persons were charged for having committed an offence punishable under the provisions of Section 302/34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 18 witnesses and statements of the accused persons, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded, in which they pleaded innocence and false implication.

6. Based on the testimonies of witnesses and the material on record, trial Court acquitted both the accused of the charged offence. Hence, the present appeal by the State.

7. We have heard Mr. Ashok Chaudhary, learned Additional Advocate General, on behalf of the State as also Mr. Javed Khan and Ms Kanta Thakur, Advocates, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the

considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

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

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

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

10. Undisputedly, there is no eye-witness to the occurrence of the incident. Hence, the present case is based on circumstantial evidence.

11. Law with regard to circumstantial evidence is now well settled. It is 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. [See: *Pudhu Raja and another Versus State Represented by Inspector of Police*, (2012) 11 SCC 196; *Madhu Versus State of Kerala*, (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat*, (2010) 15 SCC 622, *Mulakh Raj and others Versus Satish Kumar and others*, (1992) 3 SCC 43; and *Sharad Birdhichand Sarda Versus State of Maharashtra*, (1984) 4 SCC 116.].

12. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, Court held that when a case rests upon circumstantial evidence, following tests must be satisfied:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."
>
> (Also see: *Ramreddy Rajesh Khanna Reddy v. State of A.P.,* (2006) 10 SCC 172; *Balwinder Singh v. State of Punjab,* 1995 Supp (4) SCC 259; and *Harishchandra Ladaku Thange v. State of Maharashtra,* (2007) 11 SCC 436).

13. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

14. The apex Court in *State of U.P. v. Ashok Kumar Srivastava*, (1992) 2 SCC 286, while cautioning the Courts in evaluating circumstantial evidence, held that if the evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilty of the accused.

15. Prosecution case primarily rests upon five circumstances: (i) animosity between the accused and the deceased, (ii) accused lastly seen in the company of the deceased, (iii) confessional statement, (iv) disclosure statement leading to discovery of weapon of offence, (v) link evidence corroborating substantive evidence.

16. Genesis of the prosecution story of animosity inter se the parties, stands belied by prosecution witnesses themselves. Geeta Devi (PW-1), wife of the deceased, as also Prem Lal (PW-2), uncontrovertedly admit that there was no animosity between the deceased and the accused persons and more specifically accused Mukti. Apart from the testimony of

these two witnesses, there is nothing on record to even remotely suggest that the accused was harbouring any animosity against the deceased. Motive of crime is missing in this case.

17. Even with regard to the circumstance of the deceased lastly seen in the company of accused Mukti, we do not find the prosecution witnesses to have supported the prosecution.

18. To begin with, Geeta Devi admits that after meeting her husband, accused Mukti went to his house. Prem Lal, simply states that on 8.9.2006, he, Puran Chand, Prem Lal (another person by the same name), Bhupinder and Raj Kumar had consumed chicken (which they had cooked along the road side) and liquor. After some time, accused Mukti Ram came from the side of Tinu Nalla. Puran Chand left with Mukti Ram for fetching *Khaini* and *Beedi* from the shop of Kaltu Ram. This is all, that the witness states.

19. Postmortem report as also testimony of Dr. Vishwajeet (PW-8) suggest that death took place much prior to the time of meeting of these persons. Be that as it may, Prem Lal admits that the deceased went with accused Mukti Ram of his own. It is not a case where the accused persons, after hatching conspiracy, enticed deceased Puran Chand to leave with Prem Lal or Mukti**.**

20. We find that even on the last seen circumstance, both Dharam Chand (PW-3) and Kaltu Ram (PW-4) have not supported the prosecution. They were declared hostile and despite extensive cross-examination by the Public Prosecutor, nothing fruitful could be elicited from their testimony. All that Prem Chand states is that at about 8 p.m., Mukti Ram came alongwith Puran Chand and purchased bottles of liquor. It appears that this witness himself was a suspect. In his uncontroverted testimony, he categorically states that the police had kept him in the Police Station for three hours and had also severely beaten him. That apart, the witness also states that house of Mukti Ram is just at a distance of 30 metres from his house whereas house of Puran Chand is at a distance of 300 metres and that too in an opposite direction. He is categorical that from his shop both Mukti Ram and Puran Chand went to their respective houses. That apart, there is not even a whisper in the testimony of this witness with regard to presence of accused Yadav Singh and Durgu. Witness also states that Mukti Ram left his house first, implying that Puran Chand was still in the company of this witness. It is perhaps for this reason that the police suspected him. Prosecution has not been able to establish that after deceased Puran Chand and accused Mukti left the house of witness Dharam Singh, they were seen together in the night.

21. Thus, the witness clearly belies the prosecution story of the deceased being seen last in the company of accused Mukti Ram. If the accused and the deceased had left the house of Dharam Chand for their respective houses, which were in opposite directions, it cannot be said that the accused was lastly seen in the company of the deceased.

22. Kaltu Ram states that on 9.9.2006, accused Durgu Ram and Yadav Singh came to his shop and told him that “they have sent Puran Chand “Upper”(Abode of God)”. After their visit, he learnt that dead body of Puran Chand was found near the temple of Sehali Dev. We find the witness to have been cross-examined by the Public Prosecutor, yet despite the same, there is nothing in his testimony, which would support the prosecution. He is categorical of not having understood the meaning of the words “Upper Bhej Diya”. Crucially, witness admits not to have signed any statement or memo so recorded by the police. Now, “Upper Bhej Diya” cannot be construed to be an admission of guilt.

23. Prosecution wants the Court to believe that blood soiled clothes of the deceased as also the weapon of offence (Ex. P-3) were recovered from the house of Yadav Singh, in the presence of Mahinder Singh (PW-7).

24. It is not the case of prosecution that the accused persons had first killed the deceased in the jungle and then after carrying the dead body kept it on the road near the temple. Significantly, as has come in the testimony of the prosecution witnesses, dead body was found in the village itself. Now, had the deceased been killed by the accused with an axe, surely, someone would have heard the cries, which in fact is not the case of the prosecution. Also, Kaltu Ram is not able to remember as to whether such words were spoken by Durgu Ram or Yadav Singh. Significantly, these accused persons do not state that accused Mukti Ram was also involved in the crime. From the testimony of the witness, we also notice that the factum of confessional statement was so disclosed to the police, only after three-four days of the occurrence of the incident. It was not voluntary or prompt in nature. As such, it would be absolutely unsafe to give credence or weightage to such extra judicial confession.

25. On the circumstance of recovery of incriminating articles, i.e. axe (P-3), we find the testimony of Mahinder Singh (PW-7) and the Investigating Officer Kapoor Chand (PW-18) not to be inspiring in confidence at all. Even otherwise, they have contradicted each other. Mahinder Singh states that the incriminating articles, i.e. axe (Ex. P-3), shirt (Ex. P-4), pant (Ex.P-5) were recovered from the house of Yadav Singh. Significantly, witness states that he did not enter the house at the time when recovery was effected. He tries to explain the reason of the same being a caste factor. But then this is no recovery in the eyes of law. Recovery from the house of the accused had to be in presence of an independent witness. What is crucial is his admission that police was already present in the house of accused Yadav Singh, when he was called, alongwith other villagers, by the police. Now if police was already aware of the place where articles were hidden, then obviously recovery cannot be said to have been effected on the basis of disclosure statement (Ex.PW-7/A) so recorded by the police. Now, if this witness was socially not allowed to enter the house, then why is it that police did not associate any other person present on the spot? That apart, witness states that axe was lying outside on the floor of the courtyard. It was visible to all and not concealed. Investigating Officer as also other prosecution witnesses admit that prior to 17.9.2006, police had already visited the village, on a number of occasions, yet no recovery was effected at that point in time. This totally renders the prosecution case of having effected the recovery to be doubtful, if not false. Further prosecution wants the Court to believe that blood soiled *Chappal* of the deceased was also recovered by the police. Reports of the Forensic Science Laboratory (Ex. PW-18/N & 18/O) reveal that no blood was found on any of the articles recovered by the police, including the weapon of offence, i.e. axe (Ex. P-3).

26. We find that prosecution has also examined Sunu Ram (PW-5), Shukru Ram (PW-6) as also Sukh Ram (PW-10) to establish its case. Sukh Ram has not supported the prosecution and testimony of the remaining witnesses is only hearsay in nature, for they learnt about the incident after recovery of the dead body and during the course of investigation.

27. Version of police officials, namely HC Kushal Kumar (PW-13), ASI Jagroop Singh (PW-14) and SI Kapoor Chand (PW-18) also cannot be said to be inspiring in confidence. According to HC Kushal Kumar, he recorded statement of Geeta Devi, under the provisions of Section 154 of the Code of Criminal Procedure (Ex. PW-1/A), whereas Jagroop Singh states that after reaching the spot he recorded the statement of Geeta Devi. The said

statement was sent to the Police Station and Constable Bhagat Ram registered the FIR, which was signed by him, whereas according to Bhagat Ram it was he who had scribed the statement (Ex. PW-1/A) and FIR was written by Milap Chand. Prem Lal (PW-2) states that photographs on the spot were taken by a private photographer. This version of his totally belies and contradicts the testimony of SI Kapoor Chand, according to whom photographs were taken by him from his personal camera.

28. There is yet another mitigating circumstance in favour of the accused. Undisputed case of the prosecution is that deceased was under heavy influence of alcohol, which fact is evident from the report of the Forensic Science Laboratory and the doctors have not ruled out the possibility of vital injury to have been sustained on account of fall.

29. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused persons, in furtherance of their common intention, inflicted injury on the head of Puran Chand, resulting into his death.

30. From the material placed on record, prosecution has failed to establish that the accused are guilty of having committed the offence, they have been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the accused and no other hypothesis other than the same.

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 so placed on record by the parties.

32. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged. Appeal stands disposed of, so also pending application(s), if any.

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

State of Himachal Pradesh ...Appellant.

Versus

Renuka Devi & others ...Respondents.

Cr. Appeal No. 498 of 2009
Judgment reserved on: 07.04.2015
Date of Decision: May 5, 2015

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased solemnized love marriage with accused no. 1- both husband and wife used to quarrel with each other- she wanted to take control of the finances- she and her brother subjected the deceased to cruelty and abetted him to commit suicide- deceased died by jumping into the river- held, that in order to prove the abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary- parents of the deceased nowhere deposed that accused wanted to control the finances- colleagues of the deceased stated that salary was remitted directly to the bank- Bank Manager deposed that deceased was operating the account himself and all the benefits of the deceased were released to his mother- no complaint was made by the deceased regarding the cruelty- mere daily quarrels cannot amount to abetment – in these circumstances, acquittal of the accused was justified.

(Para-11 to 26)

Cases referred:

Prandas v. The State, AIR 1954 SC 36

M. Mohan Versus State Represented by the Deputy Superintendent of Police, (2011) 3 SCC 626

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant: M/s Ashok Chaudhary, Addl. AGs., with Mr. J.S. Guleria, Asstt. AG., for the appellant-State.

For the Respondents: Mr. Satyen Vaidya, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 06.06.2009, passed by learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., in Sessions Trial No. 9 of 2005, titled as State Versus Renuka Devi & others, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that deceased Hem Singh was working as a Junior Supervisor with the Nathpa Jhakri Power Corporation (hereinafter referred to as NJPC). In the year 2003, he was posted at a place known as Jhakri. Deceased solemnized love marriage with Renuka Devi (accused No.1), sometime in the year 1998. From the wedlock two children were born. Both the husband and wife would often quarrel with each other. Also accused Renuka Devi wanted to take control of all finances. In effect, accused Renuka Devi alongwith her brothers, co-accused, Sat Pal (accused No.2) and Yashpal (accused No.3) subjected the deceased to cruelty and abetted him to commit suicide on 29.09.2003. Prosecution also wants the Court to believe that on 27.09.2003, co-accused Sat Pal, who had come to stay with the deceased, demanded money and picked up a quarrel which incident was witnessed by the maid servant Premi Devi (PW.8). On the complaint of Smt. Nirmala Devi (PW.1), police registered an FIR No.124 of 2003 dated 30.09.2003 (Ex.PW.15/C) under the provisions of Section 306 of the IPC at Police Station, Jhakri, against the accused. Investigation was conducted by police officials SI Vidya Chand (PW.15) and Inspector Phool Chand (PW.18). The incident of deceased jumping into the river and committing suicide was witnessed by Narayan (PW.2), Rakesh Chandel (PW.3) and Rattan

Lal (PW.4). With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

3. Accused were charged for having committed an offence punishable under the provisions of Section 306 read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as eighteen witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which accused Renuka Devi took the following defence:-

> "Sh. Hem Singh was having abnormal behavior and in the evening whenever we wanted to go to Rampur he used to comment that the people wanted to kill him and during nights he never switched off the lights which were normally switched off by me. He used to woke me up during nights and used to say that somebody was outside the window who wanted to kill me and I should sleep on side the bed, sit or draw curtains. I used to teach children of Smt. Bindu Chandel and she wanted to come close to my husband and I found that she wanted to be intimate with my husband which was not to my liking. Smt. Bindu Chandel did not pay tuition fee to me, despite request and got furious. My father in law used to demand money regularly from my husband and my husband even used to take my salary for sending to them on demand. My husband used to be under stress on telephonic call from my father in law as he used to say that his father may disinherit him."

Other co-accused took plea of false implication. Four witnesses were examined by the accused in their defence.

5. Trial Court, after appreciating the testimony of prosecution witnesses acquitted the accused. Hence the present appeal.

6. We have heard M/s Ashok Chaudhary, learned Additional Advocate General assisted by Mr. J.S. Guleria, learned Assistant Advocate General, on behalf of the State as also Mr. Satyen Vaidya, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

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

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

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no

power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. The fact that deceased committed suicide and was not murdered is not in dispute.

10. The apex Court in *M. Mohan Versus State Represented by the Deputy Superintendent of Police,* (2011) 3 SCC 626 has held, "sui" to mean "self" and "cide" to mean "killing", thus implying an act of self-killing.

11. It is also a settled proposition of law that to attract ingredients of offence of abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary. The act of abetment is thus *sine-qua- non* for invocation of provisions of Section 306 IPC.

12. Smt. Nirmala Devi (PW.1) and Uttam Singh (PW.9), parents of the deceased, have no where disclosed that accused wanted to take control of the finances of the deceased. On the contrary, officials of NJPC, who were colleagues of the deceased, have categorically deposed that salary was directly remitted into the bank account of the deceased, which only he would operate. We find through the testimonies of N.D. Negi (DW.4), Branch Manager of State Bank of India, Branch Jhakri, accused to have established that even her bank account was in fact being operated by the deceased himself. Thus, there is no evidence on record, establishing the fact that accused Renuka Devi attempted or desired of taking over the control of the assets or the salary of the deceased. On the other hand, we find, through the testimony of Smt. Seema Kumari (PW.14) that entire benefits, were released in favour of Smt. Nirmala Devi, mother of the deceased, on the basis of legal heirs certificate, so

produced by her. Noticeably, complainant, who is the mother of the deceased, has not even reflected the children (minor) born out of the wedlock to be the legal heirs**.**

13. It is also alleged that on 27.09.2003, brothers of accused Renuka Devi, who are also the accused persons, came and stayed at Jhakri and demanded money for solemnizing a function in their house. Now except for the testimony of Premi Devi (PW.8), there is no other evidence (documentary or oral) on record to this effect.

14. We find testimony of Premi Devi not to be inspiring in confidence at all, apart from the fact that Investigating Officer Phool Chand (PW.18), himself admits to have introduced her as a witness during investigation. He states that ".....It is correct that Smt. Premi Devi was introduced by us and actually she was not female servant of the deceased Hem Singh. It is correct that from the statements of the witnesses Dr. Jagat Ram, Tameshwar, SI and Avtar Singh it can be said that Hem Singh at that time was mentally disturbed. I also received the treatment slip and reference letter of the doctor by which Hem Singh was referred to the Indira Gandhi Medical College, Shimla. I did not take the account statements of Sh. Hem Singh and Renuka from the banks at Jhakri. I cannot say that Sh. Hem Singh was mentally disturbed and due to this, he committed suicide. I have not filed any final report in this case."

15. Premi Devi is supposed to have stayed in the house of deceased, as a maid servant only for a period of one month and twelve days prior to the incident. She states that on 27.09.2003 accused Sat Pal came to the house of the deceased and at about 3.00 AM in the night, she noticed accused Renuka Devi and deceased quarrelling with each other. A demand of Rs.20,000/-, two Karas and some gold ornaments was raised. Who raised the demand, she does not state. She categorically does not ascribe any role to the co-accused. She further states that Hem Singh resisted the same on the ground that even in the past he had been giving enough money to her brothers and nothing was left with him. Now we do not find this version of hers to be anywhere recorded by the police. There is improvement / exaggeration / embellishment. Veracity of her statement, itself is in doubt, in view of the statement of the Investigating Officer. There is no other evidence proving employment of Premi Devi as a maid servant. Noticeably Hem Singh never disclosed such fact to his mother or any other relative.

16. The question, which needs to be further considered, is as to whether prosecution has been able to establish, through the testimonies of Smt. Nirmala Devi (PW.1), Rakesh Chandel (PW.3), Bindu Chandel (PW.5), Surjeet Singh (PW.6) and Jyoti Prakash (PW.12) that the accused abetted the crime or not.

17. At this juncture, we take notice of the testimonies of defence witnesses on the question of mental state of the deceased. Dr. J.R. Thakur (DW.1) has categorically deposed that on 19.05.2003, at about 6.00 AM, he saw a person whom he identified to be the deceased, throwing pieces of glass and stones. Deceased also climbed the roof of his house. Since the behaviour was abnormal, police was called for help. Such version is corroborated by Attar Singh (DW.3).

18. That deceased was suffering from acute schizophrenia stands witnessed by prosecution witness Dr. R.L. Gupta (PW.7), according to whom, he had referred the deceased, through the Chief Medical Officer, for treatment to the IGMC Hospital at Shimla.

19. Dr. Hardayal Chauhan (PW.11) does state that he did examine the deceased but found him to be normal. But the fact of the matter is that all was not well with the

mental state of the deceased. He had to undergo medical treatment at two places. He may have become normal when so examined by this person. According to the mother, accused wanted the deceased to be declared insane for getting the monetary benefits and as such, on one occasion, noticed the deceased tied with a rope by the accused. We do not find such version to be believable. Had it been so, deceased would have not come from Kullu/Jhakri to Shimla for showing himself at the State level Hospital. In fact the defence taken by the accused to some extent stands probablized.

20. Prosecution also wants the Court to believe that accused Renuka Devi used to constantly quarrel with the deceased, which prompted him to take away his life. We find the testimony of Smt. Nirmala Devi (PW.1), Rakesh Chandel (PW.3), Bindu Chandel (PW.5), Surjeet Singh (PW.6) and Jyoti Prakash (PW.12) to be vague on the issue. One cannot forget that marriage was solemnized in the year 1998. No complaint whatsoever, of any nature, was ever lodged by the deceased with any person with regard to any acts of cruelties/maltreatment. In fact, mother of the deceased admits that on most of the occasions she used to reside with the parties at Jhakri. In any event her version of such quarrels is vague and unspecific with respect to time, nature, duration and place. Also mother admits that 4-5 days prior to the incident, she had left for her native place.

21. What was that immediate cause, which prompted the deceased to have committed suicide has not come on record. In fact it has come on record, as also is the prosecution case, that on the fateful day, in his car, deceased himself took his wife and children for visiting the temple. However, after driving for some distance, he suddenly stopped the vehicle on the side and went towards the river and jumped from the boulder. None of the witnesses have deposed that on the fateful day, deceased and the accused had quarrelled. Though it has come in the testimony of Bindu Chandel that the previous night, accused and the deceased quarrelled and she had also noticed scratch marks on his face. But the question is whether version of this witness is believable or not. In our considered view, no. This we say so for the reason that she never ever informed anyone about the same. Accused Renuka Devi was employed as a teacher at DPS School, Jhakri. Children of Bindu Chandel were also studying in the same school, yet no grievance was made with any person. In fact, witness admits that she had no knowledge of any quarrel between the accused and the deceased, which took place the night preceding the fateful day. Thus, she contradicts herself.

22. Uttam Singh (PW.9), father of the deceased, states that even Bhupinder Singh, father of accused Renuka had threatened of murdering the deceased. But then such version has emerged for the first time, only in Court. Bhupinder Singh is not an accused. This witness produced a letter (Ex.PW.9/A), allegedly written by the deceased, so found by him two years prior to his deposition in Court. But this document is absolutely inadmissible in evidence. Mere exhibiting of a document would not prove contents thereof. Father does state that letter was written by his son, but then prosecution has not led any evidence to prove the author of the same and the letter is not despatched in the normal course of business/routine. After all deceased was employed with a Public Sector undertaking and his hand writing could have been matched with the material, contemporaneous in nature, which was easily available. Father does not even remember the date when he handed over this letter to the prosecution. In any event contents of the letter do not reveal any act of abetment.

23. None of the witnesses, in our considered view, have been able to establish the essential ingredients, required for constituting an offence of abetment. Mere daily

quarrels and discords cannot be termed as abetment, forcing the deceased to commit suicide**.**

24. On the contrary, we find that accused Renuka Devi, who loved her husband, despite his mental state, not only continued to reside with him, but also gave birth and brought up his children.

25. To our mind, prosecution has not been able to establish, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that suicide was abetted by the accused.

26. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that the judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record, resulting into miscarriage of justice.

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

For all the aforesaid reasons, present appeal, being devoid of merit, is dismissed, so also the pending application(s), if any. Bail bonds furnished by the accused are discharged. Record of the trial Court be immediately sent back.

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

Surinder Singh son of Darshan Singh .....Applicant.

Versus

State of Himachal Pradesh. .....Non- applicant.

Cr.MP(M) No. 372 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5,2015.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 465 and 471 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- police had not claimed that custodial interrogation is necessary in the present case- interests of the State or general public will not be affected by keeping the accused inside the jail- therefore, bail granted. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Naresh Verma, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No.180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 of the Indian Penal Code at Police Station Jawalamukhi District Kangra Himachal Pradesh.

2. It is pleaded that investigation of the present case is completed and recovery has been effected. It is further pleaded that there is no direct evidence against the applicant and he is innocent. It is further pleaded that applicant will not induce or threat prosecution witness in any manner and will abide by the terms and conditions imposed by the Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 IPC at Police Station Jawalamukhi District Kangra HP. There is recital in police report that statement of co-accused Jitender Singh was recorded under Section 27 of the Indian Evidence Act and as per disclosure statement of co-accused Jitender Singh site plan of location was prepared where cash chest of ATM machine was kept. There is further recital in police report that broken locks of shutter which were thrown in the bushes by accused persons were also recovered as per disclosure statement given by co-accused Jitender Singh. There is further recital in police report that one CD and bank statement dated 26.9.2014 and statement of cash kept in the ATM machine also took into possession vide seizure memo. There is further recital in police report that on dated 26.9.2014 the ATM machine kept by PNB Bank Kaloh Tehsil Rukker District Kangra HP was broken and Rs.6,24,200/-(Six lac twenty four thousand two hundred) was stolen from cash chest of ATM machine by accused persons. There is further recital in police report that one spray bottle, cash chest of ATM machine and cash to the tune of Rs.5,97,700/- (Five lac ninety seven thousand seven hundred) and car having registration No. HR-51E-6011 were also took into possession vide seizure memo. There is further recital in police report that investigation is complete and challan is filed in the competent Court of law on dated 2.12.2014.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after completion of investigation and after filing of challan in competent Court of law as alleged?.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in competent court of law and criminal case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. As per police report investigation is complete and challan already stood filed in Court in the present case and criminal case will be disposed of in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent of Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not commit similar offence in future. If applicant commits similar offence in future then prosecution will be at liberty to file application for cancellation of bail in accordance with law. It is not expedient in the ends of justice to keep applicant in jail because investigation is complete and challan stood filed in competent Court of law. Point No.1 is answered in affirmative.

Point No.1 (Final order).

9. In view of my findings on point No.1 bail application filed by applicant is allowed. It is ordered that applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court (i) That applicant will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India

without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner so that applicant can be located after giving short notice. (vi) That applicant will attend the proceedings of learned trial Court regularly. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Babita Rani. ....Petitioner
versus
Divisional Commissioner Kangra & others. ...Respondents.

CMPMO No. 37 of 2015
Decided on: 6.5.2015.

Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel for the petitioner submitted that he did not want to continue with the present petition and same be dismissed as withdrawn- In view of statement of the Learned Counsel, petition is dismissed as withdrawn.

For the petitioner : Ms. Sacholan Rana, Advocate.
For the respondents: Mr. M.L. Chauhan, Additional Advocate General, for respondents No. 1 to 4.
Mr. Sanjeev Kuthiala, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the petitioner submitted that petitioner does not want to continue the petition and the same be dismissed as withdrawn. In view of the submission of learned Advocate appearing on behalf of the petitioner petition is dismissed as withdrawn. No order as to costs. Petition disposed of. Pending applications if any also disposed of.

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

State of Himachal Pradesh .....Appellant.
Vs.
Kaur Singh son of Utam Singh & others ...Respondents.

Cr. Appeal No. 569 of 2008
Judgment reserved on: 17th March, 2015
Date of Decision: 8th April, 2015

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased was married to accused 'K'- accused harassed the deceased for bringing insufficient dowry- she narrated the incident of harassment to her father, step mother, Pardhan and ward member- milk was not provided to her children on which she complained to her father- complainant provided cow to the deceased two months prior to her death - deceased died and was cremated without intimating any person- held, that there should be nexus between abetment and suicide- no positive, cogent and reliable evidence was led to prove that accused had abetted the deceased to commit suicide- accused acquitted of the commission of offence punishable under Section 306 of IPC. (Para-11)

Indian Penal Code, 1860- Section 498-A read with Section 34 - Accused 'K' used to harass the deceased for bringing insufficient dowry- she narrated the incident of harassment to her parents as well as Pardhan and ward member- milk was not provided to her children on which she complained to her father- two months prior to her death, complainant provided cow to the deceased- deceased died and was cremated without intimating any person-PW-1 specifically stated that accused used to call the deceased 'Kanjar' (Person leading illicit life)- held, that calling a married woman 'Kanjar' ipso facto amounts to cruelty upon married woman- other prosecution witnesses also deposed that deceased used to complain about the harassment- held that the prosecution had proved its case for the commission of offence punishable under Section 498-A read with Section 34 IPC.(Para-13)

Indian Penal Code, 1860- Section 201 read with Section 34- Accused cremated the deceased without intimating any person- held, that in order to establish Section 201 of IPC, prosecution has to prove that accused had knowledge about the commission of offence and that they had caused disappearance of evidence of commission of criminal offence- two persons were sent to intimate the parents of the deceased about the death- deceased was cremated in presence of co-villagers- in these circumstances, offence punishable under Section 201 read with Section 34 of IPC is not proved against the accused. (Para-14)

Cases referred:

Sangaralonia Sreenoo vs. State of A.P., 1997 (4) Supreme Court page 214
M.Mohans vs. State, AIR 2011 SC page 239
Sita Ram and others vs. State of Haryana and another, 1997(3) Crimes 362 (P&H)
Jagdish and others vs. State of Rajasthan and another, 1998 Cr.L.J. 554
Ram Saran Mahto vs. State of Bihar, AIR 1999 Supreme Court page 3435
Bhee Ram vs. State of Haryana, AIR 1980 SC 957
Rai Singh vs. State of Haryana, AIR 1971 SC 2505
State of West Bengal vs. Orilal Jaiswal and another, 1993(3) Crimes 518 SC
Ramaiah alias Rama vs. State of Karnataka, (2014)9 SCC 365
Bhola Ram vs. State of Punjab, (2013)16 SCC 421
State of H.P. vs. Umardeen, 2012(1) Shim.LC 108
State of H.P. vs. Ani Kumar and others, 2012(2) Shim. LC 710
Jose Vs. The State of Kerla (Full Bench), AIR 1973 SC 944
Dalbir Singh Vs. State of Punjab, AIR 1987 S.C. 1328
State of M.P. vs. Surendra Singh, AIR 2015 SC 398

For the Appellant: Mr. Ashok Chaudhary Additional Advocate General with Mr. V.S.Chauhan, Additional Advocate General and Mr.J.S.Guleria, Assistant Advocate General.

For the Respondents: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against the judgment of acquittal passed by learned Additional Sessions Judge Court No.1 Kangra at Dharamshala in Sessions case No. 1-N of 2006 decided on dated 28.3.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that deceased Veena @ Sanju Devi was married with co-accused Kulwant about 10-12 years back. It is alleged by prosecution that co-accused Kaur Singh is father-in-law of deceased, co-accused Krishna Devi is mother-in-law of deceased, co-accused Parvesh Lata is sister-in-law and Ravindr is brother-in-law of deceased. It is alleged by prosecution that accused persons have committed cruelty with deceased Veena Devi for bringing insufficient dowry. It is alleged by prosecution that all accused persons used to call the deceased as 'Kanjar' (Person leading illicit life). It is further alleged by prosecution that deceased had narrated the incident of harassment to her father and her step mother and also narrated the incident of cruelty to Pardhan and ward member. It is alleged by prosecution that milk was not provided to the children of deceased Veena Devi and she has complained to her father two months prior to her death and thereafter on advice of Panchayat Pardhan complainant Chanda Singh had provided cow to deceased in order to arrange milk for her children. It is also alleged by prosecution that accused persons have cremated deceased Veena Devi without informing her parents and destroyed the evidence. It is alleged by prosecution that FIR Ext.PW1/A was recorded in police station Nurpur and after registration of FIR statements of prosecution witnesses were recorded. It is also alleged by prosecution that site plan Ext.PW14/A was prepared where deceased was cremated and thereafter ash and bones at the spot were collected and sealed in separate piece of cloth. It is alleged by prosecution that deceased had committed suicide by way of consuming poison due to cruelty committed upon the deceased in her matrimonial house. It is alleged by prosecution that post mortem of deceased was not allowed to be conducted. It is also alleged by prosecution that ash and bones of deceased were collected from cremation site on dated 30.7.2004 after four days of cremation of dead body of deceased and sent to FSL Junga for chemical analysis through C. Dhani Ram who deposited the same in FSL Junga and chemical analyst report Ext.PA was sought.

3. Charge was framed against the accused persons by learned Additional Sessions Judge Court No.1 Kangra at Dharamshala on dated 21.6.2006 under Sections 498-A read with Section 34 IPC, under Section 306 read with Section 34 IPC and under Section 201 read with Section 34 IPC. Accused person did not plead guilty and claimed trial.

4. Prosecution examined the following witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Chanda Singh

PW2	Veena Devi
PW3	Roshan Lal
PW4	Baldev Singh
PW5	Balbir Singh
PW6	Harbans Singh
PW7	Joginder Singh
PW8	Kuldeep Singh
PW9	Ramesh Chaudhary
PW10.	C. Dhani Ram
PW11	Anju
PW12	Dr. Sanjeev Aggarwal
PW13	Rajinder Singh
PW14	SI Parkash Chand
PW15	Inspector Nathu Ram

4.1 Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description:
Ex.PW1/A.	FIR
Ex.PW13/A.	Recovery memo
Ex.PW14/A	Site plan
Ext.PW14/B	Sample of seal
Ex.PW14/C to Ext.PW14/H	Statements
Ext.PA	Chemical Examiner report
Ext.P1	Parcel
Ex.P2 &Ext.P3	Ash and bones

5. Statements of the accused recorded under Section 313 Cr.P.C. Accused did not lead any defence evidence. Learned trial Court acquitted all accused persons qua offence under Sections 498-A, 306 and 201 read with Section 34 IPC.

6. Feeling aggrieved against the judgment passed by learned Trial Court State of H.P. filed present appeal under Section 378 of Code of Criminal Procedure.

7. We have heard learned Additional Advocate General appearing on behalf of the State of H.P. and learned Advocate appearing on behalf of the respondent and also perused the entire record carefully.

8. Point for determination in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice.

9. ***ORAL EVIDENCE ADDUCED BY PROSECUTION:***

9.1. PW1 Chanda Singh has stated that he was married twice. He has stated that his first wife Leela Devi died and from loins of his first wife he has two daughters and one

son. He has stated that deceased Veena Devi @ Sanju was born from the loins of first wife. He has stated that deceased was married with co-accused Kalwant Singh about 10-12 years back and out of wedlock three children born. He has stated about 2/3 years before the death of Veena Devi she was harassed and beaten by accused persons present in Court. He has stated that accused persons used to harass and beat his daughter for bringing insufficient dowry and further stated that same fact was narrated to him directly by his deceased daughter Veena Devi. He has further stated that accused persons used to taunt deceased that she did not perform household work and also used to taunt the deceased that father of deceased had married second time. He has stated that accused persons used to address his deceased daughter as 'Kanjar' (Person leading illicit life). He has stated that whenever deceased used to come to her parental house she used to disclose the facts of harassment and beating. He has stated that deceased has also informed the facts of cruelty to Pardhan and ward members Prem Singh and Baldev Singh. He has stated that two months prior to her death she had visited her parental house and directly told him that accused persons were not provided milk to her children. He has stated that thereafter he had given cow to his daughter on advice of Pardhan of Panchayat. He has stated that his son-in-law co-accused Kulwant Singh is working in factory at Jammu. He has stated that on dated 25.7.2004 he came to know about 9 PM from Roshan about death of his daughter. He has stated that deceased had consumed poison because of harassment given to deceased by accused persons. He has stated that on dated 26.7.2004 he went to house of accused but dead body of his daughter was not found and deceased was already cremated by accused persons. He has stated that FIR Ext.PW1/A was lodged on police station Nurpur and further stated that at that time Pardhan, Prem Singh, his wife and Baldev Singh were also with him. He has admitted that all three children of deceased Veena Devi are residing in the house of accused. He has denied suggestion that on dated 25.7.2004 Pawan Kumar came to his house on motor cycle and informed that his daughter died because of vomiting and dysentery. He has denied suggestion that accused persons had not harassed and beaten his deceased daughter. He has denied suggestion that accused persons have not told his deceased daughter that she was daughter of 'Kanjar' (Person leading illicit life). He has denied suggestion that deceased has not personally narrated to him the facts of harassment. He has denied suggestion that deceased had died natural death due to dehydration. He has denied suggestion that he has inimical relations with accused persons and due to inimical relations he has deposed falsely against accused persons in present case.

9.2 PW2 Veena Devi Pardhan Gram Panchayat has stated that PW1 Chanda Singh belonged to her village and deceased Veena Devi was daughter of Chanda Singh and was married to co-accused Kulwant Singh in the year 1994. She has stated that her house is situated adjacent to the house of Chanda. She has stated that 2/3 months prior to death of deceased Veena Devi visited her parental house and deceased directly told her that she was ill-treated by accused persons for bringing insufficient dowry. She has stated that deceased has also told her directly that accused persons were taunting her that she did not perform the household work properly. She has stated that deceased also directly told her that deceased was beaten by accused persons. She has stated that deceased has also visited her parental house 2/3 months prior to her death and told that accused persons did not provide milk to her children and thereafter she requested her father to purchase a cow for deceased so that milk could be provided to children of deceased. She has stated that on dated 25.7.2004 she heard the cries of weeping from house of Chanda Singh and thereafter she went to the house of Chanda Singh and came to know about death of Veena Devi. She has stated that accused persons have not informed about death. She has stated that deceased had committed suicide by way of consuming poison as she was harassed and

beaten by accused persons. She has admitted that children of deceased are residing in the house of accused. She has stated that she does not know that on dated 25.7.2004 at about 12 Noon Pawan Kumar co-villager of accused persons had visited the village on motor cycle and informed the parents of deceased about death. She had denied suggestion that deceased had not disclosed any fact to her during her life time relating to harassment by accused persons. She has denied suggestion that deceased had not narrated to her any fact during her life time relating to beatings to deceased by accused persons. She has denied suggestion that she did not advice PW1 Chanda to purchase cow for deceased. She has denied suggestion that PW1 has not given any cow to deceased. She has denied suggestion that being co-villager and relative of deceased she had given statement to police after due deliberation in connivance with Chanda.

9.3 PW3 Roshan Lal has stated that on dated 25.7.2004 at about 8.30 PM he was at bus stop in connection with his personal work. He has stated that two boys came there on motor cycle and they asked about Chanda Singh. He has stated that he told them that there are 3-4 Chanda Singh in their village. He has stated that thereafter they told him that they wanted to inquire about Chanda Singh whose daughter was married to co-accused Kulwant Singh of village Randoh. He has stated that thereafter they told him to inform that his daughter had died. He has stated that he informed Chanda Singh at about 8.45 PM. He has stated that he does not know that information about death of deceased was given to Chanda Singh at about 12 Noon. He has denied suggestion that he remained busy in deliberating false story against accused persons for about 2/3 days.

9.4 PW4 Baldev Singh has stated that he was BDC member during the year 2004 and further stated that he also remained Pardhan of G.P. Khehar. He has stated that he is familiar with Chanda Singh and further stated that Chanda Singh had married twice. He has stated that deceased Veena Devi was born from first wife. He has stated that deceased was married 8-10 years back with co-accused Kulwant Singh of village Randoh. He has stated that 2-3 years prior to death deceased came to her parents' house and told her father that accused were harassing her for bringing insufficient dowry. He has stated that deceased father has also personally told him that deceased was taunted and ill-treated by her husband, brother-in-law, sister-in-law, father-in-law and mother-in-law. He has stated that he tried to console the deceased. He has further stated that deceased also came to her parental house two months prior to her death and told that accused were not providing milk to her children. He has stated that thereafter he asked the father of deceased Chanda Singh to purchase cow for deceased so that she could provide milk to her children. He has stated that on dated 26.7.2004 early in the morning Chanda Singh came to his home and informed that his daughter was killed and her last rites were also performed without informing him. He has stated that thereafter he along with Pardhan of Gram Panchayat along with 2/3 persons went to village Randoh. He has stated that he inquired from father-in-law of deceased as to how the deceased had died and thereafter father-in-law of deceased informed that deceased had died by consuming poison. He has stated that thereafter he also inquired from father-in-law of deceased as to why post mortem of deceased was not conducted but father-in-law of deceased did not reply. He has stated that deceased had died at 6 AM in the morning and was consigned to flames without giving intimation to parents of deceased. He has stated that deceased had died because of harassment given to her by accused persons. He has denied suggestion that deceased Veena Devi and her father Chanda Singh did not informed him about non-supply of milk to her children. He has denied suggestion that deceased Veena Devi and her father did not tell him about harassment and beatings on behalf of accused persons.

9.5 PW5 Balbir Singh has stated that Kaur Singh accused is his real uncle. He has stated that at about 6-7 AM he heard noise from house of Kaur Singh and thereafter he went to the house of Kaur Singh and he saw that Veena was vomiting in verandah of house. He has stated that Kaur Singh was not in his house and he arrived in house after some time. He has stated that he, Bhuri Singh, Kaur Singh took the deceased Veena Devi to hospital in tractor and thereafter from Bhojpur they hired a jeep and took Veena Devi to the hospital in jeep. He has stated that he remained outside the hospital. He has stated that he does not know what happened inside hospital because he had not gone inside hospital. The witness was declared hostile. He has stated that incident took place on dated 25.7.2004. He has denied suggestion that yellow water was emitting. He has denied suggestion that Kaur Singh had disclosed to medical officer that deceased Veena had consumed some poisonous substance. He has denied suggestion that medical officer had applied pipe to deceased and extracted the poisonous water from her body. He has denied suggestion that he has resiled from his earlier statement in order to save accused persons. He has admitted that co-accused Parvesh sister-in-law of deceased is married and is residing in her in-laws house. He has stated that one Pawan Kumar was sent at 12 Noon to the house of parents of deceased on motor cycle for giving information to parents of deceased about death and he came back around 1 PM.

9.6 PW6 Harbans Singh has stated that after retirement from Army he was performing the agriculture work at village Randoh. He has stated that he heard noise from house of accused and thereafter he asked his wife and thereafter his wife told him that wife of co-accused Kulwant Singh had died. He has stated that thereafter he went to the house of co-accused. He has stated that dead body of deceased was kept in room and many people of village had assembled. He has stated that he told Kaur Singh to inform parents of deceased about death but he kept mum. He has stated that co-accused Kulwant arrived at 4 PM and thereafter dead body was took for last rites at about 5 PM. He has stated that he had also joined the funeral procession. He has stated that he does not know that accused persons have sent Pawan Kumar to the house of parents of deceased to inform them about death.

9.7 PW7 Joginder Singh has stated that after retiring from Army he is plying Mahindra jeep bearing number HP-38-7203. He has stated that jeep is driven by him. He has stated that on dated 25.7.2004 Bhuri Singh of village Randoh came to his house and told that one lady was to be taken to hospital as she was unconscious. He has stated that lady was brought upto Bhojpur in tractor and thereafter she was took to Pathankot in private hospital in his jeep. He has stated that accused Kaur Singh, Manju and Balbir were accompanying the deceased. He has stated that lady was in unconscious condition and she was daughter-in-law of co-accused Kaur Singh. He has stated that deceased had vomited in the vehicle and further stated that deceased was took to Krishna hospital. He has stated that he does not know what happened inside the hospital. He has stated that thereafter the person who took the lady to hospital came out and told that Veena had died. He has stated that thereafter he brought back the dead body to place near the village of accused. He has stated that thereafter he returned to his village.

9.8 PW8 Kuldeep Singh has stated that on dated 25.7.2004 he had gone to his fields at about 7 AM. He has stated that his sister-in-law came to him in field and told him that Veena was ill and she was to be taken to hospital. He has stated that he took his tractor and took deceased Veena upon tractor upto Bhojpur. He has stated that Balbir Singh, Kaur Singh, Manju, Bhuri Singh were with deceased Veena Devi and further stated that Veena Devi was unconscious when he took her in his tractor. He has stated that thereafter from

Bhojpur the deceased was took to hospital at Pathankot in jeep of Joginder. He has stated that thereafter they returned back at 10.30 AM with dead body of deceased. He has stated that dead body of deceased was consigned to flames at 4 PM. He has stated that he does not know what was consumed by deceased. The witness was declared hostile. He has stated that accused Kaur Singh is his real uncle and his wife is real aunt and other co-accused are his brother and sister. He has stated that he wanted that accused should be saved from criminal punishment. He has stated that he does not know whether Pawan was sent to the house of parents of deceased to inform about the death.

9.9 PW9 HC Ramesh Chaudhary has stated that in the year 2004 he was posted as MHC in P.S. Nurpur and on dated 23.7.2004 Parkash Chand had deposited with him one parcel sealed with seal 'M' containing bones and ash. He has stated that he recorded the entry in register and thereafter sent to FSL Junga through C. Dhani Ram vide RC No. 175/04. He has stated that after depositing the articles in office of FSL Junga RC was returned by constable. He has stated that articles remained intact in his custody.

9.10, PW10 C. Dhani Ram has stated that in the year 2004 he was posted in P.S. Nurpur and further stated that on dated 10.10.2004 MHC Ramesh Chand handed over him one parcel, sample of seal and docket vide RC No. 175/04 for depositing the same in FSL Junga. He has stated that he deposited the same in office in proper condition and further stated that articles remained intact during his custody.

9.11 PW11 Anju has stated that accused Kaur Singh is her father-in-law and her house is situated at about 30-40 feet from house of accused. She has stated that on dated 25.7.2004 she was milking the cow at 7 AM in her house. She has stated that Bhuri Singh came to her house and asked and inquired about Kuldeep Singh. She has stated that Kuldeep Singh is her brother-in-law. She has stated that when she reached in house of co-accused Kaur Singh at that time whole villagers were present there and she has stated that Veena was vomiting in verandah and she came to know that Veena was ill. She has stated that she does not know that what Veena Devi had consumed. She has stated that thereafter Veena took to hospital in tractor of her brother-in-law and she, her husband, Kaur Singh and Bhuri Singh were also accompanying Veena Devi in tractor which was driven by her brother-in-law Kuldeep Singh. She has stated that they travelled in tractor upto Bhojpur and thereafter they went to Krishna hospital at Pathankot in a hired vehicle from there. She has stated that at Krishna hospital the deceased was checked by medical officer. Again stated that she was sitting in vehicle and she does not know what was stated by doctor. She has stated that from Krishna hospital they came back. She has stated that Veena Devi had died on way to hospital. She has stated that thereafter deceased was took to cremation place for her last rites. She has stated that Parmanand was sent to call the parents of deceased but none came from parents' side of deceased. She has denied suggestion that Bhuri Singh had told her that Beena Devi had consumed poison due to which she would be taken to hospital. She has denied suggestion that doctor working in Krishna hospital informed that deceased had died due to consumption of poison. She has denied suggestion that deceased was not brought to government hospital deliberately by accused persons. She has denied suggestion that parents of deceased were not informed about death of deceased. She has admitted that all accused are relatives i.e. father-in-law, mother-in-law and brother-in-law. She has denied suggestion that in order to save accused persons she has resiled from her previous statement. She has admitted that parents of deceased could not come on the day for cremation and they came on next day.

9.12 PW12 Dr. Sanjeev Aggarwal has stated that he was proprietor of Krishna hospital Pathankot. He has stated that he does not know what had actually happened. He has stated that some police officials came to the hospital for inquiries. He has denied suggestion that on dated 25.7.2004 accused persons present in Court have brought deceased Beena Devi to his clinic at about 8.30 AM. He has denied suggestion that he examined the deceased and told the accused to take the deceased to government hospital because deceased had consumed poison.

9.13 PW13 Rajinder has stated that he remained associated with police. He has stated that police has collected the ash and bones and were sealed in cloth parcel with seal 'M' and same were took into possession vide memo Ext.PW13/A. He has stated that he could not state that dead body of deceased was consigned to flames in absence of her parents. He has stated that he does not know that accused persons have informed the police officials that cause of death of deceased was consumption of poison. Witness was declared hostile by prosecution. He has admitted that accused had helped his wife in the elections of Panchayat. He has denied suggestion that he has resiled from his earlier statement from portion 'A' to 'A' and 'B' to 'B' in order to give benefit to accused.

9.14 PW14 SI Parkash Chand has stated that during the year 2004 he was posted as ASI in P.S. Gangth. He has stated that FIR Ext.PW1/A was registered and matter was investigated. He has stated that he recorded statements of witnesses and thereafter he went to village Randoh. He has stated that he also went to cremation ground and prepared site plan Ext.PW14/A. He has stated that from cremation ground he collected ash and bones. He has stated that accused persons have not informed the parents of deceased and also did not inform the police officials qua consumption of poison by deceased. He has stated that accused persons destroyed the evidence by way of burning the dead body and thereafter took the bones to Haridwar on the same day. He has stated that deceased had died on dated 25.7.2004. He has stated that no report of incident was lodged till dated 30.7.2004. He has denied suggestion that deceased had died due to vomiting and dysentery. He has denied suggestion that FIR was lodged after due deliberation at the instance of Pardhan, Veena Devi, Baldev Singh and parents of deceased. He has denied suggestion that he recorded the statements of witnesses according to his own choice. He has denied suggestion that he has implicated the accused persons forcibly in false case.

9.15 PW15 Inspector Nathu Ram has stated that in the year 2004 he was posted as SHO P.S. Nurpur. He has stated that case file was taken by him for investigation on dated 1.8.2004. He has stated that he recorded statements of six witnesses correctly as per their versions. He has stated that after completion of investigation ASI Parkash Chand handed over the file to him. He has stated that after receipt of FSL report he prepared final report. He has denied suggestion that deceased was residing in her in-laws house properly. He has stated that deceased was treated in her matrimonial house with cruelty. He has denied suggestion that he recorded statements of witnesses according to his own choice.

10. Statements of accused recorded under Section 313 Cr.P.C. Accused have stated that deceased had died due to natural death and further stated that deceased was not harassed in any manner and accused have also stated that parents of deceased were informed well in time and when they did not come only then deceased was cremated. Accused persons did not lead any defence evidence.

11. Submission of learned Additional Advocate General appearing on behalf of the State that offence of abetment under Section 306 IPC is proved against accused persons

beyond reasonable doubt is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that 'sui' means self and 'cide' means self-killing. It is well settled law that there should be direct nexus between abetment and suicide and there should be proximity of time between abetment and suicide. It is well settled law that there are two types of abetment (1) Active abetment (2) Passive abetment. Active abetment is done to end the life of deceased while in passive abetment something is not done to save the life of deceased. Court has carefully perused the testimonies of PW1 to PW15. There is no positive, cogent and reliable evidence on record in order to prove that accused persons had abetted the deceased to commit suicide. Hence it is held that criminal offence of abetment is not proved against accused persons beyond reasonable doubt because there is no positive evidence of proximity of time between abetment and suicide in present case. ***See 1997 (4) Supreme Court page 214 titled Sangaralonia Sreenoo vs. State of A.P. See AIR 2011 SC page 239 titled M.Mohans vs. State***.

12. Submission of learned Additional Advocate General appearing on behalf of State that prosecution has proved beyond reasonable doubt that accused persons have committed criminal offence under Section 498-A IPC is accepted for the reasons hereinafter mentioned. We have carefully perused the testimony of PW1 Chanda Singh. PW1 Chanda Singh has specifically stated in positive manner that deceased was harassed in her matrimonial house and was beaten in her matrimonial house by accused persons for bringing insufficient dowry. PW1 has also specifically stated in positive manner that accused persons used to address the deceased as daughter of 'kanjar' (Person leading illicit life). PW1 has specifically stated in positive manner that above stated fact was directly narrated by deceased to him when deceased had visited her parental house. We are of the opinion that uttering the word 'Kanjar' (Person leading illicit life) to a married woman *ipso facto* amounts to mental cruelty upon married woman. It is well settled law that cruelty is of two types i.e. mental cruelty and physical cruelty. By way of uttering the word 'Kanjar' (Person leading illicit life) to deceased the mental cruelty in matrimonial house upon deceased is proved on part of accused persons.

13. We have carefully perused the testimony of PW2 Veena Devi. PW2 Veena Devi who was Pardhan of Gram Panchayat has specifically stated in positive manner when she appeared in witness box that deceased had directly told her when deceased came to her parental house that her husband, her sister-in-law and others ill-treated her for bringing insufficient dowry and deceased had also directly narrated to PW2 Veena Devi Pardhan that deceased was beaten by accused persons in her matrimonial house. Mental cruelty upon deceased in her matrimonial house is proved beyond reasonable doubt as per testimony of PW2. We have carefully perused the testimony of PW4 Baldev Singh BDC member. PW4 has specifically stated in positive manner that when deceased came to her parental house she told her father about cruelty and demand of insufficient dowry and thereafter father of deceased directly told these facts to PW4. Testimony of PW4 is also trustworthy reliable and inspires confidence of Court. It was held in case reported in ***1997(3) Crimes 362 (P&H) titled Sita Ram and others vs. State of Haryana and another*** that cruelty is not physical only but mental cruelty is also cruelty as defined under Section 498-A IPC. It is well settled law that offence under Section 498-A IPC is continuing offence. ***(See 1998 Cr.L.J. 554 titled Jagdish and others vs. State of Rajasthan and another)*** Court is of the opinion that uttering work 'kanjar' (Person leading in illicit relations) to a married woman in her matrimonial house amounts to mental cruelty as defined under Section 498-A IPC. It is well settled law that every woman has legal right to live in her matrimonial house with

dignity and honour and any derogatory remarks to a married woman in her matrimonial house amounts to mental cruelty.

14. Another submission of learned Additional Advocate General appearing on behalf of State that criminal offence under Section 201 IPC is also proved beyond reasonable doubt against accused persons is rejected being denied of any force for reasons hereinafter mentioned. Ingredients of Section 201 IPC are (1) That accused should have knowledge that an offence has been committed (2) That thereafter accused persons have caused disappearance of evidence of commission of criminal offence. ***See AIR 1999 Supreme Court page 3435 titled Ram Saran Mahto vs. State of Bihar***. In the present case two persons were sent to inform parents of deceased about death of deceased and thereafter about 4 p.m. deceased was cremated in presence of co-villagers. There was no concealment of dead body on the part of accused person. All the co-villagers were allowed to see dead body in the house of accused persons. It is held that offence under Section 201 IPC is not proved on record beyond reasonable doubt.

15. Submission of learned defence Advocate appearing on behalf of accused persons that conduct of complainant himself renders the case of prosecution doubtful because incident took place on dated 25.7.2004 and information in police station was given on dated 30.7.2004 after a gape of sufficient time and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case delay in lodging the FIR is not fatal to prosecution because there was mental shock to the father of deceased when deceased had died in her matrimonial house all of a sudden. PW1 has specifically stated in positive manner that on dated 26.7.2004 he had gone to the house of accused and dead body of his daughter was not found and it was informed to him that deceased was cremated by accused persons. He has stated that thereafter on dated 27.7.2004 PW1 father of deceased had gone to police station Indora and thereafter officials of P.S. Indora informed him that case would be registered in police station Nurpur. Thereafter PW1 father of deceased went to P.S. Nurpur and criminal case was registered. We are of the opinion that delay in filing FIR has been satisfactorily explained by PW1 when he appeared in witness box. Hence it is held that delay in filing the FIR is not fatal to prosecution case.

16. Another submission of learned defence Advocate appearing on behalf of accused that there is material contradiction and improvement in testimonies of PW1 and PW4 and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimonies of PW1 and PW4. Incident took place on 25.7.2004 and testimonies of prosecution witnesses were recorded on 6.10.2006, 10.10.2006, 11.10.2006, 12.10.2006, 12.11.2006, 21.11.2007, 22.11.2007, 22.1.2008 and 23.1.2008 after a gape of sufficient time. We are of the opinion that minor contradictions are bound to come in criminal case when testimonies of prosecution witnesses are recorded after a gape of sufficient time. In present case learned defence Advocate appearing on behalf of accused did not point out any material contradiction which goes to the root of case. It is also well settled law that concept of *falsus in uno falsus in omnibus* is not applicable in criminal cases. ***(See AIR 1980 SC 957 titled Bhee Ram vs. State of Haryana. See AIR 1971 SC 2505 titled Rai Singh vs. State of Haryana.)***

17. Another submission of learned defence Advocate appearing on behalf of accused that deceased was residing separately from her in-laws and her in-laws have been falsely implicated in present case is rejected being devoid of any force. No suggestion has

been given by accused persons to the prosecution witnesses when they appeared in witness box that deceased used to reside separately from her in-laws prior to her death. No reason has been assigned by accused persons as to why suggestion was not given to prosecution witnesses when they appeared in witness box that deceased was residing separately from her in-laws. There is no evidence on record in order to prove that deceased was residing separately from her in-laws prior to her death. In view of above stated facts plea that deceased was residing separately from her in-laws is not tenable before High Court of H.P. for the first time.

18. Another submission of learned Advocate appearing on behalf of accused that Smt. Parvesh Kumar sister-in-law of deceased was married at a distant place and no role has been attributed by prosecution to her is also rejected being devoid of any force for the reasons hereinafter mentioned. PW1 Chanda Singh has specifically stated in positive manner that deceased had directly disclosed him the factum of cruelty on the part of accused persons when deceased came to her parental house. Even PW2 Veena Devi has specifically stated when she appeared in witness box that deceased had directly narrated to her when she came to her parental house that accused persons have ill-treated her for bringing insufficient dowry and PW2 has also stated that deceased had directly informed her the fact of taunting and beating the deceased in her matrimonial house. Testimonies of PW1 and PW2 are trustworthy reliable and inspire confidence of Court. There is no evidence on record in order to prove that co-accused Parvesh Lata did not come to matrimonial house of deceased along with her husband at several intervals prior to death of deceased.

19. Another submission of learned defence Advocate appearing on behalf of accused that no offence has been committed by husband of deceased because husband of deceased was working at a distant place at Jammu and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that deceased had committed suicide in her matrimonial house leaving behind her three minor children. Court is of the opinion that no mother would commit suicide in her matrimonial house without any reasonable cause leaving her three minor children at the mercy of society. Factum of mental cruelty was informed by deceased during her life time to her father PW1 and also informed to PW2 Pardhan of G.P. Court is of the opinion that husband is under legal obligation to maintain his legally wedded wife in her matrimonial house properly. In present case it is proved on record that derogatory remarks 'kanjar' (Person who deals in illicit relations) were given to deceased in her matrimonial house. It is well settled law that offence under Section 498-A is a continuing offence and criminal offence under Section 498-A is offence against society at large. Mental harassment by way of demand of dowry and by way of uttering derogatory words to a married woman in her matrimonial house is not permissible in advance civilized society. Criminal offence under Section 498-A IPC is punishable upto three years imprisonment and fine. As per Section 468 of Cr.P.C. 1973 cognizance of criminal offence can be taken within three years if punishment of criminal offence is exceeding one year but not exceeding three years. In present case there is no evidence on record in order to prove that husband of deceased and sister-in-law of deceased did not come to their parental house within three years prior to the death of deceased. No suggestion has been given to prosecution witnesses that co-accused Kulwant and co-accused Parvesh did not come to their parental house within three years prior to death of deceased. On contrary there is positive cogent and reliable evidence on record that deceased had personally told to PW1 when she came to her parental house within two month prior to her death about factum of cruelty committed by accused persons.

20. Another submission of learned Advocate appearing on behalf of accused that minor children of deceased have not been examined by prosecution in present case and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that number of witnesses to prove the fact is not required as per Section 134 of Indian Evidence Act 1872. We are of the opinion that fact in criminal case can be proved even by testimony of a single witness. The facts of demand of dowry and facts of mental cruelty and fact of utterance of words 'kanjari' (Person who deals in illicit relations) are proved on record in present case as per testimonies of PW1, PW2 and PW4.

21. Another submission of learned Advocate appearing on behalf of accused that seller of cow is not examined in present case and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case it is proved on record as per testimonies of PW1, PW2 and PW4 that father of deceased had provided cow to deceased so that deceased could provide milk to her minor children. Testimonies of PW1, PW2 and Ext.P4 remain unrebutted on record. It is held that examination of seller of cow was not mandatory in the presence of testimonies of PW1, PW2, and PW4.

22. Another submission of learned Advocate appearing on behalf of accused that PW1, PW2 and PW4 are interested witnesses and conviction under Section 498-A IPC could not be given to accused persons on their testimonies is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that mental cruelty upon the deceased was committed in four walls of matrimonial house. It is well settled law that generally married women used to narrate the factum of mental cruelty to her near relatives only. It is held that procurement of independent witness is impossible when mental cruelty is committed upon married woman inside the four walls of residential house. It was held in case reported in ***1993(3) Crimes 518 SC titled State of West Bengal vs. Orilal Jaiswal and another*** that where evidence about physical and mental torture of deceased came from relatives same should not be discarded simply on ground of absence of corroboration from independent witness.

23. Facts of case law cited by learned defence Advocate appearing on behalf of accused persons i.e. ***(2014)9 SCC 365 titled Ramaiah alias Rama vs. State of Karnataka (2013)16 SCC 421 titled Bhola Ram vs. State of Punjab, 2012(1) Shim.LC 108 titled State of H.P. vs. Umardeen , 2012(2) Shim. LC 710 titled State of H.P. vs. Ani Kumar and others*** and facts of present case are entirely different. It is held that case law cited supra by learned defence Advocate are not applicable in facts and circumstances of present case and case law cited supra are distinguishable.

24. It is well settled law that conviction could be based on testimony of a single witness in the criminal case if testimony of single witness inspires confidence of Court. ***(See: AIR 1973 SC 944 Jose Vs. The State of Kerla (Full Bench)*** It was held in case reported in ***AIR 1987 S.C. 1328 Dalbir Singh Vs. State of Punjab*** that there is no hard and fast rule which could be laid down for appreciation of evidence and it is a question of fact and each case has to be decided on the fact as they proved in a particular case.

25. In view of above stated facts and case law cited supra appeal is partly allowed. Acquittal of accused persons qua criminal offence punishable under Section 306 and 201 IPC are upheld. Acquittal of accused persons qua criminal offence punishable under Section 498-A read with Section 34 IPC is set aside and all accused persons are

convicted qua criminal offence punishable under Section 498-A read with Section 34 IPC. Judgment of learned trial Court is modified to this extent only. Now convicted persons be heard on quantum of sentence on 6.5.2015.

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Cr. Appeal No. 569 of 2008

QUANTUM OF SENTENCE

6.5.2015

Present:- Mr. Ashok Chaudhary, Additional Advocate General with Mr.V.S. Chauhan, Additional Advocate General, and Mr. J.S. Guleria, Assistant Advocate General, for the appellant.

Mr. Rajesh Mandhotra, Advocate with the convicted persons.

Convicted persons are in custody of HHC Nardev Singh No. 1142 P.S. Nurpur, C. Darpan Kumar No. 1064 P.P. Gangth, L.C. Rita Devi No. 617, P.S. Nurpur, L.C. Mumtaz No. 578 P.S. Jawali, ASI Ashok Kumar P.P. Gangth and ASI Sukhdev Raj P.S. Jawali.

26. We have heard learned Advocate appearing on behalf of convicted persons and learned Additional Advocate General appearing on behalf of the State upon quantum of sentence.

27. Learned Advocate appearing on behalf of the convicted persons submitted before us that age of convicted Kaur Singh is 80 years, age of convicted Krishna Devi is 75 years, age of convicted Parvesh Lata is 50 years, age of convicted Kulwant Singh is 45 years and age of convicted Ravinder Singh is 40 years and they are first offenders and they have family to support and convicted persons namely Kaur Singh, Krishna Devi and Parvesh Lata are suffering from medical ailment and lenient view be adopted. On the contrary learned Additional Advocate General appearing on behalf of State submitted before us that offence under Section 498-A IPC is an offence against Society and deterrent punishment be given to convicted persons in order to maintain majesty of law.

28. We have considered the submissions of learned Additional Advocate General appearing for the State and learned defence counsel appearing on behalf of convicted persons carefully upon quantum of sentence.

29. We are of the opinion that offences under Section 498-A IPC are increasing in the society day by day. We are of the opinion that it is not expedient in the ends of justice to release the convicted persons under Probation of Offenders Act. It was held in case reported in ***AIR 2015 SC 398 titled State of M.P. vs. Surendra Singh*** that sentence should commensurate with gravity of offence. Keeping in view the fact that convicted Kaur Singh is 80 years old, convicted Krishna is 75 years old, convicted Parvesh Lata is 50 years old and in view of the fact that these convicted persons are suffering from medical ailment and keeping in view the fact that all convicted are first offenders, we sentence the convicted persons as follow:-

Sr. No.	Nature of Offence	Sentence imposed
1.	Offence under Section 498-A IPC	Each convicted persons are sentenced to undergo simple imprisonment for one month twenty days and fine to the tune of Rs.10,000/- (Rupees ten thousand only) is imposed upon each convicted person. In default of payment of fine each convicted persons shall further undergo simple imprisonment for twelve days.

30. Period of custody during investigation, inquiry and trial will be set off. Certified copy of judgment and sentence will be supplied to convicted persons forthwith free of cost by learned Registrar (Judicial). Case property if any will be confiscated to State of H.P. after the expiry of period of filing further legal proceedings before the competent Court of law. The Registrar (Judicial) will prepare the warrant of commitment strictly in accordance with law. File of learned trial Court along with certified copy of judgment and sentence be transmitted forthwith. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Dharam Singh Negi ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWP No. 1890 of 2015-I
Decided on: 07.05.2015

Constitution of India, 1950- Article 226- Petitioner was debarred from taking part in any activities or proceedings of the Gram Panchayat by the Deputy Commissioner- an appeal was preferred before Divisional Commissioner which was dismissed- held that order passed by Divisional Commissioner is non-speaking one, hence, order passed by him set aside with the direction to pass a reasoned and speaking order. (Para-2 to 5)

For the petitioner: Mr. Deepak Kaushal, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Petitioner has called in question order, dated 4th March, 2015, made by the Deputy Commissioner, District Sirmaur at Nahan, whereby he has been debarred from

participating and taking part in any of the activities or proceedings of the Panchayat for the period of six months (Annexure P-6) and order, dated 16th March, 2015, made by the Divisional Commissioner, Shimla, whereby the appeal filed by the writ petitioner came to be dismissed (Annexure P-7).

2. It appears that order, dated 4th March, 2015, (Annexure P-6) has been passed by the Deputy Commissioner in terms of the powers vested with him under Section 146 (1-A) of the Himachal Pradesh Panchayati Raj Act, 1994 (for short "the Act"), which reads as under:

> *"**146. Removal of office bearers of Panchayats.***
>
> *.....*
>
> *(1-A) The State Government, the Divisional Commissioner or the Deputy Commissioner, as the case may be, may, on consideration of the enquiry report or if it thinks proper, for reasons to be recorded in writing, revoke the suspension order and instead of removing an office bearer, warn him to be vigilant in the discharge of his duties or may also debar him from taking part in any act or proceedings of the Panchayat for the period of six months."*

3. Feeling aggrieved, the petitioner filed an appeal before the Divisional Commissioner, Shimla, which came to be dismissed vide order, dated 16th March, 2015 (Annexure P-7).

4. We have gone through order, dated 16th March, 2015, made by the Divisional Commissioner, is a non-speaking one.

5. Accordingly, order, dated 16th March, 2015, made by the Divisional Commissioner, (Annexure P-7) is set aside, the appeal is restored and the Divisional Commissioner is directed to decide the appeal afresh after hearing the parties by passing a reasoned and speaking order within two weeks with effect from 11th May, 2015.

6. Parties are directed to cause appearance before the Divisional Commissioner, Shimla, on **11th May, 2015.**

7. The writ petition is disposed of, as indicated hereinabove, alongwith all pending applications. Copy **dasti.**

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

Soni Gulati & Co. ....Petitioner.
Versus
JHS Svendgaard Laboratories Limited ...Respondent.

Company Petition No. 8 of 2009.
Judgment reserved on: 17.4.2015
Date of decision: May 7, 2015.

Companies Act, 1956 - Section 433 (e)- Petitioner claimed that respondent/company was indebted to the petitioner for a Sum of Rs. 12,06,580/- against Bill dated 26.9.2006- service tax on previous bill of Rs. 30,000/- and penalty of Rs.1,50,000/- for backing out of the

contract is payable- held, that where the company disputes the claim and the dispute is bona-fide, it cannot be said that company was avoiding its liability- said inference can only be drawn when debt is undisputed or bona-fide or some sham defence is sought to be raised towards the liability -winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bonafide disputed by the Company- balance-sheet shows that Company is financially sound and solvent – respondent has disputed the debt and it cannot be said that there was no bonafide reason for non-payment of the amount- therefore, winding up petition cannot be allowed for realizing the debt. (Para-22 to 37)

Cases referred:

Amalgamated Commercial Traders (P) Ltd. Vs. A.C.K. Krishnaswami 1965 (35) Company Cases 456

Madhusudan Gordhandas & Co. Vs. Madhu Woollen Industries (P) Ltd. 1971(3) SCC 632

Pradeshiya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical and Another 1994 (79) Company Cases 835

Mediquip Systems (P) Ltd. Vs. Proxima Medical System GmbH 2005(7) SCC 42

Vijay Industries Vs. NATL Technologies Limited 2009(3) SCC 527

IBA Health (India) Private Limited vs. INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553

For the Petitioner	:	Mr. K.D. Sood, Senior Advocate with Ms. Ranjana Chauhan, Advocate.
For the Respondent	:	Mr. Atul Jhingan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

The petitioner by medium of this petition under Section 433(e) of the Companies Act, 1956 seeks winding up of the respondent company.

2. It has been averred that the petitioner firm is registered with the Institute of Chartered Accountants of India and is carrying on the profession of the Chartered Accountants. Whereas, the respondent - company is a Public Limited Company constituted under the provisions of the Companies Act, 1956 and is limited by shares and is indebted to the petitioner for a Sum of Rs.12,06,580/- against Bill No. TS 5/09/06 dated 26.9.2006 for rendering services in connection with preparation of detailed project report for getting term loan and working capital limits sanctioned from Punjab National Bank. In addition, service tax or previous bill of Rs.30,000/- and penalty for default in honouring the contract/backing out amounting to Rs.1,50,000/- is also payable.

3. It is further averred that the respondent used to avail professional services of the petitioner in matters of preparation of project reports, conducting audit, liaison with banks for term loans and working capital etc. and even company law matters. The petitioner also used to render such services on credit and also after taking some advance from time to time. The petitioner used to take instructions from the respondent on e-mail from its Managing Director as well as other officers of the company. Even information supplied for onward submission to various authorities/Bank was through e-mail.

4. It is further averred that the petitioner had been doing his work properly but suddenly problem started when the Managing Director asked the petitioner to show EPS of more than Rs.15/- on a share of Rs.10/- on the balance sheet of September, 2005 on annualized basis (as per MD this was the minimum EPS wanted by MB).

5. In addition to this, the petitioner pointed out that:

(i). the land building at MCIA which is in the name of Proprietor of erstwhile firm should be transferred to the company as part of going concern or disclosure made for the same ;

(ii). identified some nonexistent assets and was against issue of shares to promoters against that and told not to take over those assets even from the promoters as on 31.3.2005;

(iii). the petitioner refused to compromise with the professional duties cast upon by the professional ethics.

This was sometime in Nov. 2005. On 29th Nov. 2005 the petitioner got e-mail from MD asking to go slow with bank proposal, so as to match it with post public issue. The bank proposal at that time was in its final stage. On Dec. 27, 2005, petitioner got a call from MD and then an e-mail message that MD wants to change the auditors. Petitioner was offered assignment of internal audit and all work of IPO, but terms were not acceptable and so he declined the offer.

6. It is further averred that during February petitioner was asked to resign as auditor which was done. Later petitioner was asked to give no objection certificate by new auditors which was also given but informed that the fee amounting to Rs.6.65 lacs for work done has not been paid. However, this amount was settled by MD at Rs.3 lacs as time already spent and claimed in the bill would be compensated by the continued assignment of bank loan proposal and with the condition that petitioner will continue with the job of Bank Term Loan and w/c limits of Rs.25 crore with fee of 0.5% of sanctioned amount. In addition, it was agreed that the fee settled at Rs.3 lacs would include Rs.1.5 lacs as advance towards bank work (because the significant part this work has already been done and in Principal sanction obtained). The terms of payment were Rs.50,000/- cheque dated 16.2.2006, Rs.1,00,000/- cheque dated March, 2006, Rs.2,00,000/- on clearance from Zonal office of the bank, Rs.5,00,000/- on sanction and balance on take over from Bank of Punjab.

7. However, the work was to be done in such a way that sanction matches with the Public issue. Letter was sent through e-mail for the same, as the work was done very fast as compared to the expectations of the respondent during the first assignment. Further, it was agreed that if at any stage the company backs out/or do not take the loan sanctioned/or take only in parts, the fee will still be payable as agreed and additional Rs.1,50,000/- being agreed advance will also be payable as penalty by the respondent in case the loan is not taken or company backs out at any stage.

8. It is further averred that no dues certificate was issued to enable the new auditors to take the assignment, but the respondent was asked not to put any date on that, because the auditors may have to sign the balance sheet as on 31.12.2005 in back date, as prospectus etc. has already been finalized and circulated. The petitioner looking at the time spent on the job including procuring Principal sanction from PNB, preparing various

documents and taking over of or running business of firms, incorporation of the respondent company etc. accepted this. But by the time fresh papers were filed with PNB the time of validity of IPS was over, so the case had to be filed afresh by preparing fresh documents.

9. It is the further case of petitioner that respondent through MD and other staff continued to chase the petitioner on daily basis till final sanction on 23rd September, 2006. The petitioner handed over the bill for Rs.12,06,580/- to the MD of the company on 26.9.2006 after final sanction of the loan. It is averred by the petitioner that during personal visit of the partner of petitioner to company office on 23rd, 25th September, 2006, the MD of the respondent promised the payment after he would be free from the public issue i.e. a week later but was asked to deliver the bill immediately since the MD was going to various cities for IPO conferences during those days.

10. It is averred that these promises continued to be postponed and commitment changed for availing the facilities sanctioned which constrained the petitioner to issue legal notice on 9.1.2007 asking to pay the amount due within 30 days and on failure to pay winding up petition would be filed. Reply to the notice was received on 5.9.2007 wherein respondent accused the petitioner for blackmailing etc. and claimed that all payments had already been made to the petitioner. On 11.10.2007, the petitioner sent a letter to the MD advising him to inform the facts of the case to his solicitor enclosing some papers.

11. It is further averred that the partner of the petitioner got a telephone call from the elder brother of the MD of respondent Mr. Punit, who is settled in USA, advising not to take any legal step and assured that he will convince the MD to make the payment. During February, 2008 the partner of petitioner got a call from MD of respondent asking him to prepare Power Project Report which the petitioner refused on the pretext of his outstanding dues. During May & June, 2008, it is claimed that the partner of petitioner again visited to MD of respondent and requested him to pay outstanding amount upon which MD threatened the petitioner with dire consequences. The partner of the petitioner had suffered heart attack on 26.6.2008 and was admitted in CCU of IGMC, Shimla.

12. On these allegations, it is alleged that respondent had “failed and “ignored” to make payment of the outstanding amount which had become due on 26.9.2009 alongwith penalty of Rs.1,50,000/- and interest on the whole amount. It has been prayed that the respondent-company having its registered office at Trilokpur Road, Kheri (Kala-Amb), Tehsil Nahan, District Sirmaur, Himachal Pradesh be ordered to be wounded up being “unable to pay its debts”.

13. The respondent opposed the petition by filing its reply wherein preliminary objections regarding suppressing of material facts, malafide intentions, maintainability, disputed question of facts, claim being time barred, dismissal for non-compliance of Section 434(1)(a) of the Companies Act, 1956, no legally recoverable dues payable by the respondent, non-performance of the contract etc. were raised. In paragraphs I, J and K of the reply, the respondent has made the following averments:-

> *“I. that the respondent has paid all fees and expenses to the petitioner which has been duly admitted and acknowledged by them which is clear from the document filed b y the petitioner appearing at page No.70 of their paper book wherein it has been stated by them on 11.2.2006 that they acted as the Statutory Auditors of the respondent company till 14.1.2005. Further, it has been declared therein by the petitioner that they have received all the*

claims/dues from respondent for whatever work done by them for the respondent and no dues/claim is pending from respondent in respect of any matter whatsoever, whether in their professional or personal capacity.

J. That it is most humbly submitted that the petitioner volunteered to the respondent to get them term loan and working capital limits of Rs.*23 crores sanctioned from Punjab National Bank on the condition that they will get the Zonal Office clearance by 6.3.2006, proposal cleared from Head Office by 25.3.2006, L/C opening by 1.4.2006 and get the sanction on or before 15th April, 2006 vide agreement in writing signed by the parties on 11.2.2006. The petitioner received a sum of* Rs.*1,50,000/- from the respondent through three cheques for* Rs.*50,000/- each dated 16.2.2006, 22.2.2006, and 25.3.2006 respectively towards advance for sanction. However, due to the inability of the petitioner to obtain the promised financial facility and loan and as a result of non availability of funds in time, respondent company suffered huge loss on account of Excise Duty loss as the land was already bought by the respondent company to set up their unit through internal resources but was unable to construct and move production to the tax free location due to inordinate delay and pressure tactics by the petitioner to continue extract money on one pretext or the other. It is submitted that apart from these the petitioner's partner Sh. S.C. Soni cajoled the MD of the respondent company to cough out money in cash on the ground of his personal difficulties like his child's admission to college etc., and* Rs.*1,00,000/- (Rupees one lakh) was thus extracted with promise to return the same on completion of work and on payment of fees which also he is liable to return.*

K. That it is most respectfully submitted that petitioner failed inter alia to get the sanction of the financial facility and loan within the time as mutually agreed between the parties and thereby became liable to refund to the respondent the said entire advance received i.e. Rs.*1,50,000/- . This is evident and clear from the various documents filed by the petitioner with their paper book. It is submitted that the petitioner also made the respondent pay a sum of* Rs.*5,00,000/- (Rupees five lakhs) to the bank towards processing fees much before the proposal was sanctioned. Despite repeated correspondences of the respondent to the bank to return the same the bank is yet to return the same causing loss to the respondent. Thus, the petitioner by their various acts of omission and commission has put the respondent to great loss and damages which he is fully liable to compensate.*

14. Similarly in para-7 of the reply on merits the respondent has stated as thus:-

"It is most humbly submitted that respondent company had appointed their Merchant Bankers in August 2005 and filed RHP in SEBI by Feb, 2006. The petitioner was out of the whole IPO matter the day respondent appointed their Merchant Banker and EPS allegations of petitioner is nothing but a means to blackmail the respondent company. It is wrong and denied that the alleged work was done very fast as compared to the alleged expectations of the defendant during the alleged first assignment as alleged or otherwise. It is wrong and denied that the defendant was asked not to put any date on the No Dues Certificate as alleged or otherwise. Even otherwise, since it is a no objection to be given by the petitioner where is the question of asking

defendant not to put a date on the same and especially when a date was already put on the same by the petitioner. It is wrong and denied that bill for Rs.*12,06,580/- was delivered by petitioner on 26.9.2006 as alleged or otherwise. It is denied that alleged last letter the petitioner got from the defendant regarding alleged work was on 12th Sept. 2006 as alleged or otherwise. On the other hand, no such alleged letter dated 12th Sept., 2006 was handed over by the respondent to the petitioner. It is wrong and denied that during alleged personal visit of the alleged partner of petitioner to company office on 23rd, 25th Sept., 2006 the MD of the defendant promised the alleged payment after the MD is free from alleged Public issue viz a week later but was asked to deliver the alleged bill immediately since MD was going to various cities for IPO conferences during those days as alleged or otherwise. It is wrong and denied that the alleged promises continued to postpone and alleged commitment changed for availing the alleged facilities sanctioned. It is wrong and denied that alleged reminder was also sent on 20.12.2006 by alleged partner of firm requesting to make payment of at least the alleged amount which had become allegedly due on sanction as alleged or otherwise and it is also denied that alleged bill was submitted on 26th Sept. 2006 as alleged or otherwise. It is wrong and denied that it was requested to pay at least* Rs.*5 lakhs out of* Rs.*12 lakhs as alleged or otherwise. It is wrong and denied that on phone the MD of defendant informed that payment would be made in full on alleged documentation with bank as alleged or otherwise. It is wrong and denied that looking at the lapse of sanction and alleged bad intention of the MD of the defendant, alleged notice was sent on 9.1.2007 asking to pay within 30 day and on failure to pay winding up petition would be filed as alleged or otherwise. It is wrong and denied that on 11.10.2007 petitioner sent alleged letter to the MD advising him to inform the facts of the case to his solicitor enclosing some alleged papers evidencing the alleged facts as stated in the said alleged letters and enclosures as alleged or otherwise. It is wrong and denied that the brother of the MD from USA, Mr. Punit called partner of the petitioner advising him not to take any legal step and assured that he would convince MD of defendant to make the alleged payment as alleged or otherwise. It is wrong and denied that during Feb. 2008 partner of the petitioner got a call from MD of defendant asking him to prepare alleged power project report to which petitioner asked to pay alleged previous dues first before alleged fresh assignment could be taken as alleged or otherwise. It is wrong and denied that during May & June, 2008 the alleged partner of petitioner called MD of the defendant requesting him to pay otherwise he would be compelled to take legal help for recovery including winding up petition as alleged or otherwise. It is wrong and denied that upon this, MD threatened with alleged dire consequences as alleged or otherwise. It is wrong and denied that purported bill for alleged services was sent on 26th Sept. 2006 and the limitation fall on 26.09.2009 as alleged or otherwise. It is most humbly submitted that contents of para D of the reply may also form part and parcel of the present para."*

All the other averments, as contained in the petition were denied.

15. The petitioner filed rejoinder, reiterating the submissions made in the petition and the contrary submissions made in the reply were denied.

16. This Court on 14.3.2014 had heard detailed arguments whereafter the judgment was reserved. But, before the judgment could be pronounced, the learned counsel for the petitioner moved an application for placing on record the documents relating to the public issue for which the services of the petitioner had been engaged by the respondent-Company for sanctioning the loan from the Punjab National Bank.

17. In this application, it is alleged that the prospectus for public issue was published by the respondent-Company and even thereafter on 21.8.2006 the respondent-Company continued to correspond with the petitioner for sanctioning of the loan from the Punjab National Bank. In this regard a copy of financial results for the quarter ended 30.6.2006 was given to the petitioner for onward submission to the Punjab National Bank. It is further alleged that the loan was sanctioned to the respondent-Company by the Punjab National Bank on 23.9.2006 and communication in this regard was duly sent by the bank to the respondent-Company and the public issue was subsequently opened on 26.9.2006.

18. In reply to this application, it is submitted that the averments of the petitioner to the effect that the respondent-Company even after 31.8.2006 continued to correspond with the petitioner for sanctioning of the loan was factually incorrect and projects an incomplete picture. As per the terms and conditions/regulations concerning the public issue, the respondent-Company prior to opening of the public issue was essentially required to arrange for the sanction of term loan. Since the petitioner failed to get the term loan sanctioned in a timely manner, the opening of the public issue got delayed. In order to avoid continuous and further delay in the opening of the public issue, the Company was constrained to seek sanction of the term loan from the Centurion Bank of Punjab Ltd. It was after obtaining this loan that the public issue was floated on 26.9.2006 and not due to any effort of the petitioner in attempting to get the term loan sanctioned from the Punjab National Bank. It was not denied that some functionaries of the Company may have corresponded with the petitioner, who by then had started blackmailing and threatening the respondent-Company that he would write letters to the regulatory bodies like SEBI and others for stalling the launching of the public issue.

19. In rejoinder to the reply of this application, the petitioner has stated that the Managing Director of the respondent-Company vide his e-mail dated 11.9.2006 had asked the petitioner not to send e-mail on Airtel/Blackberry as he was not in station in Delhi and had been frequently touring. Earlier an unsigned statement had been sent by the Company to the petitioner and it had been requested that the Managing Director of the Company send signed statements and documents for submission to the Punjab National Bank.

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

21. The following point arises for determination:-

> *"Whether in the given facts and circumstances the respondent-Company is required to be wound up having failed and ignored to make payments of the outstanding amount being unable to pay its debts."*

22. In a petition for winding up of a company on the basis that the company is unable to pay its debts, apart from the merits of dispute, the sincerity of the respondent-Company in raising the same is also relevant. In such a situation, where the company disputes the claim and the said dispute appears to be bonafide, it naturally follows that the company has declined to pay the claim on account of a dispute and not on account of its

inability or negligence to pay the debts. The assumption that the company is unable to pay its debts can only be made in a situation where the debt is undisputed or an illusory and a sham defense is sought to be raised towards the liability. In both these cases, the company is liable to pay the debt and the fact that it has failed and neglected to pay the same despite a notice under Section 434 (1) (a) of the Act would indicate that the Company is unable to discharge its liability. However, in a case where the company sincerely believes that the amount is not payable and is able to establish that there are bonafide disputes, the question of failure and neglect to pay an admitted debt does not arise as the claim is neither accepted as a debt nor admitted to be payable. In such circumstances there can be no failure or neglect to pay a debt as contemplated under Section 434(1) (a) of the Act.

23. Though number of judgments have been cited on either side, but in view of the comprehensive law laid down by the Hon'ble Supreme Court, this Court shall be confining itself to the pronouncements made by the Hon'ble Supreme Court from time to time.

24. The Hon'ble Supreme Court in the matter of **Amalgamated Commercial Traders (P) Ltd.** Vs. **A.C.K. Krishnaswami** reported in **1965 (35) Company Cases 456** has held that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the Company but if debt is not disputed on some substantial ground, the court may decide on the petition and make the order.

25. The Hon'ble Supreme Court in the matter of **Madhusudan Gordhandas & Co.** Vs**. Madhu Woollen Industries (P) Ltd.** reported in **1971(3) SCC 632** has culled out the following rules for passing the order of winding up:-

> *"20. Two rules are well settled.*
>
> *First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. See London and Paris Banking Corporation (1874) LR 19 Eq 444. Again, a petition for winding up by a creditor who claimed pauyment of an agreed sum for work done for the company when the company contended that the work had not been properly was not allowed. See Re. Brighton Club and Horfold Hotel Co. Ltd (18565) 35 Beav 204.*
>
> *21. Where the debit is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt, see Re. A Company 94 SJ 369. Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely see Re. Tweeds Garages Ltd 1962 Ch 406. The principles which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends".*

26. In the case of **Pradeshiya Industrial and Investment Corporation of Uttar Pradesh** Vs. **North India Petro Chemical and Another** reported in **1994 (79) Company**

Cases 835, the Hon'ble Supreme Court has held that an order under Section 433(e) is discretionary and there must be a debt due and the company must be unable to pay the same and the debt must be a determined or definite sum of money payable immediately or at a further date and inability u/S.433(e) should be taken in the commercial sense.

27. In the matter of **Mediquip Systems (P) Ltd.** Vs. **Proxima Medical System GmbH** reported in **2005(7) SCC 42** Hon'ble Supreme Court has reiterated the principles relevant for passing winding up order by holding as follows:-

> *"25. The rules as regards the disposal of winding-up petition based on disputed claims are thus stated by this Court in Madhsudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd (1971) 3 SCC 632.*
>
> *This Court has held that if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The principles on which the court acts are;*
>
> > *[i] that the defence of the company is in good faith and one of substance;*
> >
> > *[ii] the defence is likely to succeed in point of law; and [ii] the company adduces prima facie proof of the facts on which the defence depends.*

28. In the matter of **Vijay Industries** Vs. **NATL Technologies Limited** reported in **2009(3) SCC 527**, the Hon'ble Supreme Court has reiterated the prerequisites for winding up on the ground of inability to pay debt by holding that for invoking Sec.433(e) what is necessary that despite service of notice by the creditor, the company which is indebted in a sum exceeding one lakh rupees then due, failed or neglected to pay the same within three weeks thereafter or to secure or compound for it to the reasonable satisfaction of the creditor. It has further been held that Section 433(e) does not state that the debt must be precisely a definite sum and it is not a requirement of law that the entire debt must be definite and certain.

29. The Hon'ble Supreme Court in the case of **IBA Health (India) Private Limited** vs. **INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553,** has also explained that a dispute would be substantial if it is bonafide and not spurious, speculative, illusory or misconceived, the relevant extract from the decision is quoted below:

> *"20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bonafide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bonafide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but*

a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bonafide disputed debt."

30. From the aforesaid judgments, the following broad legal principles can be deduced:

1. If the debt is bonafide disputed and the defense is a substantial one, the Court will not wind up the company. Conversely, if the plea of denial of debit is moonshine or a cloak, spurious, speculative, illusory or misconceived, the Court can exercise the discretion to order the company to be wound up.

2. A petition presented ostensibly for winding up order, but in reality to exert pressure to pay the bonafide disputed debt is liable to be dismissed.

3. Solvency is not a stand alone ground. It is relevant to test whether denial of debt is bonafide.

4. Where the debt is undisputed and the company does not choose to pay the particular debt, its defence that it has the ability to pay the debt will not be acted upon by the Court.

5. Where there is no dispute regarding the liability, but the dispute is confined only to the exact amount of the debt, the Court will make the winding up order.

6. An order to wind up a company is discretionary. Even in a case where the companys liability to pay the debt was proved, order to wind up the company is not automatic. The Court will consider the wishes of shareholders and creditors and it may attach greater weight to the views of the creditors.

7. A winding up order will not be made on a creditors petition if it would not benefit him or the companys creditors generally and the grounds furnished by the creditors opposing winding up will have an impact on the reasonableness of the case.

In the light of the settled legal principles, the endeavour of this Court must be to find out whether the debt claimed by the petitioner is a bonafide disputed debt or not and in this process this Court will not dwell into the intricate disputed questions of fact like a Civil Court exercising its jurisdiction in a suit filed for recovery of money. It is for this precise reason that the pleadings of the parties has been quoted in extenso.

31. The respondent has placed on record its balance-sheets as on 31.3.2006 from which it can safely be gathered that the Company was in a financially sound and in solvent condition. Therefore, the question would arise is as to whether the dispute between the parties is extant and not illusory. No doubt, numbers of e-mails and other correspondences have been exchanged between the parties, which would indicate that the petitioner had indeed raised a dispute with the respondent, but then the question arises as to whether the defense raised by the respondent is a bonafide one or not. After all, to raise a presumption of a company's inability to pay its debts it is not enough merely to show that the company had omitted to pay the debt despite service of statutory notice, it must be further shown that the company had omitted or neglected to pay without reasonable excuse and conditions of insolvency in the commercial sense exist.

32. While considering the issue of commercial solvency, the Hon'ble Supreme Court in **IBA Health (India)** Supra held that the examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bonafide dispute as to liability or whether it reflects an inability to pay, and in such a situation, solvency is relevant not as a separate ground. It was held as under:

> *"24. The appellant Company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay it debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.*
>
> *25. An examination of the company's solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the company's liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterised as a stand alone ground."*

33. It would be noticed here that the petitioner has neither made any averment nor has placed any document on record to demonstrate that the respondent is commercially insolvent. On the other hand, from the documents on record, it is evident that the respondent is a profit making solvent company and is in a position to meet its debt as and when it arises.

34. The Company Court exercises an equitable jurisdiction. It is well settled that a winding up petition is not legitimate means of seeking to enforce for payment of dues which is bonafidely disputed by the respondent.

35. The respondent-Company has clearly set out in their reply the reasons why the amount as claimed by the petitioner has not been paid to them and the contents thereof have already been reproduced (infra). The debt, therefore, is disputed and it cannot also be said that the respondent-Company has no genuine or substantial ground for refusal to pay or is unable to pay the same. The Company refusal to pay debt is as a result of bonafide

dispute. The dispute is substantial and genuine and cannot be termed to be spurious, speculative, illusory or misconceived.

36. In view of the preceding analysis, it is evident that the amount due in the instant case has not crystallized and there is a bonafide dispute with regard to liability of the respondent to pay the amount in question to the petitioner. The petitioner has also failed to prove that the respondent is insolvent in the commercial sense.

37. It is well settled that proceeding for winding up, is not a proceeding for the recovery of outstanding dues. Nor for that matter, can the remedy of a petition for winding up be utilized to pressure a company which is commercially solvent to pay a debt which is bonafide disputed.

38. For the reasons aforesaid, no case for winding up of the respondent is made out. In the result, the company petition fails and is hereby dismissed, so also the pending application(s) if any.

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

State of H.P. .....Appellant**.**
Versus
Kulbhushan Sood and others ...Respondents.

Cr. Appeal No.: 24 of 2012
Reserved on: 23.04.2015
Date of Decision : 07.05.2015

Prevention of Corruption Act, 1988- Section 13(2)- **Indian Penal Code, 1860-** Sections 467, 468, 471, 419, 420 and 120-B- a surprise checking of the record was conducted during which signatures on some of the forms were found to be forged- FIR was registered- SDM, Palampur initiated inquiry regarding the licence being forged by the accused- ADM, Kangra concluded that accused had forged the signatures- however, signatures on the forged licences, signatures of the accused and SDM were not sent for comparison- SDM admitted that accused used to bring licences in bulk and he used to sign them in bulk - hand-writing expert also found that licences were in hand-writing of the accused but this opinion is not sufficient as the hand-writing of the SDM was not sent for comparison- further, no evidence was led that applicant had paid the driving licence fee in excess of the prescribed fee, therefore, offence punishable under Section 13(2) of Prevention of Corruption Act, 1988 was not proved- held, that in these circumstances, acquittal of the accused was justified.

(Para-10 and 11)

For the Appellant: Mr. Ramesh Thakur, Asstt. A.G.
For the respondents: Mr. Adarsh Sharma, Advocate vice Mr. Ashok Sharma, Advocate, for respondent No.1.
Mr. Rajnish Maniktala, Advocate, for respondents No. 2 & 5.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

This appeal is directed against the judgement of acquittal rendered on 6.6.2011 by the learned Special Judge, Kangra at Dharamshala, H.P. in Corruption Case No. 4-P/2004 whereby he acquitted the respondents for theirs having committed offences punishable under Sections 467, 468, 471, 419, 420 and 120-B IPC and under Section 13(2) of the Prevention of Corruption Act, 1988.

2. The prosecution story, in brief, is that during the period July 2001 to January 2002, PW-50 Devesh Kumar was posted as SDM, Palampur and was incharge of license branch and at that time accused Kulbhushan was working as license clerk. It is alleged that in the month of January, 2002 PW-50 Devesh Kumar conducted a surprise checking of the record pertaining to the licenses and it was found that in some of the forms his signatures were found forged, regarding which he sent intimation to Deputy Commissioner, Kangra. Deputy Commissioner, Kangra, ordered for an inquiry into the matter and during inquiry PW-31 found that the licenses were not signed by the then SDM and forged signatures of SDM were on the licenses, about which PW-31 prepared his report and submitted the same to the Deputy Commissioner, Kangra, on which F.I.R. Ext.PW-49/A came to be registered. During investigation, the police impounded the record of the forged driving license from the SDM Office, Palampur. Some of the prosecution witnesses deposed during investigation that they had given money to accused Kulbhushan, which was in excess of the license fees and that the driving licenses after preparation were given to them by the accused. During investigation, accused Rameshwar Singh, Manager, Kundan Driving School, produced one register Ext.PW-43/A which was from November, 2001 to February 2002 which was impounded by the police vide memo Ext.PW-43/B. Accused Dinesh Awashti produced one diary to the police which was taken into possession vide seizure memo Ext.PW-47/A. Dr. Varinder Kumar, also produced one register of his clinic which was taken into possession vide memo Ext.PW-53/A. The specimen signatures for comparison of Devesh Kumar were taken before learned JMIC, Mandi and before the learned CJM, Hamirpur. I.O. during investigation took into possession some of the licenses and recorded the statements of the witnesses under Section 161 Cr.P.C. Dr. Meenakshi Mahajan, G.E.Q.D had examined the above questioned writings, specimen handwritings and admitted writings and given her report Ext.PW-58/B.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for theirs having committed offence punishable under Sections 467, 468, 471, 419, 420 and 120-B IPC and under Section 13 of the Prevention of Corruption Act, 1988. to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 61 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused were given an opportunity to adduce evidence in defence and they chose not to adduce any evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused/respondents.

6. The State of H.P. is aggrieved by the judgement of acquittal, recorded by the learned trial Court. Shri Ramesh Thakur, Assistant Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly an appropriate sentence be imposed upon the accused/respondents.

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

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

9. PW-50 the then SDM Palampur, Devesh Kumar, initiated an inquiry qua the factum of driving licenses issued to PWs being forged by accused Kulbhushan Sood. PW-31 the then ADM, Kangra, S.S.Guleria, was appointed an inquiry officer. He submitted his report PW-31/A wherein he concluded that the accused Kulbhushan Sood had forged the signatures of PW-50 on driving licenses Ext.PW-4/D, Ext.PW-5/E, Ext.PW-7/A, Ext.PW-10/A, Ext.PW-17/A, Ext.PW-18/A, Ext.PW-19/A, Ext.PW26/A, Ext.PW-34/A, Ext.PW-35/A, Ext.PW-37/F, Ext.PW-39/A, Ext.PW-42/D. However, the preliminary inquiry does not hold good nor conclusively determines the factum of the prosecution hence having been able to prove its case against the accused, especially when then the signatures existing on the purportedly forged driving licenses of the prosecution witnesses, as also of the accused besides of PW-50 were not sent for comparison to the handwriting expert for rendition of opinion qua the factum of the accused Kulbhushan having forged the signatures of PW-50. In sequel to the furnishing of report by PW-31 comprised in Ext.PW-31/A an F.I.R. was lodged against the accused persons. The accused Kulbushan was working as a license clerk in the office of PW-50, the then SDM Palampur and Motor Licensing Authority. PW-50 has deposed that accused Kulbhushan used to bring forms for preparation of license etc in bulk for signatures before him and he used to sign the licenses and forms in routine. Nonetheless, apart from offences of forgery attributed to Kulbhushan Sood, there is no depiction or disclosure in the deposition of the Investigating Officer of the driving license issued to the prosecution witnesses having not preceding their issuances to the prosecution witnesses undergone the enjoined processes of theirs having not come to be entered in the apposite register. Consequently, it can be with aplomb at this stage held that the accused Kulbhushan Sood did not present driving license before PW-50 without the necessary enjoined processes prior to their presentation before PW-50 having come to be completed or consummated.

10. In the month of January, 2002 when PW-50 conducted a surprise checking of the license register he found that in some of the forms his signatures did not exist and were forged qua which he sent intimation letter to Deputy Commissioner, Kangra. He disputed his signatures existing on the licenses of the prosecution witnesses. Though PW-58 has proved her opinion Ext.PW-58/B, underscoring the factum of the specimen handwritings of the accused Kulbhushan comprised in Ext.PW58/S-1 to Ext.PW58/S-18 on comparison with the questioned writings having been found to be in the handwritings of the accused, nonetheless the aforesaid opinion rendered by the hand writing expert is of no avail

to the prosecution in clinching the fact of the aforesaid accused having forged signatures of PW-50 on the license register as also on the driving licenses of PWs, especially when preponderantly the admitted handwritings of PW-50 the then Motor Licensing Authority were not sent for comparison with his purported disputed signatures existing on the license register or on the purported fake driving licenses held by the PWs. Hence, the deposition of PW-50 qua the factum of his having not signatured either the license register or the driving licenses cannot be construed to be truthful, besides even in the absence of the investigating officer having uncontrovertedly not sent the specimen handwritings of the accused alongwith the purportedly forged signatures of PW-50 existing on the driving licenses of the PWs or the ones existing on the driving license for their interse comparison for facilitating an opinion thereupon by the handwriting expert that hence the specimen handwritings of accused on being tallied with the disputed handwritings existing on both the driving licenses of the PWs and also those existing on the license register were similar, for as such constraining a conclusion that hence the accused Kulbhushan Sood had forged the signatures of PW-50 on both the license register and the driving licenses issued to PWs. Consequently, a sound and formidable conclusion, which is to be formed is that the prosecution has been unable to prove the factum of accused Kulbushan Sood having forged the signatures of PW-50 either on the license register or on the driving licenses issued to PWs. Even the opinion of the handwriting expert comprised in Ext.PW-58/B does connect the accused in his having forged the signatures of PW-50 on driving license application forms. The reason for so concluding is anvilled on the factum that the specimen handwritings of accused Kulbhushan had been collected during the investigation of the case and not during its trial and with the amendment to Section 311 Cr.P.C. whereby clause (A) had come to be introduced on the statute book in the year 2006 to the provisions of Section 311 Cr.P.C. which then alone facilitated the collection of the specimen handwritings of the accused during the investigation of the case and not earlier in the year 2002 when the case was investigated against the accused, renders the collection of the specimen handwritings and signatures of the accused during investigation of the case to be legally impermissible besides constitutes the opinion of the handwriting expert comprised in Ext.PW-58/B connecting the accused Kulbhushan Sood with his having forged the signatures of PW-50 on driving license application forms to be concomitantly not binding upon this Court. Provision, if any, which empowered the Court to render any conclusion on comparison of the specimen handwritings of the accused collected by it from the accused with his admitted handwritings qua the factum of accused Kulbhushan Sood hence having forged the signatures of PW-50 on driving license application forms existed in Section 73 of the Evidence Act. However, the said provisions have their application, only during the course of trial of the case. Nonetheless the said provisions were never resorted to by the learned Court. In aftermath, for reiteration the opinion of the handwriting expert comprised in Ext.PW-58/B connecting the accused Kulbhushan Sood in his having forged the signatures of PW-50 on the driving license forms are rendered to be acquiring no probative tenacity or force. Consequently, the opinion of the handwriting expert comprised in Ext.PW-58/B is not handy to the prosecution for succoring a conclusion qua the factum of accused Kulbhushan Sood having forged the signatures of PW-50 on driving license application forms.

11. Moreover, accused Kulbhushan Sood was charged for his having committed offence punishable under Section 13(2) of the Prevention of Corruption Act, 1988 inasmuch, as, in the face of the testimonies of the prosecution witnesses underlining the factum of theirs having paid the driving license fees to accused Kulbhushan Sood in excess of their mandatory obligation to do so, hence he is canvassed to be liable for conviction for committing an offence punishable under Section 13(2) of the Prevention of Corruption Act.

However, the license fee as purportedly received by him from the prosecution witnesses had come to be deposited by Kulbhushan Sood in the manner as ordained by law. Potent evidence ought to exist on record portraying the factum of the precise quantum of the license fees to be deposited by the PWs in the branch concerned, as a pre requisite process for theirs obtaining a driving license from the Motor Licensing Authority, Palampur, for rendering an apt and concomitant finding that the money, if any, constituting the license fee was purportedly in excess of the enjoined fee. Now when the license fees stood deposited in the branch concerned even though it was handed over to Kulbhushan Sood by the PWs, the factum of its deposit by Kulbhushan Sood in the branch concerned, as also the prosecution witnesses omitting to underline in their respective testimonies that the accused was demanding fees, purportedly in excess of the license fees, per se entwined with the factum that when they took to handover the cash to Kulbhushan Sood rather than depositing it with the branch concerned, renders an inference that except for the immunity granted to them under Section 24 of the Prevention of Corruption Act for theirs allegedly paying bribe to the accused, who is a public servant, they would have stood prosecuted for the offence constituted under Section 7 of the Prevention of Corruption Act for giving bribe and would have also rendered themselves punishable under Section 12 of the prevention of Corruption Act. Even if they enjoyed the immunity from Section 24 of the Prevention of Corruption Act against their prosecution yet their testimonies are fraught with discrepancies constituted in the fact that they omitted to at the time of handing over license fees in its purported excess to accused Kulbhushan Sood, which came to be deposited by Kulbhushan Sood in the branch concerned of the Motor Licensing Authority, reported the said fact to the authority concerned or rather when they remained reticent qua the aforesaid fact till the lodging of the F.I.R. qua the occurrence, renders their testimonies to be suspect qua accused Kulbhushan Sood having committed offence punishable under Section 13(2) of the Prevention of Corruption Act, 1988.

12 In so far accused Ajay Mehta is concerned, he is the proprietor of Kundan Driving School, Dharamshala. No specific evidence of probative worth has been brought by the prosecution portraying his connectivity or collusion with accused Kulbhushan Sood in the preparation of forged driving license especially when none of the witnesses deposed against the accused. Hence, his exculpation from guilt by the learned trial Court does not warrant any interference. Besides, accused Rameshwar Singh, who is the owner of Kundan Driving School at Dharamshala and whom PW-21 paid Rs.3000/- for his being imparted training in driving by accused Rameshwar Singh is alleged to have as connoted by the testimony of PW-21 to have obtained Rs.1500/- from him for his getting his driving license prepared. However, his testimony is vague qua the date and time on which he handed over the money to accused Rameshwar Singh as also qua the persons in whose presence such money was demanded and handed over to accused Rameshwar Singh, as such, with an imprecise occurrence in his deposition qua the date and time on which he handed over Rs.1500/- to accused Rameshwar Singh to get his driving license prepared renders the testimony of PW-21 while connoting a role to accused Rameshwar Singh of his having colluded with accused Kulbhushan Sood for the offences which the latter came to be charged, to be legally unworthwhile.

13. Accused Dinesh Kumar is a document writer and is alleged to be working as a middleman for accused Kulbhushan Sood. However, the investigating officer impounded his diary Ext.PW47/B. In it there is no portrayal of his having colluded or connived with accused Kulbhushan Sood and theirs having committed an offence for which the latter came to be charged. There has also been omission on the part of the prosecution to either collect

the opinion of the handwriting expert telling upon the factum of accused Dinesh Kumar having forged signatures of PW-50 on driving licenses as also on license register. As such, his role in the alleged commission of offence stands negated.

14. Lastly the only role which has been ascribed to Dr. Varinder Kumar is that of his having issued medical certificates. However, there has been no evidence on record by the prosecution underscoring the factum of his having played any role in the preparation of the purportedly forged licenses held by the PWs. Rather even the factum of his having issued medical certificate Ext.PW59/A to one of the prosecution witnesses perse would not render him liable inculpation for his having purportedly colluded or connived with other accused in the commission of offences attributed to other accused. Moreso when Ext.PW-59/A has not been proved by cogent evidence to be a forged medical certificate.

15. In view of the above discussion, the learned trial Court is to be concluded to have appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained.

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

Subhash Kumar .....Appellant/Defendant.

Versus

Mandra Devi (deceased) through L.R.s
Ujjagar Singh and others ..... Respondents/Plaintiff.

RSA No. 425 of 2001-E.
Judgment reserved on :01.05.2015.
Date of decision: May 7, 2015.

Indian Succession Act, 1925- Section 63- Plaintiff claimed that no Will was executed by her husband during his life time and the Will propounded by the defendant is invalid, inoperative and ineffective qua the rights of the plaintiff- wife and mother of the deceased were alive at the time of execution of the Will, however, no reference was made to them in the Will- there is no evidence to suggest that deceased did not have a cordial relation with his mother and wife, therefore, it is highly improbable that a person executing a Will in favour of third person, will not make a reference to his wife and mother at the time of execution of the Will- deprivation of the natural heirs is not a suspicious circumstance but in view of non-mentioning of the legal representative of the deceased, the Will is required to be seen with care and caution- propounder is required to prove that there was some reason for leaving aside his aged mother and wife- propounder had failed to prove that he attended to the deceased at the time of his illness and was with him in the hospital- mere registration of the Will does not dispense with the statutory requirement of proving the Will in accordance with law- where there are some suspicious circumstances, burden is upon the propounder to prove the due execution of the Will. (Para-16 to 18 and 25)

Indian Evidence Act, 1872- Section 50- Plaintiff was married to the deceased- plaintiff stated that marriage was witnessed by the respectables of the village- PW-3 deposed that marriage of the plaintiff and the deceased was solemnized in accordance with customary rites - statement was corroborated by PW-4 and PW-5- testimonies regarding the marriage

can be taken into consideration under Section 50 of Indian Evidence Act – held that it was duly proved that marriage of the plaintiff was solemnized with the deceased as per custom. (Para- 20 to 24)

Cases referred:
Shakuntala Devi versus Savitri Devi and others AIR 1997 HP 43
Pentakota Satyanarayana and others versus Pentakota Seetharatnam and others AIR 2005 SC 4362
Savithri and others versus Karthyayani Amma and others (2007) 11 SCC 621
Bharpur Singh and others versus Shamsher Singh (2009) 3 SCC 687
Gurpal Singh versus Darshan Singh 1998 (1) S.L.J. 174
Baru Ram and others versus Smt.Kishani Devi 1992 (1) Sim. L.C. 115
Babu Ram versus Shrimati Roshan Devi 1997(2) Current Law Journal (H.P.) 251
Balbir Singh versus Smt.Kaushalaya Devi (now deceased) through her L.R. Bakshi Ram 2000(1) Current Law Journal (H.P.) 240.

For the Appellant : Mr. Sanjeev Kuthiala, Advocate.
For the Respondents : Mr.Neeraj Gupta, Advocate, for respondent No.1(b).
Mr.Tara Singh Chauhan, Advocate, for respondents No.1(a), 1(c), 1(d), 1(g) and 1(h), except minors.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

The defendant is the appellant, who has lost in both the Courts below.

2. The predecessor-in-interest of the respondents, Mandra Devi, had filed a suit for declaration to the effect that she is owner in respect of estate of her husband namely Ramesh Chand which is fully detailed in the head note of the plaint. Ramesh Chand, husband of the plaintiff, died on 30.07.1983 and the plaintiff being the only legal heir is entitled to succeed the estate of her husband. It was alleged that the defendant is very head strong person and being influential in the locality managed to procure some forged document alleged to be the Will having been executed by deceased Ramesh Chand in his favour during his life. The alleged Will is invalid, inoperative and ineffective and has no bearing on the right, title or interest of the plaintiff over the suit land. It was further alleged that on the basis of the alleged Will the defendant has started extending threats to interfere over the suit land.

3. The suit was contested by the defendant by filing written statement wherein he raised preliminary objections that the plaintiff was neither widow of deceased Ramesh Chand nor his legal heir and thus had no concern with the suit property. On merits, it was admitted that Ramesh Chand son of Biru was owner of the suit land, but it was specifically denied that he was married to plaintiff. Ramesh Chand, infact, was unmarried and was living with the defendant. Since the plaintiff was neither the widow of Ramesh Chand nor his legal heir, therefore, the plaintiff was not entitled to the suit property. It was admitted by the defendant that Ramesh Chand died on 30.07.1983 and during his lifetime he bequeathed his entire property including the suit land in favour of the defendant vide

registered sale deed dated 25.07.1983. Lastly, it was alleged that the defendant is in possession of the suit property on the basis of the aforesaid Will.

4. Plaintiff filed replication whereby she reiterated and reaffirmed the averments made in the plaint and denied the averments made by the defendant in the written statement.

5. On the pleadings of the parties, the following issues were framed by the learned trial Court on 04.02.1985:-

1. Whether the plaintiff is the widow of deceased Ramesh Chand. If so, its effect? OPP
2. Whether the deceased Ramesh Chand executed a valid Will in favour of the defendant as alleged? OPD
3. Whether the plaintiff has cause of action? OPP.
4. Relief.

6. After recording the evidence and evaluating the same, the learned trial Court on 31.03.1994 decreed the suit filed by the plaintiff with costs. The appeal preferred against the judgment and decree by the appellant was dismissed. Aggrieved by the judgments and decrees passed by the learned Courts below, the appellant has filed the present appeal and this Court was pleased to admit the same on the following substantial question of law:-

> "Whether the learned Courts below have misread and misconstrued the oral and documentary evidence on record especially the statements of PW-2 Mandra Devi, PW-5 Surat Ram, PW-6 Ujjagar Singh, DW-1 Subhash Kumar, DW-3 Om Parkash, DW-4 Balak Ram (both marginal witnesses), Ex.D1 extract of family register, Ex.DX extract of pass book, Ex.DA extract of voter list and Ex.DW-2/A Registered Will dated 25-7-1997 (it should be 25.07.1983)?"

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

8. Shri Sanjeev Kuthiala, learned counsel for the appellant has strenuously argued that the Will Ex.DW-2/A has been duly executed in accordance with the requirements of law. He further contended that once the appellant had proved the due execution of the Will, then the onus shifted on the plaintiff/respondent to prove by cogent and reliable evidence that the Will is shrouded with suspicious circumstances. He further contended that merely because there is no recital in the Will regarding disinheritance of the plaintiff, who was not even the wife of the deceased Ramesh Chand and the mother of Ramesh Chand namely Durgi Devi admittedly who was alive at that time would not in any manner prove that the Will in question was a fake document. After-all, the entire purpose of executing the Will was to disinherit the natural heirs. The learned counsel for the appellant would further contend that the learned Courts below have failed to take into consideration the oral and documentary evidence available on record and thereby reached a wrong conclusion.

9. The learned counsel for the appellant has drawn the attention of this Court to various judgments wherein it has been held that debarring natural successors should not raise any suspicion. Reliance has been placed upon the judgment of this Court in ***Shakuntala Devi*** *versus* ***Savitri Devi and others AIR 1997 HP 43***, wherein it was held

that merely because certain natural heirs had been excluded would not be a suspicious circumstance because the whole idea behind making a Will is to interfere in normal line of succession. The relevant paras read thus:-

> *"25. The Hon'ble Supreme Court in Smt. Sushila Devi v. Pandit Krishna Kumar Missir, AIR 1971 SC 2236, has held that prima facie, the circumstance that no bequest was made to the natural heir(s) by the testator would make the will appear unnatural, but if the execution of the Will is satisfactorily proved, the fact that the testator had not bequeathed any property to one of his children cannot make the Will invalid."*
>
> *26. Again, in Rabindra Nath Mukherjee v. Panchanan Benerjee (dead) by LRs., (1995) 4 SCC 459: (AIR 1995 SC 1684), it has been held by the Hon'ble Apex Court that deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of will; of course, it may be that in some cases they are fully debarred and in others only partially. The Hon'ble Apex Court in the said case, where the will was executed by the testator in favour of the sons of a half-blood brother by excluding the descendants of a full blood sister, held the Will to be valid and that disinheritance of the descendants of a full blood sister could not have been taken as a suspicious circumstances."*

10. It would be seen that this Court in ***Shakuntala Devi's case*** *(supra)* has only followed what the Hon'ble Supreme Court had held in ***Sushila Devi and Rabindra Nath Mukherjee's*** cases. To similar effect is the judgment of the Hon'ble Supreme Court in ***Pentakota Satyanarayana and others*** *versus* ***Pentakota Seetharatnam and others AIR 2005 SC 4362*** and judgment of the Hon'ble Supreme Court in ***Savithri and others*** *versus* ***Karthyayani Amma and others (2007) 11 SCC 621***, wherein again it has been held that mere exclusion of natural heirs would not in itself be a suspicious circumstance.

11. The learned counsel for the appellant has though relied upon the judgment of Hon'ble Supreme Court in ***Bharpur Singh and others*** *versus* ***Shamsher Singh (2009) 3 SCC 687***, but the ratio thereof as would be discussed later goes against the appellant.

12. The learned counsel for the appellant further relied upon a judgment of learned single Judge of Punjab and Haryana High Court in ***Gurpal Singh*** *versus* ***Darshan Singh 1998 (1) S.L.J. 174***, wherein it was held that registered Will raises a presumption of the Will having been executed in a sound disposing mind, especially, when there is no evidence to show that at the time of execution of the Will the testator was suffering from any mental ailment or other disability or was incapable of making disposition.

13. On the other hand, Shri Neeraj Gupta, learned counsel for the respondent No.1(b) has vehemently argued that registration of a Will in itself does not raise any presumption of the genuineness of the Will and has relied upon the following observations from judgment rendered by this Court in ***Baru Ram and others*** *versus* ***Smt.Kishani Devi 1992 (1) Sim. L.C. 115***.

> *"5. Sh. K.D.Sood, learned Counsel for Sh. Baru Ram and others, has urged that since the will was registered, presumption of its correctness and genuineness arises in the facts and circumstances of the present case. This argument deserves to be rejected outrightly in view of the law laid down in*

Gopal Das and another v. Sri Thakurji and others, AIR 1943 Privy Council 83, that even after the endorsement of Registrar made under section 60(2) of the Registration Act is proved, it remains to be shown that the person admitting execution before the Registrar was Balandu. The registration of the will does not create any presumption of its genuineness, which is to be proved independently and statement of the Registrar is only a piece of evidence which is to be assessed to Judge how far it proves that the execution of will is in accordance with section 63 of Indian Succession Act. It is to be kept in mind that the Registrar cannot be statutory attesting witness. (Please refer to Karri Nookaraju v. Putra Ventataro and others, AIR 1974 And Pra 13; In the Goods of Late Shri C.Rai, Barrister-at-law, 1980 RLR 346, Punjab and Haryana High Court; Labh Singh and others v.Piara Singh (deceased) by L.Rs)and another, AIR 1984 P & H 270 and Dharam Singh v.A.S.O. and another, 1990 (Supp) SCC 684."

14. He has further argued that once the two Courts below have concurrently on a question of fact regarding the execution of the Will held against the appellant, then these findings cannot be challenged and interfered with in the present second appeal. In support of his submission, he has relied upon a judgment of this Court in ***Babu Ram*** *versus* ***Shrimati Roshan Devi 1997(2) Current Law Journal (H.P.) 251*** wherein it was held as under:-

"*10. The learned counsel for the defendant at the very outset has raised a preliminary objection that the concurrent findings of the two courts below on a question of fact regarding the execution of a Will cannot be challenged and interfered with in the present Second Appeal.*

11. In Ladli Parshad Jaiswal v. The Karnal Distillery Co. 1, Ltd. Karnal & Ors., AIR 1963 SC 1279, it was held that whether a particular transaction was vitiated, on the ground of undue influence, is primarily a decision on the question of fact and that the High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact howsoever gross or in executable the error may seem to be.

12. In Ramanuja Naidu v. V. Kanniah Naidu & Anr., JT 1996(3) SC 164, the question of genuineness of a sale -deed was involved. The trial Court and the first appellate court had upheld the genuineness of the sale -deed. The High Court in second appeal had set aside the concurrent findings of the two courts below as to the genuineness of the sale-deed. On further appeal before the Apex court, it was held:

".....The concurrent findings of the courts below that Ex.B-2, sale deed in favour of the first defendant is earlier in point of time and was genuine and valid is a finding of fact. Such a finding was not open to any challenge in Second Appeal. The learned single Judge of the High Court totally misconceived his jurisdiction in deciding the second appeal under Section 100 of the Code of Civil Procedure in the way he did. No question of law arose for consideration before the learned single Judge. The sole question that arose for consideration was, whether Ex.B-2, sale deed, in favour of the first defendant dated

5.5.1967, which is admittedly earlier in point of time to Ex.A-1 dated 5.6.1967, in favour of the plaintiff is genuine and valid ..."

13. The Apex court further held that in interfering with the concurrent findings of fact of the lower courts, the High Court acted in excess of the jurisdiction vested in it, under Section 100, Code of Civil Procedure. The High Court totally erred in its approach to the entire question, and in reappraising and reappreciating the entire evidence, and in considering the probabilities of the case, to hold that the judgments of the courts below were perverse and that the plaintiff was not entitled to the declaration of title to suit property and recovery of possession."

15. To similar effect is the judgment of this Court in ***Balbir Singh*** *versus* ***Smt.Kaushalaya Devi (now deceased) through her L.R. Bakshi Ram 2000(1) Current Law Journal (H.P.) 240***.

16. It is more than settled that the onus to prove the Will lies upon the propounder. The learned Courts below have concurrently found that at the time of execution of the Will Ex.DW-2/A, not only Mandra Devi wife of Ramesh Chand, but even his mother Durgi Devi was very much alive. If that be so, atleast a reference qua them ordinarily and in normal course would have been made in the Will. This assumes greater importance because there is nothing on the record to suggest that the deceased Ramesh Chand prior to his death was not having cordial relations with his mother or wife. Therefore, in such circumstances, the learned Courts below have rightly concluded that it is highly improbable that an ordinary man at the time of execution of the Will in favour of a person, who is not even related to him, would not make reference regarding his legal heirs, particularly, his wife and mother.

17. Undoubtedly, mere deprivation of the natural heirs in itself may not raise any suspicion but then this contention has to be appreciated in the peculiar facts and circumstances of each case. Why would anyone execute a Will in favour of a person, who is not even related to him, when his mother and wife with whom he is sharing cordial relations are alive and living with him? This fact is further required to be viewed with suspicion when the appellant has failed to lead clear, cogent and convincing evidence that he had served Ramesh Chand during his lifetime. The appellant was further required to prove that there were special reasons why Ramesh Chand leaving aside his aged mother and wife executed a Will in his favour.

18. The appellant has tried to prove that he was looking after deceased Ramesh Chand during his lifetime and had got him admitted at T.B. Hospital, Tanda and spent money on his treatment, but he has failed to prove any record in support of his claim. Shri Balwant Singh from Tanda Hospital was though examined as DW-5, who in his statement has stated that the name of the attendant, who was accompanying the patient from 12.05.1980 to 27.05.1980 is mentioned in the record Ex.DW5/A. But, then a perusal of this document shows that it does not indicate that some attendant or atleast the appellant was infact accompanying Ramesh Chand at that time.

19. The learned counsel for the appellant would further argue that Mandra Devi was not the wife of Ramesh Chand. He has further contended that in the family register Ex.D1 pertaining to the year 1983 to 1990 relating to the family of Ramesh Chand, the plaintiff Mandra Devi has been shown as daughter of Balandu Ram aged about 24 years.

This extract of family register pertains to the village of the plaintiff prior to her marriage. The learned counsel for the appellant has thereafter drawn the attention of this Court to Ex.DX wherein Mandra Devi has been shown to be the wife of one Harmesh Chand and would contend that it has not been proved on record as to whether Harmesh was also known by the name of Ramesh Chand. He would further argue that in the voter list Ex.DA, Mandra Devi has been shown to be the wife of one Sadhu Ram at Serial No.546.

20. However, the learned counsel for the respondents, on the other hand, would argue that as per the statement of Bal Krishan, Election Kanungo, in the voter list at Serial No.833, Ramesh Chand son of Biru is shown to be married and the name of his wife has been reflected as Sundri. Since Ramesh Chand was not having any wife except the plaintiff, hence, this entry pertains to the plaintiff only. Regarding marriage between the plaintiff and deceased Ramesh Chand, he further made reference to the statement of PW-2 Mandra Devi herself, who stated that she had been married to Ramesh Chand and this marriage had been witnessed by the respectable of the village.

21. The learned counsel for the respondents also invited my attention to the statement of PW-3 Jeet Singh, who has stated that plaintiff was married to Ramesh Chand, son of Biru and he had also participated in the marriage which was solemnized about 26-27 years ago. Jeet Singh further deposed that the marriage was solemnized in accordance with the customary rites. This statement is corroborated and supported by PW-4 Surat Ram, who is uncle of the plaintiff. This witness has deposed that marriage was solemnized in accordance with the customary rites. PW-5 Ujjagar Singh is from the family of deceased Ramesh Chand and father of Ramesh Chand namely Biru was grandfather of this witness. He has deposed that Ramesh Chand was his uncle and had solemnized marriage with the plaintiff at Indora and since then Mandra Devi and Ramesh Chand had been living together as husband and wife.

22. At this stage, it may be noticed that the learned lower appellate Court has rightly invoked the provisions of Section 50 of the Evidence Act to conclude that the plaintiff was married to deceased Ramesh Chand. Section 50 of the Evidence Act reads as follows:-

> *"50. Opinion on relationship, when relevant.- When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:*
>
> *Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecution under sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860)."*

23. Now, once the plaintiff alongwith other respectable persons from her as well as her husband's relations have stepped into the witness box and stated regarding the marriage of the plaintiff and Ramesh Chand and they have further stated that they had participated in the marriage or had seen solemnization of marriage was a relevant factor and could, therefore, be taken into consideration. Statements of Jeet Singh PW-3, who belongs to the village of Ramesh Chand, PW-4 Surat Ram, who is uncle of the plaintiff, PW-5 Ujjagar Singh, who is the nephew of Ramesh Chand, are very relevant. As discussed above, these witnesses have clearly stated that marriage between Ramesh Chand and the plaintiff was solemnized in accordance with customary rites.

24. The learned Courts below have concurrently found Mandra Devi to be the wife of deceased Ramesh Chand and such finding being a finding of fact is not open to challenge. Moreover, the appellant has no locus-standi to challenge her status, particularly, when he has failed to prove on record the so-called Will and also the fact that he had served Ramesh Chand during his lifetime. Suffice it to say that the learned Courts below have correctly appreciated the statements of Bal Krishan, Election Kanungo, PW-2 Mandra Devi, PW-3 Jeet Singh and PW-4 Surat Ram and PW-5 Ujjagar Singh and after evaluating their statements have come to the firm conclusion that Mandra Devi was the wife of deceased Ramesh Chand.

25. The appellant has vehemently argued that the deceased had executed a registered Will in his favour and, therefore, greater weight as to the presumption of its genuineness should be attached to the same. In ***Bharpur Singh's case*** (supra), it was categorically held by the Hon'ble Supreme Court that it may be true that the Will was registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with. In terms of Section 63(c), Succession Act, 1925 and Section 68, Evidence Act, 1872, the propounder of the Will must prove its execution by examining one or more attesting witnesses. It was further held that when the Will is surrounded with suspicious circumstances, it would not be treated as the last testamentary disposition of the testator, its proof ceases to be a simple lis between the plaintiff and the defendant and adversarial proceeding in the case becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that the Will was duly executed by the testator wherefor cogent and convincing explanation of suspicious circumstances shrouding the making of Will must be offered.

26. The concurrent findings recorded by both the Courts below are in the realm of appreciation. They are pure findings of fact and these findings are properly and reasonably arrived at. No perversity could be pointed out. Second appeal is limited to substantial question of law and cannot be converted into a third innings of fact. The substantial question of law is accordingly answered against the appellant.

27. In view of aforesaid discussion, I find no merit in this appeal and accordingly the same is dismissed. Pending application, if any, also stands disposed of. The parties are left to bear their own costs.

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

Vipin Sharma & anr. ..... Petitioners.

Vs.

Punjab State Electricity Board & anr. ..... Respondent

Civil Revision No. 12 of 2015.
Date of decision: 7.5.2015.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Petitioner was held to be in arrears of rent to the extent of Rs. 20 lakh - amount was not deposited by the petitioner within 30 days of the order- held, that Court does not have power to extend time to deposit arrears of rent beyond the period of 30 days. (Para-4 to 8)

Cases referred:
Krishan Murari vs. Amar Dutt Sharma 1994 (Suppl.) Sim. L.C. 242
Ram Niwas vs. Rajinder Prasad 1996 (1) RCR 427
Bilasi Ram vs. Bhanumagi 2007 (1) Shim. LC 88
Rewat Ram vs. Ashok Kumar and others 2011 (Supp) Him L.R. 1580,
Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh (2014) 9 SCC 78

For the petitioners : Mr. Neel Kamal Sood, Advocate.
For the respondents : Mr. Anand Sharma, Advocate with Mr. Jagan Nath, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J. (Oral).

The petitioner is a tenant, who has suffered an eviction order passed by the learned Rent Controller, Jogindernagar, which in turn has been affirmed by the appellate authority holding the petitioner to be arrears of rent of more than Rs.20,00,000/- (twenty lacs) as on the date of eviction.

2. Sh. Neel Kamal Sood, learned counsel for the petitioners has strenuously argued that order passed by the learned Rent Controller is based on surmises and conjectures and that the learned Rent Controller had not correctly calculated the amount in question.

On the other hand Sh. Anand Sharma, learned counsel for the respondents has supported the order of eviction passed by the learned Rent Controller and has argued that this court would have no jurisdiction to extend the time period for deposit of arrears of rent, even if the petitioner is now ready and willing to deposit the amount.

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

3. Indisputably even as on date the entire arrears of rent as determined by the learned Rent Controller have not been tendered/ paid by the petitioner. However, learned counsel for the petitioner states that his clients are ready to deposit the arrears in instalments. Therefore, in this background one of the questions which requires to be determined is as to whether this court, under section 14 of H.P. Urban Rent Control Act, 1987 (hereinafter referred to as the Act) can enlarge the period of deposit of arrears beyond the statutory period of 30 days from the order of eviction as passed by the learned Rent Controller.

4. This question is no longer *res integra* in view of numerous judgements of this court, some of which are being noticed below.

5. In **Krishan Murari** vs. **Amar Dutt Sharma 1994 (Suppl.) Sim. L.C. 242,** this court has held as follows:-

> "12. Tenant in the aforesaid provisions has been afforded two opportunities to be availed of by him in order to avoid his eviction on the ground of non-payment of arrears of rent. The first and Second proviso referred to above deal with first opportunity which the tenant can avail in

order to avoid eviction order. In this regard third proviso contains the second opportunity.

13. It has been contended on behalf of the landlord-respondent that third proviso only gives to a tenant thirty days from the order of the Controller alone to deposit the amount due and not otherwise. It has been contended on behalf of the tenant that in case Controller dis-allowed the eviction petition and the lower Appellate Authority accepts the same on the ground of non-payment of arrears of rent, time for depositing the arrears of rent and other amounts, thirty days time limit would start from the date of the order passed by the lower Appellate Authority and not from the order of Controller.

14. Insofar as, third proviso is concerned it clearly makes out that where the Controller has made an order for eviction on the ground of non payment of arrears of rent, due from him, in that event, tenant shall not be evicted as a result of his order (i. e. order of eviction passed by the Rent Controller), if the tenant pays the amount due within a period of 30 days from the date of order. This proviso clearly speaks regarding the order of eviction passed by the Controller, but this provision is not to be read in isolation. There may be a case as submitted by the learned Counsel for the tenant-petitioner that Controller has dis-allowed eviction petition on the ground of non-payment of arrears of rent but the same has been allowed by the lower Appellate Authority and in case third proviso deals with order of Controller alone, it will not at all serve the purpose and intention of the Act insofar as the order of eviction passed upon arrears of rent due is to be made and complied with.

15. At this stage, sections 24 (4) and (5) of the Act can safely be referred which runs as under :-

> "Section 24 (4) The decision of the Appellate Authority and subject only to such decision, an order, of the Controller shall be final and shall not be liable to be called in question in any court of Jaw except as provided in sub-section (5) of this section.
>
> Section 24 (5), The High Court may at any time, on the application' of any aggrieved party or on its own motion call for and examine the records relating to any order passed or proceedings taken under this Act for the purpose of satisfying itself as to the legality or propriety of such order or proceedings and may pass such order in relation thereto as it may deem fit."

16. Section 24 deals with Power of the State Government for conferring powers of Appellate Authority for the purposes of the Act and also deals with right of the party to file an appeal assailing the order of the Controller passed for recovery of possession etc The aforesaid provision of law makes it very clear that the decision of the Appellate Authority and subject only to such decision, an order, of the Controller shall b; final and shall not be liable to be called in question in any court of law except as provided in sub-section (5) of this section. This provision only means that insofar as the order of Controller, is concerned it would remain final subject to variations made to such an order by the Appellate Authority in an appeal preferred before this

Authority or subject to revisional powers of the High Court as provided under sub-section (5) above.

17. These provisions clearly reflected that in case Rent Controller has dis-allowed the petition and the Appellate Authority has accepted the eviction petition on the ground of non-payment of arrears of rent, tenant could legally avoid eviction order in case tenant deposits the arrears of rent etc. within thirty days from the passing of the order by the Appellate Authority and in case Rent Controller and lower Appellate Authority have both disallowed the eviction petition, and the High Court in revision passed eviction order, in that event, thirty days period for depositing rent would start from the date of passing of the eviction order by the High Court.

18. In the present case, Rent Controller passed eviction order on 25-11-1993, which order of eviction was maintained by the lower Appellate Authority, though amount due was varied. It may be very specifically referred here that admittedly the amount due was not deposited by the tenant within thirty days from the passing of the eviction order by the Rent Controller on 25-11-1993 The eviction order has been maintained uptil High Court though the amount due as observed by the Appellate Authority was maintained by the High Court also. It is not a case where the Rent Controller dis-allowed the petition and the lower Appellate Authority allowed the eviction petition on the ground of non-payment of arrears of rent but it is otherwise. Order of eviction passed by the Rent Controller was assailed before the Appellate Authority, was not at all stayed by the lower Appellate Authority, otherwise if it had been stayed insofar as depositing of amount due within thirty days from the order of Rent Controller was concerned, this statutory period could not have been enlarged by any authority whatsoever. The tenant selected not to deposit the amount due as ordered by the Rent Controller within 30 days of the passing of the order. The risk was his and he assailed the order of eviction before the lower Appellate Authority. On the basis of the grounds taken by him, entire order passed by the Rent Controller, could have been set aside and in that event tenant could have got the benefit but the risk taken by him was not successful. He avoided to comply with the directions of the Rent Controller to deposit the amount within thirty days He has to bear all the legal consequences for not complying with that order.

19. At this stage, some decided case law can safely be referred.

20. In 1994 Supp (1) SCC 437, Madan Mohan and another v. Krishan Kumar Sood, it has been held that the Rent Control Acts are necessary social measures for protection of tenants, and the Rent Control laws have tried to balance the equity. Their Lordships observed that landlord is duty bound to satisfy the ground of eviction mentioned in various Rent Acts and if he does not satisfy, he cannot get the order of eviction merely because the Act restricts his rights, but there are certain Rent Acts which, even when a ground of eviction is satisfied, still confer powers on the Rent Controllers to consider the question of comparative hardship and it is only in those types of cases, if the Controller is satisfied, he can decline passing orders of eviction. But if there is no such limitations, the Rent Controllers, after the ground of eviction specified in the Act is made out, have no discretion to reject the

application. It was further observed that once the order of eviction is passed, the executing court is duty bound to execute its orders. No question of equity or hardship arises at this stage.

21. Their Lordships further observed taking note of the facts of the case that in the present case, the tenant spared no efforts to harass the landlords and after the order of eviction, the tenant again failed to pay the rent and the landlord was forced to file another eviction petition on the ground of non-payment of arrears of rent and it was only after the filing of the said eviction petition and in order to avoid eviction he deposited the rent. The matter did not rest there even and it was only after the notice of the special leave petition was issued in the present case that the tenant chose to pay the rent after keeping it in arrears for practically six years and under the circumstances, Supreme Court's interference under Article 136 is called for.

22. It was further held that in view of the aforesaid facts and circumstances of the case, impugned order of the High Court dated May 17, 1991 and the order of the Rent Controller dated May 18, 1990 were set aside and the Rent Controller was directed to issue warrants of possession for ejectment of the respondent from the premises in dispute and place the landlords/appellants in possession. The apex Court held that order being not without jurisdiction, right or wrong, executing court had not to go behind its own order and grant extension of time.

23. In ILR (Himachal Series) (1982) p 279, in M/s. K. N. Trading Company v. Masonic Fraternity of Simla, following observations of this Court would be very much relevant:

> "Section 14. This section (section 14) gives various opportunities to a tenant to pay the arrears of rent. The second proviso gives a last chance to the tenant to pay up the amount due from him. This he can avail even after the order of eviction has been passed. The period during which be can deposit the dues is fixed. It is 30 days from the date of the order. He can save the eviction only if he pays the amount due within the prescribed period in terms of the aforementioned proviso. This period can neither be enlarged nor abridged by the court. There is no provision for condonation of the delay in depositing the rent. Since the time is fixed by law there is no question of anyone misleading the tenant about the same."

24. Earlier decision of this very court in Krishan Kumar v. Gurbax Singh, 1977 (2) RCR 62, was also taken note of while disposing of the aforesaid proposition of law. In Krishan Kumar's case {supra) this court held:

> "It is apparent that the statute itself provides a period of 30 days from the date of the order for payment of rental arrears by the tenant. On such payment, the statute declares, effect will not be given to the order of eviction. The statute does not leave the determination of the period to the Rent Controller. It is ' not open to the Rent Controller when, disposing of the petition for eviction, to make an order either abridging or enlarging the period of 30 days

Indeed, the period having being determined by the statute itself, no order was necessary by the Rent Controller."

25. In M/s. K. N. Trading Company v. Masonic Fraternity of Simla, referred to above, facts appear to be of identical nature as in the present case. However, in the reported case, even there was a stay order passed by the Appellate Authority against the order of eviction of the Controller, but inspite of that it was held that period of 30 days would start from the passing of the eviction order passed by the Controller.

26. The aforesaid citations clearly established that the date when eviction order was passed by Rent Controller on the basis of arrears of rent, would be the date to be taken note of for depositing the amount due by the tenant within 30 days and not from the date of the order passed by the Appellate Authority or by the High Court where the eviction order had been maintained, as passed by the Controller.

27. In the present case, the tenant if so advised could have deposited the amount due as arrived by the Rent Controller within thirty days from the date of passing of the order by Rent Controller and in case, as has happened in the present case, the amount being varied by the higher authority it could have been permitted to be withdrawn by the tenant but the original amount required to be deposited could not have been under the provisions of the Act deferred for a period not allowed by the statute."

6. The matter was again considered by this court in **Ram Niwas** vs. **Rajinder Prasad 1996 (1) RCR 427,** wherein the aforesaid proposition was reiterated and it was held that period of 30 days provided under the Act for the deposit of arrears of rent cannot be extended.

7. Yet again when the matter came up before this court in **Bilasi Ram** vs. **Bhanumagi 2007 (1) Shim. LC 88,** it was held as follows:-

"3. Third proviso to clause (i) of sub-section (2) of Section 14 of the H.P. Rent Control Act, 1987 clearly enjoins upon the tenant against whom the Rent Controller has made an order for eviction on the ground of nonpayment of rent due from him, the statutory duty to pay the amount due within a period of 30 days from the date of order.

4. By now it is well established, in the light of the authoritative pronouncements by a Full Bench of this Court in the case of Wazir Chand v. Ambaka Rani and another, reported in 2005 (2) Shim. L.C. 498, based upon and in the light of the ratio in the case of Madam Mohan and another v. Krishan Kumar Sood, reported in 1994 Supp (1) Supreme Court Cases 437, that the expression "amount due" occurring in the aforesaid third; proviso includes the arrears of rent, the interest thereupon @ 9% per annum and the amount of costs. It is also a well settled proposition of law by now that if the tenant fails to deposit the amount due within a period of 30 days from the date of the order, the only option available in law is to enforce the eviction order. Whether the shortfall is Re. 1/- or the shortfall is more than Re. 1/- if there is any shortfall in the deposit of the amount the eviction order has to be executed, because by not depositing the amount due in its entirety, the

tenant forfeits the concession granted to him under the aforesaid third proviso and the only option thereafter is to execute the eviction order.

5. While interpreting the aforesaid third proviso in the light of the fact situation that there occurred a shortfall, howsoever small, in the matter of deposit of the amount due, the Court cannot take into consideration either any extenuating circumstance or any circumstance based upon leniency or amplitude or any other circumstance-which may be based upon or linked with any compelling reason or reasons of difficulty or discomfiture. If there is a shortfall with respect to the deposit of the amount due within a period of 30 days or if the amount due has not been deposited within the aforesaid period of 30 days and even if the deposit is late by one day, concession granted under the aforesaid third proviso immediately goes away. There is no escape to that."

8. The third proviso to clause (1) of sub-section (2) of section 14 of the Act was yet again a subject matter of discussion by this court in **Rewat Ram** vs. **Ashok Kumar and others 2011 (Supp) Him L.R. 1580,** wherein after analyzing the entire provisions of the Rent Act, it was held as follows:-

"5. Section 14(1) and 14(2)(i) of the H.P. Urban Rent Control Act read as follows:-

"Section 14(1) A tenant in possession of a building or rented land shall not be evicted there from in execution of a decree passed before or after the commencement of this Act or otherwise, whether before or after the termination of the tenancy, except in accordance with the provisions of this Act.

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant is satisfied-

(i) that the tenant has not paid or tendered the rent due from him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement by the last day of the month next following that for which the rent is payable:

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at the rate of 9% per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have dully paid or tendered the rent within the time aforesaid;

Provided further that if the arrears pertain to the period prior to the appointed ay, the rate of interest shall be calculated at the rate of 6% per annum:

Provided further that the tenant against whom the Controller has made an order for eviction on the ground of non payment of rent due from him, shall not be evicted as a result of his order, if the tenant

pays the amount due within a period of 30 days from the date of the order; or"

6. A bare reading of this provision clearly shows that a landlord can apply for eviction of a tenant in case the tenant has not paid or tendered the rent due from him in respect of the rented premises within the stipulated time. Since the Rent Control legislation is in the nature of a legislation to protect the tenant, the legislature in its wisdom included a proviso that if the tenant on the first hearing of the application for ejectment pays or tenders the arrears of rent alongwith interest @ 9% per annum alongwith the costs assessed by the Rent Controller, the tenant shall be deemed to have duly paid or tendered the rent within time and therefore no order of eviction can be passed.

7. We are not concerned with the second proviso since admittedly the arrears relate to the period after the appointed day i.e. 18th August, 1997 and all the arrears which are subject matter of this petition fell due after the said date.

8. By the third proviso to this sub section the legislature gave another protection to the tenant. Even after the order of eviction is passed the tenant can avoid being affected if he pays or deposits the arrears of rent alongwith interest @ 9% per annum alongwith costs of the petition as assessed by the Rent Controller.

9. These provisions have come up for consideration in a number of cases. A Division Bench of this Court in Om Parkash vs. Sarla Kumari and others, 1991(1) Sim. LC 45, held that the "amount due" in the third proviso is only the arrears of rent and not interest. This judgement of the Division Bench was overruled by the Apex Court in Madan Mohan and another vs. Krishan Kumar Sood, 1994 Supp(1) SCC 437, wherein the Apex Court held as follows:-

> "12. A reading of the aforesaid relevant part of the section shows that sub-section (1) of Section 14 creates a ban against the eviction of a tenant except in accordance with the provisions of the Act. The ban is liable to be lifted. Sub-section (2) of Section 14 provides the circumstances in which the ban is partially lifted. It contemplates that where an eviction petition is filed, inter alia, on the ground of non-payment of rent by the landlord, the Controller has to be satisfied that the tenant has neither paid nor tendered the rent in the circumstances mentioned in clause (i) of sub Section (2) of Section 14. He has to arrive at this satisfaction after giving a reasonable opportunity of showing cause against it to the tenant. But there may be cases where the tenant, on being given notice of such an application for eviction, may like to contest or not to contest the application. The tenant is given the first chance to save himself from eviction as provided in the first proviso to clause (i) of sub-section (2) of Section 14. This first proviso contemplates that the tenant may on the first hearing of the application for ejectment pay or tender in court the rent and interest at the rate mentioned in the proviso on

such arrears together with the cost of application assessed by the Controller and in that case the tenant is deemed to have duly paid or tendered the rent within the time as contemplated by clause (i) of sub section (2) of Section 14. Where the tenant does not avail of this opportunity of depositing as contemplated by the first proviso and waits for an ultimate decision of the application for eviction on the ground of non-payment of rent, the Controller has to decide it and while deciding, the Controller has to find whether the ground contained in clause (i) of sub-section (2) of Section 14 has been made out or not. If the Controller finds that the ground as contemplated by clause (i) of sub-section (2) of Section 14 is made out, he is required to pass an order of eviction on the ground of non-payment of rent due from him. A second opportunity to avoid eviction is provided by the third proviso to clause (i) of sub section (2) of Section 14. But the second opportunity is provided after the order of eviction. The benefit of avoiding eviction arises if the tenant pays the "amount due" within the period of 30 days of the date of order.

13. The question is what is the meaning of the words "amount due" occuring in the third proviso to clause (i) of sub-section (2) of Section 14 of the Act.

14. It will be noticed that there is no provision in the Act for giving powers to the Controller to direct payment or deposit of 'pendente lite' rent for each month during the pendency of the petition for eviction of the tenant. First proviso to sub-section (2) of Section 14 shows that in order to show payment or valid tender as contemplated by clause (i) of Ss. (2) of Section 14 by a tenant in default, he has to pay on the first date of hearing the arrears of rent along with interest and costs of the application which are to be assessed by the Controller. Surely where a tenant does not avail of the first opportunity and contests the eviction petition on the ground of non-payment of arrears of rent and fails to show that he was not in default and court finds that the ground has been made out, an order of eviction has to follow. Therefore, it does not stand to reason that such a tenant who contests a claim and fails to avoid order of eviction can still avoid it by merely paying the rent due till the date of the filing of the application for ejectment. The third proviso to clause (i) of Ss. (2) of Section 14 should also receive an interpretation which will safeguard the rights of both the landlord and tenant. The "amount due" occurring in the third proviso in the context will mean the amount due on and up to the date of the order of eviction. It will take into account not merely the arrears of rent which gave cause of action to file a petition for eviction but also include the rent which accumulated during the pendency of eviction petition as well. If the tenant has been paying the rent during the pendency of the eviction petition to the landlord, the "amount due" will be only arrears which have not been paid. The landlord, as per the scheme of the section, cannot be worse off vis-a-vis a tenant who was good enough to deposit in court the arrears of rent together with interest and costs

> on the first date of hearing. If the interpretation given by the High court is accepted the result would be that the tenant will be better off by avoiding to pay the arrears of rent with interest and costs on the first date of hearing and prefer suffering order of ejectment after contest and then merely offer the amount due as mentioned in the application for ejectment to avoid eviction. This could not be the intention of the legislature.
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> 15. In such cases it will be advisable if the Controller while passing the order of eviction on the ground specified in clause (0 of Ss. (2 of Section 14 of the Act specifies the "amount due" till the date of the order and not merely leave it to the parties to contest it after passing of the order of eviction as to what was the amount due.
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> 16. Surely the Rent Control Acts, no doubt, are measures to protect tenants from eviction except on certain specified grounds if found established. Once the grounds are made out and subject to any further condition which may be provided in the Act, the tenants would suffer ejectment. Again the protection given in the Acts is not to give licence for continuous litigation and bad blood,
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> 17. Surely the legislature which made the Act could not have envisaged that after the parties finish off one round of litigation, the party should be relegated to another round of litigation for recovery of rent which accrued pendente lite. Whatever protection Rent Acts give they do not give blanket protection for "non-payment of rent". This basic minimum has to be complied with by the tenants. Rent Acts do not contemplate that if one takes a house on rent, he can continue to enjoy the same without payment of rent."

10. The Apex Court in no uncertain terms held that a tenant who pays the rent after an order of eviction is passed can in no circumstances be placed on a better footing than a tenant who pays the arrears of rent on the first date of hearing. A reading of the first proviso shows that on the first date of hearing, a tenant, can avoid an order of eviction if he deposits not only the rent but also the interest due thereupon and the costs as assessed by the Rent Controller. Obviously, the interest has to be calculated from the date when the interest fell due and is not the day of the institution of the petition or any other date.

11. The question which arises in this petition is whether a tenant who deposits the amount due after an order of eviction is passed can claim that he is liable to deposit the interest only from the date of the institution of the petition? The answer is obviously no. The Full Bench of this Court in Wazir Chand vs. Ambaka Rani and another, 2005(2) Shim.L.C.498 again considered the import of Section 14(2)(i) after taking note of the judgement of the Apex Court in Madan Mohan's case supra and held as follows:-

> "9. Taking a cue from the aforesaid observations of their Lordships of the Supreme Court in Madan Mohan and another vs. Krishan Kumar Sood (supra), we hereby issue a binding direction to

all the Rent Controllers in the State that whenever a Rent Controller passes an eviction order in terms of Section 14(2)(i) of the 1987 Act, it must in the same eviction order, in its concluding part specify the exact amount of rent payable by the tenant to the landlord, of course, alongwith interest and costs. Undoubtedly, based on the ratio of Madan Mohan and another vs. Krishan Kumar Sood (Supra), the rent payable by the tenant to the landlord, which the Rent Controller would be specifying in the order of eviction would be the arrears of rent uptil the filing of the eviction petition under Section 14(2)(i) as well as the arrears of rent which have accumulated ruing the pendency of eviction petition, right up to the date of passing of the eviction order. The purpose behind the Rent Controller specifying in the eviction order the exact amount of rent payable by the tenant is to directly link it with the third proviso so as to effectively enable the tenant to know with certainty the amount that he is liable to pay to save his eviction.

10. There can be situations and circumstances where a tenant may have a grievance that even though the Rent Controller in the final eviction order has specified the amount of rent payable by the tenant to the landlord, yet while doing so the Rent Controller did not take into account any amount paid by the tenant by way of arrears of rent during the pendency of the eviction petition. Disputes and controversies can arise with regard to this aspect of the matter, in as much as in certain situations and circumstances a tenant can contend and agitate that during the pendency of the petition he had been paying the rent to the land lord and despite such payments having been made by him, the Rent Controller did not reflect such payments nor took note of them, nor adjusted such payments while assessing and specifying, in the course of final eviction order the rent payable by the tenant to the landlord. To avoid the happening of any such eventuality, we wish to observe and direct that the onus to prove that the tenant had been paying any rent or arrears of rent during the pendency of the eviction petition, with a view to claim adjustment of such amount in the final analysis, would lie on the tenant alone and upon no one else. The only way in which such apprehended dispute can effectively be avoided is for the tenant to conclusively establish before the Rent Controller, before the passing of the final eviction order, that the tenant had actually paid a specified amount by way of arrears of rent during the pendency of eviction petition. A duty, therefore, would be cast always on the tenant to establish beyond any doubt before the Rent Controller, before the passing of final eviction order, that during the pendency of the eviction petition the tenant had paid a particular amount towards the arrears of rent so that the tenant gets the amount adjusted in the final analysis. With a view to minimize or ourtail any scope for any dispute on this account we wish to observe and lay down as a binding principle of law that any prudent tenant in normal course of wisdom would like to avoid any dispute about establishing the fact of such payment being made during the pendency of the eviction

petition by taking recourse to Section 21 of the 1987 Act because the endeavour of every tenant should be to establish beyond any doubt conclusively the fact of any amount of rent having been paid during the pendency of the petition. After all, when the landlord and the tenant are locked in a litigation over the fact of the tenant allegedly having committed defaults and the landlord seeking eviction of the tenant from the property in question on the ground of default, it cannot legitimately be believed that the tenant in the face of such litigation would risk payment to the landlord without his insisting on conclusive proof of such payment having been made. The Rent Controller, therefore, while taking not of any such submission of the tenant has to take into account above referred circumstances and, therefore, while passing the final eviction order and specifying the exact amount payable, has to give credit and adjustment only to such amount which the tenant claims it has paid as has been conclusively established. Any claim of the tenant which is shrounded in doubt, or which does not have the trappings of any conclusive proof, has to be rejected."

12. Thereafter, a learned Single Judge of this Court in Bilasi Ram vs. Bhanumagi, 2007(1) Shim.LC 88, while considering the provisions of Section 14 held as follows:-

"4. By now it is well established, in the light of the authoritative pronouncements by a Full Bench of this Court in the case of Wazir Chand vs. Ambaka Rani and another, reported in 2005 (2) Shim. L.C. 498, based upon and in the light of the ratio in the case of Madam Mohan and another vs. Krishan Kumar Sood, reported in 1994 Supp (1) Supreme Court Cases 437, that the expression "amount due" occurring in the aforesaid third proviso includes the arrears of rent, the interest thereupon @ 9% per annum and the amount of costs. It is also a well settled proposition of law by now that if the tenant fails to deposit the amount due within a period of 30 days from the date of the order, the only option available in law is to enforce the eviction order. Whether the shortfall is Re.1/- or the shortfall is more than Re.1/-, if there is any shortfall in the deposit of the amount, the eviction order has to be executed, because by not depositing the amount due in its entirety, the tenant forfeits the concession granted to him under the aforesaid third proviso and the only option thereafter is to execute the eviction order.

5. While interpreting the aforesaid third proviso in the light of the fact situation that there occurred a shortfall, howsoever small, in the matter of deposit of the amount due, the Court cannot take into consideration either any extenuating circumstance or any circumstance based upon leniency or amplitude or any other circumstance which may be based upon or linked with any compelling reason or reasons of difficulty or discomfiture. If there is a shortfall with respect to the deposit of the amount due within a period of 30 days or if the amount due has not been deposited within the aforesaid period of 30 days and even if the deposit is late by one

> day, concession granted under the aforesaid third proviso immediately goes away. There is no escape to that."

9. In so far as the contention of the petitioner that the amount has not been correctly calculated or worked out by the learned Rent Controller is concerned, the petitioner was unable to convince this court in this regard. Moreover, the petitioner cannot be permitted to raise this ground more particularly when the same was not agitated before the learned Lower Appellate Authority.

10. This Court in exercise of its revisional jurisdiction is only entitled to satisfy itself as to the correctness, legality or propriety of any decision or order impugned before it. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or order, this Court shall not exercise its powers as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a Court of first appeal. This was so held by the Hon'ble Supreme Court in ***Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh*** *(2014) 9 SCC 78* wherein after discussing various provisions of rent laws in India, the following conclusion was arrived at:-

> *"43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that findings of facts recorded by the court/authority below is according o law and does not suffer from any error of law. A finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself as to the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."*

11. In view of the aforesaid discussion and also taking into consideration the settled position of law, I find no infirmity, impropriety or illegality in the order passed by the learned Rent Controller as affirmed by the learned Appellate Authority. Accordingly, there is no merit in the revision petition and the same is dismissed, leaving the parties to bear their own costs.

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

Amarjeet Singh. ....Petitioner
versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 114 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application No. 56-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 56-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Hema Ram .....Appellant.
Versus
State of Hemachal Pradesh .....Respondent.

Cr. Appeal No. 223 of 2009
Reserved on: May 06, 2015.
Decided on: May 08, 2015.

Indian Penal Code, 1860- Section 302- Deceased was posted as Asstt. Lineman, in the HPSEB- he left home after his duty but did not return- his dead body was found with the injuries on the head in the jungle by PW-1- PW-4 admitted that deceased had consumed alcohol and was unable to walk properly- 316.25 mg % ethyl alcohol was found in the blood sample of the deceased- since, deceased was heavy drunk, therefore, possibility of his fall from a height cannot be ruled out, especially when body was recovered at a distance of more than 100 meters below the path- accused acquitted. (Para- 27 to 36)

Cases referred:
Parkash vrs. State of Karnataka, (2014) 12 SCC 133,
Ashok vrs. State of Maharashtra, 2015(4) SCC 393,
Bhim Singh and another vrs. State of Uttarakhand, (2015) 4 SCC 281

For the appellant: Mr. Umesh Kanwar, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 23/26.05.2009, rendered by the learned Sessions Judge, Shimla, H.P. in Sessions Trial No. 16-S/7 of 2008, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 302 IPC, has been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that Hitender Kumar was posted as Asstt. Lineman, in the HPSEB at Drabla, Sub Section. On 3.7.2008, at about 8:30 AM, Hitender Kumar left from his house for duties to Drabla and did not return in the evening and also till the evening of 4.7.2008. On 4.7.2008, at about 11:00 PM, PW-5 Devloo Ram, resident of Village Malyan, telephonically informed his brother PW-1 Tikhu Ram, that one dead body was lying in Jug Forest, upon which PW-1 alongwith his elder brother Hukmi Ram proceeded to the forest in search of his brother Hitender Kumar. But, they could not locate the dead body in the forest and they returned back. On the following day, PW-1 alongwith PW-4 Kamlesh Kumar, his brother Hukmi Ram and Mathu Ram proceeded to the Jungle in search of his brother Hitender Kumar. During their search, they found that Hitender Kumar was lying dead facing downward at a distance of 100-120 meters down from the path in the Jungle. Hitender Kumar had suffered injuries on his head and forehead, apparently caused with heavy object. PW-1 telephonically informed PW-12 Deep Ram, who in turn informed the police. The police reached the spot and recorded the statement of PW-1 Tikhu Ram under Section 154 Cr.P.C., vide Ext. PW-1/A. The FIR was registered vide Ext. PW-19/A. PW-23, proceeded with the investigation of the case and inspected the dead body of Hitender Kumar. He took photographs of the spot and also prepared the site plan. The articles lying near the body were seized and taken into possession. PW-23 also lifted blood with cotton swab from the spot. The dead body was sent for post mortem examination. The post mortem on the dead body was conducted by PW-24 Dr. Piyush Kapila. The report is Ext. PW-24/B. According to the report, the deceased died as a result of gross head injury leading to laceration of brain and death. The accused was arrested. Disclosure statement

was recorded vide Ext. PW-6/B, on the basis of which, the recoveries were effected. The case property was sent for chemical examination. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 24 witnesses. The accused was also examined under Section 313 Cr.P.C. He specifically denied the incriminating circumstances put to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Umesh Kanwar, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 23/26.5.2009.

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

6. PW-1 Tikhu Ram, deposed that his brother was posted as Asstt. Lineman in HPSEB. On 3.7.2008, his brother Hitender Kumar, left for his duties to Drabla. He did not return from his duties in the evening. He also did not return from his duty till the evening of 4.7.2008. On 4.7.2008, at about 11:00 PM, PW-5 Devloo Ram, resident of Village Malyan, telephonically informed him, that one unknown person was lying in Jug Forest. He alongwith his elder brother Hukmi Ram proceeded to the forest in search of his brother Hitender Kumar. But, they could not locate the person who was lying in the forest and they returned. On the following day, he alongwith Kamlesh Kumar, his brother Hukmi Ram and Mathu Ram proceeded to the Jungle in search of his brother Hitender Kumar. During the search, they found that Hitender Kumar was lying dead by his face downward at a distance of 160/170 feet down from the path in the said Jungle. Hitender Kumar had suffered injuries on his head and forehead. It appeared that he had been inflicted injuries with some heavy object. The police was informed. The police reached the spot. He further deposed that on 4.7.2008, at 11:00 PM, while Devloo Ram informed him telephonically that there was a person lying in the jungle. He also informed him that in the evening of 3.7.2008, Hitender Kumar, Kamlesh Kumar and Hema Ram were together at Baldian and all the three were proceeding downwards. The police reached the spot and recorded the statement Ext. PW-1/A. In his cross-examination, he admitted that Devloo Ram is the father-in-law of his brother Hitender Kumar. Atma Ram is the brother-in-law of Hitender Kumar. The house of Devloo is at a distance of 5-6 km. from his house. The house of Devloo Ram is at a distance of about half kilometer from the place where dead body was found. They did not inquire about the whereabouts of Hitender Kumar during the night intervening 3rd and 4th July, 2008 because sometimes, he was deputed on night duty. He reiterated in his further cross-examination that only Devloo Ram had disclosed on telephone on 4.7.2008 at 11 PM that a person was lying in Jug Jungle and blood was also lying there. He received the telephone of Atma Ram after one hour after receipt of the telephone of Devloo Ram on 4.7.2008. He admitted in his cross-examination that the path below on which the dead body was found in Jug Jungle, is sloppy and rocky in the shape of Dhank (cliff).

7. PW-2 Kamlesh Kumar, deposed that he had gone in search of Hitender Kumar with PW-1 Tikhu Ram. In his cross-examination, he admitted that Hitender Kumar and Hema Ram were not inimical to each other. Both of them were friends. The land was sloppy but not steep. The land was not rocky. There were no stones from the path where blood was lying up to the dead body of Hitender Kumar.

8. PW-3 Const. Tek Singh, has apprehended the accused from the rain shelter alongwith his cousin Bal Krishan.

9. PW-4 Kamlesh Kumar, is the most material witness. He knew accused Hema Ram from his childhood. He also knew Hitender Kumar from childhood. On 3.7.2008 at about 7-7:30 PM, Hema Ram accused and Hitender Kumar both together met him at Baldian. Both were drunk and were under the influence of liquor. Both of them asked him to bring bottle of country liquor and to purchase the said bottle of liquor Hema Ram handed over to him Rs. 70/-. They also asked him to accompany them. He brought the bottle from the liquor vend and handed over to Hema Ram accused. He accompanied Hema Ram accused and Hitender Kumar towards his house. When they reached in the next bazaar of Baldian, Hema Ram accused purchased two disposable glasses and Namkieen from the shop of Rakesh Kumar alias Bhaiya. All of them proceeded from the said shop together towards their houses. When they were proceeding on a path through the forest named Jug Jungle, they stopped near a water tank. At that place, both Hema Ram and Hitender Kumar took liquor. He did not take liquor. Both of them consumed about 3/4th bottle of liquor. While they were taking liquor, he asked both of them to proceed to their houses as they were getting late. They walked on the path for about 15-20 minutes and reached a curve at place Dudladhar in the jungle. Both of them stopped at the said place and wanted to take more liquor. He asked them to proceed further, upon which, Hema Ram accused abused him. At that time, Hema Ram accused was in anger and also abused him and Hitender Kumar. He also threatened Hitender Kumar by saying that he would see him. Thereafter, he left the spot alone. On the following day, at about 8/8:30 AM, he came to Baldian on his duty from his house. When he was proceeding through the same path to Baldian, Devloo Ram, father in law of Hitender Kumar alongwith his wife met him at place curve of Dudladhar, where he had left Hitender Kumar and Hema Ram accused on the previous evening. He disclosed to Devloo Ram that in the previous evening two persons were sitting there taking liquor and abusing each other. He had disclosed that they were Hitender Kumar and Hema Ram. Thereafter, they left for their own houses and he left for his duty. On 5.7.2008, he was called by SHO, PS Dhalli and upon asking, he disclosed to him about the occurrence which was witnessed by him. From SHO he came to know that Hitender Kumar had died. In his cross-examination, he admitted that the dead body was found below the *kenchy more* (curve) on the path where he had left their company. When he started from Baldian, Hitender Kumar was heavily drunk and was not walking properly. While he was walking on the steep path, he was unable to walk properly and walking with jerks by holding grass and bushes. The jungle below the *kenchy more* (curve) was sloppy having trees and stones.

10. PW-5, Devloo Ram deposed that on 4.7.2008 at about 8:15/8:30 A.M., he was returning to his house from Baldian. He was alone. While he was proceeding to his home through a path which passes from Jug-Ka-Jungle, PW-4 Kamlesh Kumar met him at place Dudladhar. He was proceeding from Baldian for his work. He disclosed to him that on the previous evening two persons, namely Hema and Hitender were sitting there on the path taking liquor. He asked about as to whether they have reached home or not. PW-4 had left the spot. On 4.7.2008 at about 8:00 p.m., his son Atma Ram came back. He asked Atma Ram to telephone at the house of Hitender Kumar and enquire as to whether he had reached home or not. It was disclosed on telephone to Atma Ram by PW-1 Tikhu Ram that Hitender Kumar had not come neither on 3rd nor on 4.7.2008. During the night, they remained at home. On 5.7.2008 at about 5:00 a.m, he received a telephone of PW-1 and his daughter. They disclosed that the dead body of Hitender Kumar was found in the jungle. He alongwith his son and other persons proceeded to the spot. The police reached the spot and prepared

the inquest papers vide memo Ext. PW5/A. The police took into possession bag Ext. P1, folding umbrella Ext. P2, two diaries Ext. P3 and P4 alongwith passbook Ext. P5. The blood stained hair were also taken into possession. The police had lifted the blood from the scene of occurrence. In his cross-examination, he deposed that he along with PW-4 Ramesh Kumar remained at the spot named Dudladhar for about 10-15 minutes. There was no blood or any other symptoms of struggle or quarrel. He reached at his house at about 9:00 a.m., in the morning. He did not try to enquire about the whereabouts of Hitender Kumar. He did not ring or talk to Tikhu on the night of 4.7.2008. Volunteered that his son Atma Ram had talked. The place in front of path was sloppy having rock and forest trees. Tikhu Ram told him in the morning of 5.7.2008 that the dead body of his son-in-law was found.

11. PW-6 Khem Raj deposed that the accused made disclosure statement vide Ext. PW6/B, on the basis of which, recoveries were effected. He signed the memo along with Besar Dass. The accused got recovered the clothes stained with blood.

12. PW-7, Bal Krishan deposed that on 5.7.2008 before 1:00 p.m., Hema Ram accused met him at village Jagalru near nullah. Hema Ram had handed over a key of the lock of his room.

13. PW-8, Atma Ram is the brother-in-law of the deceased. He deposed that on 4.7.2008 at about 10:00 a.m., his father came home from Baldian bazaar. Kamlesh disclosed to his father that some quarrel had taken place between Hema Ram and Hitender Kumar. In the evening, his father asked him to telephone at the house of Hitender Kumar and enquire about his welfare. He rang him up. The phone was attended by PW-1 Tikhu Ram. He talked with his sister. He enquired the whereabouts of his brother-in-law Hitender Kumar. His sister disclosed that Hitender Kumar had not come home for the last 2-3 days. He had seen blood in the path in Jug Jungle. He telephoned to them at about 9:30 p.m. On the next morning, the dead body of Hitender Kumar was recovered.

14. PW-11 Besar Dass has deposed the manner in which the disclosure statement was made by the accused vide memo Ext.PW6/B and he signed the same. The recoveries were made on the basis of disclosure statement made by the accused.

15. PW-12 Deep Ram has informed the police of police post Mashobra.

16. PW-13 Dr. Soma Negi has examined the accused and issued MLC Ext.PW13/B.

17. PW-14 Rakesh Kumar deposed that Hitender Kumar was an employee of the electricity department. In the rainy season on 3rd of that month of 2008 at about 8:00 p.m., Hema Ram accused along with accused Kamlesh Kumar came to his shop and purchased Namkeen and two disposable glasses.

18. PW-15 HHC Subhash Chand deposed that he received telephone of Deep Ram son of Rattan Dass to the effect that dead body of Hitender Kumar, his brother-in-law, was lying in Jug Jungle.

19. PW-16 HHG Chander Mohan deposed that he along with SHO left for the spot of incident. The statement of PW-1 Tikhu Ram was recorded by the SHO vide memo Ext. PW1/A.

20. PW-18 HC Shiv Kumar deposed that the case property was deposited with him. He entered the same in malkhana register. The case property was sent through Constable Sant Ram to FSL Junga.

21. PW-21 Constable Sant Ram deposed that he had taken 13 sealed parcels to FSL Junga.

22. PW-23 Insp. Manohar Lal deposed that he received a telephone message from P.P. Mashobra at about 6:45 a.m., that dead body of Hitender was lying in Jug Jungle. He deputed SI Shyam Sunder, to the spot. He along with other staff reached at the spot. The dead body was lying facing downwards. It had injury marks on the head. He recorded the statement of Tikhu Ram under Section 154 Cr.P.C. vide memo Ext.PW1/A. He prepared the site plan. The case property was taken into possession. In his cross-examination he admitted that when they visited the spot, the stone was got recovered by the accused on 9.7.2008. He had removed Section 34 IPC against the accused and Kamlesh as during the investigation, it was found that Kamlesh had left accused Hema Ram and deceased Hitender. Except Kamlesh, nobody told him that Kamlesh had left the company of accused Hema Ram and deceased Hitender.

23. PW-24 Dr. Piyush Kapila has issued post mortem report Ext. PW24/B. According to the final opinion the deceased died as a result of gross head injury leading to laceration of brain. In his cross-examination he admitted that at 316.25 mg % urine alcohol concentration, the person can loose his equilibrium and balance and can fall. He also admitted that the chances of loosing balance and inconsequence of that falling from height are more in case of the heavy alcohol concentration than in a normal person. He also admitted that there were more chances of fall with the concentration of 316.25 mg% if the path is sloppy and narrow.

24. The case of the prosecution, precisely, is that the deceased left his house at 8:30 PM on 3.7.2008. The deceased did not return home on the evening of 3rd and 4th July, 2008. On 4.7.2008, as per the averment contained in rukka Ext. PW-1/A, at about 11:00 PM, Atma Ram son of Devloo Ram telephoned PW-1 Tikhu Ram and told that the dead body was lying at Jug jungle. Then, they went in search of their brother. However, when PW-1 Tikhu Ram appeared in the Court, he testified that on 4.7.2008, at about 11:00 PM, PW-5 Devloo Ram, resident of Village Malyan, telephonically informed him, that one unknown person was lying in Jug Forest, upon which he alongwith his elder brother Hukmi Ram proceeded to the forest in search of his brother Hitender Kumar. Devloo Ram is the father-in-law of his brother Hitender Kumar. Atma Ram is the brother-in-law of Hitender Kumar deceased. Thus, according to PW-1 Tikhu Ram's statement in the Court, PW-5 Devloo Ram told him that the dead body was lying in Jug Jungle. However, PW-5 Devloo Ram, categorically deposed that he asked his son on 4.7.2008 at 8:00 PM to telephone at the house of Hitender Kumar and enquire whether he had reached home or not. It was disclosed on telephone to Atma Ram by PW-1 Tikhu Ram that the deceased has not come home. He has also admitted in his cross-examination that he did not ring Tikhu Ram on the night of 4.7.2008. PW-8 Atma Ram also deposed that on 4.7.2008, at 10:00 AM, his father came home from Baldian bazaar. In the evening his father asked him to telephone at the house of Hitender Kumar and enquire about his welfare. He accordingly telephoned to the house of Hitender Kumar. However, according to the statement made under Section 154 Cr.P.C. by PW-1 Tikhu Ram, it was Atma Ram, who has told him about the body lying in the forest.

25. PW-1 Tikhu Ram, as noticed above, testified that PW-5 Devloo Ram has informed him about the incident. PW-5 Devloo Ram stated that it was his son who informed Tikhu Ram. PW-8 Atma Ram also deposed that he contacted PW-1 Tikhu Ram. An important information has been supplied to Tikhu Ram about the dead body lying in the Jug Jungle. The deceased has not come home in the evening of 3rd July, 2008 and also in the evening of 4th July, 2008. The family members of the deceased have not made any efforts to find out the whereabouts of the deceased. The only explanation given by PW-1 Tikhu Ram is that at times, he was put on night duty. There is no contemporaneous material placed on record to establish that Jitender Kumar deceased was put on night duty on 4.7.2008.

26. The father-in-law of the deceased PW-5 Devloo Ram was apprised by PW-4 Kamlesh that he had seen Hitender and Hema Ram fighting at a particular spot. If that was so, it was expected from PW-5 Devloo Ram to contact his daughter who was residing only at a distance of 5 kms. from his house. He waited till evening and only told his son on 4.7.2008 at night to inquire about the whereabouts of Hitender Kumar. The conduct of PW-5 Devloo Ram is not the one which is expected from a normal person. Rather the conduct of PW-5 Devloo Ram is not worth credence. He should have made inquiries since PW-4 Kamlesh Kumar in his statement has stated that he has told PW-5 Devloo Ram that he has seen Hema Ram and deceased abusing each other. The normal human conduct of PW-5 Devloo Ram and PW-8 Atma Ram would have been to reach the house of the deceased to know about his whereabouts instead of waiting till 5:00 AM.

27. PW-4 Kamlesh Kumar was in the company of accused and Jitender Kumar deceased. His version is that the deceased and Hema Ram were taking liquor and were intoxicated. They asked him to bring bottle of country liquor and to purchase the bottle of liquor Hema Ram handed over to him Rs. 70/-. They also asked him to accompany them. He brought the bottle from the liquor vend and handed over to Hema Ram accused. He accompanied Hema Ram accused and Hitender Kumar towards their houses. When they reached in the next bazaar of Baldian, Hema Ram accused purchased two disposable glasses and Namkieen from the shop of Rakesh Kumar alias Bhaiya. In his cross-examination, he admitted that when he started from Baldian, Hitender Kumar was heavily drunk and was not walking properly. While he was walking on the steep path, he was unable to walk properly. He was walking with jerks by holding grass and bushes. The jungle below the *kenchy more* (curve) was sloppy having trees and stones.

28. The quantity of ethyl alcohol found in the blood sample of deceased was 316.25 mg %. PW-24 Dr. Piyush Kapila, in his cross-examination has admitted that at 316.25 mg % urine alcohol concentration, the person can loose his equilibrium and balance and can fall. The deceased died due to gross head injury leading to laceration of brain. Since the deceased was heavily drunk and was going down the steep path, the possibility of his fall from the height cannot be ruled out, more particularly when his body was recovered at a distance of more than 100 meters below the path.

29. Mr. M.A.Khan, learned Addl. Advocate General has vehemently argued that the accused was last seen in the company of deceased by PW-4 Kamlesh Kumar. It has come in the statement of PW-2 Kamlesh Kumar that the accused and deceased were not inimical to each other but were friends. While relying upon the theory of 'last seen together', all the circumstances have to be taken into consideration including the relationship of the deceased with the person last seen together. The case in hand is based on circumstantial evidence. There is no eye witness. There is variance in the statements made by PW-1 Tikhu

Ram, PW-5 Devloo Ram and PW-8 Atma Ram about the inquiries made about the whereabouts of the deceased and who telephoned PW-1 Tikhu Ram.

30. The statement of PW-4 Kamlesh Kumar, does not inspire confidence for the simple reason that he was also made accused in the case at one point of time. His name was subsequently struck off, as per the statement of PW-23 SI Manohar Lal, only on the ground that he had left Hitender Kumar and Hema Ram at a particular spot and gone to his house. Nobody has told him except Kamlesh Kumar that he had left the company of accused Hema Ram and deceased Hitender Kumar and gone home.

31. Mr. Umesh Kanwar, Advocate, appearing on behalf of the accused has drawn the attention of the Court to Ext. PW-23/E, FSL report of the viscera, whereby the quantity of ethyl alcohol in urine was found to be 316.25 mg%. According to Ext. PW-24/C, final opinion of Dr. Piyush Kapila, the deceased died due to gross head injury leading to laceration of brain in case of consumption of alcohol. The doctor has noticed urine alcohol concentration i.e. 316.25 mg%. The prosecution has failed to prove the case against the accused beyond reasonable doubt. There are major contradictions, embellishments in the statement of witnesses. The conduct of PW-1 Tikhu Ram of not searching his brother till 4.7.2008 and the conduct of PW-5 Devloo Ram, who despite claiming that PW-4 Kamlesh had told him about the fight between the deceased and the accused in the morning of 4.7.2008, has not made inquiries from his daughter, is not worth belief.

32. Mr. M.A.Khan, Addl. AG, has also argued that the blood stained clothes of the deceased were recovered and has also drawn the attention of the Court to Ext. PW-23/D, report of FSL, whereby human blood was found on exhibit-1, 5, 6(a), 6(b), 8(a), 8(b) and 8(c).

33. Their lordships of the Hon'ble Supreme Court in the case of ***Parkash vrs. State of Karnataka,*** reported in ***(2014) 12 SCC 133,*** have held that when the blood stained clothes are recovered, a serological comparison of blood of deceased and appellant and blood stains on his clothes was necessary and that was absent from evidence of prosecution. In this case, the prosecution has sought to prove that blood group of deceased was AB and blood stains on appellant's seized clothes also belong to blood group AB. This does not lead to any conclusion that bloodstains on appellant's clothes were those of deceased's blood. There are millions of people who have blood group AB and it is quite possible that even appellant had the blood group AB. Thus, merely since clothes of appellant were bloodstained and stains bore same blood group as that of deceased, circumstances could not be used against the appellant. Their lordships have further held that in a case of circumstantial evidence, there has to be some degree of trustworthiness and certainly about existence of circumstances. It has been held as follows:

> "40. The second discrepant statement was that Shivanna stated that the police had kept Prakash's clothes on the table. It was submitted, in other words, that the blood stained clothes were already seized by the police and kept on the table. We are not sure whether the actual statement made by Shivanna has been lost in translation.
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> 41. In any event, the recovery of the blood stained clothes of Prakash do not advance the case of the prosecution. The reason is that all that the prosecution sought to prove thereby is that the blood group of Gangamma was AB and the blood stains on Prakash's seized clothes also belong to blood group AB. In our opinion, this does not lead to any conclusion that the blood

stains on Prakash's clothes were those of Gangamma's blood. There are millions of people who have the blood group AB and it is quite possible that even Prakash had the blood group AB. In this context, it is important to mention that a blood sample was taken from Prakash and this was sent for examination. The report received from the Forensic Science Laboratory [Exh.P-27] was to the effect that the blood sample was decomposed and therefore its origin and grouping could not be determined. It is, therefore, quite possible that the blood stains on Prakash's clothes were his own blood stains and that his blood group was also AB.

45. We are not satisfied with the conclusion of the High Court that since the clothes of Prakash were blood stained and the stains bore the same blood group as that of Gangamma, the circumstance could be used Prakash. A serological comparison of the blood of Gangamma and Prakash and the blood stains on his clothes was necessary and that was absent from the evidence of the prosecution."

34. Their lordships of the Hon'ble Supreme Court in the case of ***Ashok vrs. State of Maharashtra,*** reported in ***2015(4) SCC 393,*** have held that *'last seen together'* itself is not conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt. In the instant case, we have already noticed that the relations of accused with the deceased were cordial. Their lordships have held as under:

"8. The "last seen together" theory has been elucidated by this Court in Trimukh Marotiu Kirkan v. State of Maharashtra, (2006)10 SCC 106, in the following words:

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."

9. In Ram Gulab Chaudhary v. State of Bihar, (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

> 10. In Nika Ram v. State of H.P., (1972) 2 SCC 80, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.
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> 11. The latest judgment on the point is Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715. In this case this Page 10 10 Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.
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> 12. From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of Page 11 11 weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt.
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> 20. From the above discussion, we conclude that the prosecution has not brought any clinching evidence in support of last seen together theory so as to shift the burden of proof on the accused-appellant. In light of this, the prosecution has evidently failed to prove the guilt of the accused-appellant beyond doubt. Therefore, the appeal is allowed and the judgment and order passed by the High Court as also by the Trial Court are set aside. The appellant is directed to be released forthwith if not required in connection with any other case."

35. Their lordships of the Hon'ble Supreme Court in the case of ***Bhim Singh and another vrs. State of Uttarakhand,*** reported in ***(2015) 4 SCC 281,*** have held that there should not be any snap in the chain of circumstances and if there is a snap in the chain, the accused is entitled to benefit of doubt. Their lordships have held as under:

> "22. In the present case, the guilt or innocence of the accused has to be adduced from the circumstantial evidence. The law regarding circumstantial evidence is more or less well settled. This Court in a plethora of judgments has held that when the conviction is based on circumstantial evidence solely, then there should not be any snap in the chain of Page 22 22 circumstances. If there is a snap in the chain, the accused is entitled to benefit of doubt. Gurpreet Singh v. State of Haryana (2002) 8 SCC 18 is one of such cases. On the question of any reasonable hypothesis, this Court has held that if some of the circumstances in the chain can be explained by any other reasonable hypothesis, then the accused is entitled to benefit of doubt. But in assessing

the evidence, imaginary possibilities have no place. The Court considers ordinary human probabilities.

23. On circumstantial evidence, this Court has laid down the following principles in Sharad Birdhichand Sardar v. State of Maharashtra, (1984) 4 SCC 116:

> "(1) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may 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 guilty.
>
> (3) The circumstances should be of conclusive nature and tendency.
>
> (4) They should exclude every possible hypothesis except the one to be proved and,
>
> (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. Whenever there is a break in the chain of circumstances, the accused is entitled to the benefit of doubt; State of Maharashtra v. Annappa Bandu Kavatage (1979) 4 SCC 715."

36. In the instant case, there was no eye witness and the case is based on circumstantial evidence. It is the duty of the prosecution to link the accused with the alleged incident. The prosecution could not link the entire chain of events. It is settled law that in a case based on circumstantial evidence, the chain must be complete and the circumstances should point towards the guilt of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

37. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 23/26.5.2009, rendered by the learned Sessions Judge, Shimla, H.P., in Sessions trial No. 16-S/7 of 2008, is set aside. The accused is acquitted of the charges framed under Sections 302 IPC, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

38. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

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

Himesh Sharma. ....Petitioner
Versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 117 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application No. 60-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 60-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Inderpal Singh. ....Petitioner
Versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 115 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General

submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application No. 57-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 57-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Kamal Deep Bhardwaj. ....Petitioner
versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 113 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application

No. 61-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 61-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

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

Cr. Appeal No. 387 of 2012
Reserved on: May 07, 2015.
Decided on: May 08, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was carrying a bag which was containing 2 kg 500 grams charas - independent witness had not supported the prosecution version- accused was not apprised of his legal right to be searched before Magistrate or Gazetted Officer- no entry was made regarding the taking out of the case property after it was brought from the Court- it has caused serious prejudice to the accused- held, that in these circumstances, prosecution version was not proved – accused acquitted. (Para-15 to 19)

Case referred:
Makhan Singh vrs. State of Haryana, JT 2015 (4) SC 222

For the appellant: Mr. Bhupinder Ahuja, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 26.3.2012, rendered by the learned Special Judge (II), Kinnaur at Rampur, H.P., in RBT No. 33-AR-3 of 2010/2011, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to

pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 27.6.2008 at about 6:45 P.M., PW-11 Insp. Sangat Ram, SHO PS Rampur alongwith PW-4 SI Brij Lal, PW-5 HC Uttam Kumar, Const. Sanjeev Kumar, PW-10 Const. Devi Dass was present at Kudidhar near Nirth, in connection with routine patrol duty. PW-2 Pawan Katoch and PW-3 Pal Singh met them there and they started talking to the police party. In the meantime, accused Rajesh came from the side of Snahjhula carrying a bag in his right hand and on seeing the police party, he got scared and tried to flee. He was apprehended. He was informed to exercise his option under Section 50 of the Act. He opted to be searched by the police party. Thereafter, PW-11 Insp. Sangat Ram alongwith other witnesses rendered themselves to be searched by the accused. The accused and his bag was searched. Charas weighing 2 kg 500 grams was recovered from the possession of the accused. The charas recovered was put in the same bag, which was made into parcel and seal impression "O" was taken on it. NCB form Ext. PW-11/B was updated in triplicate. The impression of seal "O" was also taken on a piece of cloth vide memo Ext. PW-11/C. The case property was taken into possession vide seizure memo Ext. PW-11/D. Rukka Ext. PW-9/A was prepared on the spot. It was sent to the Police Station Rampur through Const. Devi Dass, on the basis of which FIR Ext. PW-9/B was registered. Site plan was prepared. PW-11 Insp. Sangat Ram deposited the case property in the malkhana of the Police Station with MHC. PW-9 MHC Liaq Ram incorporated the entries at Sr. No. 734 in the malkhana register vide Ext. PW-9/D. Special report was also prepared and sent to SDPO Rampur. Chemical report is Ext. PW-11/H. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 11 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. Bhupinder Ahuja, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan learned Addl. AG, for the State has supported the judgment of the learned trial Court dated 26.3.2012.

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

6. PW-1 Prem Singh deposed that on 27.6.2010, HC Uttam Chand visited his shop and borrowed weighing scale and weights of 1 kg, 500 gms, 200 gms and 100 gms at about 7:15 PM.

7. PW-2 Pawan Katoch, deposed that on 27.6.2010 at 6:45 PM, when he was coming to attend his duty and reached at Kuridhar near Nirath on NH-22, the police was present there alongwith the accused person. One bag was lying near the accused. The police told him that charas was contained in that bag but he did not check the stuff but had seen it. He did not see the police apprehending the accused. The police also did not make inquiry about the name and address of the accused in his presence. He remained present on the spot for 15-20 minutes as he was to attend his duty. The police also did not inform the accused that they were suspecting that he was carrying some narcotic substance and as

such it was intended to conduct his personal search as well as search of his bag. The police had prepared documents on the spot and obtained his signatures on those documents. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that when he alongwith Pal Singh and police were present on the spot, the accused person came from the side of Shnahjhula and on seeing the police party, he turned back and tried to escape. He also denied that on suspicion the police apprehended the accused person in their presence and at that time the accused person was also carrying a bag in his right hand. He also denied that the police had made inquiry about the name and address of the accused person in their presence and thereafter informed that it was intended to conduct personal search as well as search of his bag and if he so desired search could be arranged in the presence of the Magistrate or the gazetted officer but the accused person opted to be searched by the police on the spot in their presence. He also denied that thereafter the bag of the accused was checked in their presence from which one pink colour bag containing three nylon socks containing charas was recovered. He also denied that the charas recovered from the bag was put back into the same bag which was made into parcel and sealed with seal bearing impression "O" which was handed over to Pal Singh after its use. He also denied that NCB form in triplicate were updated in his presence. He identified his signatures on mark A, B and C. In his cross-examination, he admitted that when he reached on the spot, at that time Pal Singh was not present and he reached there after five minutes.

8. PW-3 Pal Singh deposed that on 27.6.2010, when he was coming from Nankhari, the police met him at Kuridhar near Nirath at about 6:45 PM. At that time, besides police accused Rajesh were also present. The police officials were preparing some documents. The police asked him to stop by saying that his signatures were required on some documents as they had seized charas from the accused person. Thereafter, the police obtained his signatures on some documents. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that Pawan Katoch was also present on the spot. He denied that when they were talking to the police the accused person came from Snahjhula and on seeing the police party, he tried to flee and on suspicion, he was apprehended. He denied that the police informed the accused that it was intended to conduct his personal search and that if he so desired the search could be arranged in presence of Magistrate of gazetted officer but the accused person opted to be searched by the police on the spot in their presence vide consent memo Mark A. He also denied that bag of the accused was searched and during search, three nylon socks containing chars 2 kg. 500 gms were recovered from the bag of the accused. He also denied that the charas recovered from the bag was put back in the same bag which was made into parcel and sealed with seal bearing impression "O". He also denied that NCB form in triplicate were updated in their presence and thereafter samples of seal were drawn and the seal was handed over to him. He also denied that search and seizure memo mark B was prepared which was witnessed by him and Pawan Katoch. He admitted that consent memo Mark A, seizure memo Mark B, form mark C and sample of seal Mark G bears his signatures. He denied that he has put his signatures on all the aforesaid documents after going through its contents. In his cross-examination, he denied that the bag containing charas was recovered from the accused in his presence.

9. PW-4 SI Brij Lal, deposed the manner in which the accused was apprehended and the charas was recovered, on search from the accused. The same was put back in the bag and thereafter made into parcel which was sealed with seal impression "O". Rukka was scribed by Insp. Sangat Ram, which was sent to the Police Station through

Const. Devi Dass. In his cross-examination, he admitted that a large number of shops are situated at Nirath. According to him, Pawan Katoch and Pal Singh were already present on the spot before they reached there.

10. PW-5 HC Uttam Kumar, also deposed the manner in which the accused was apprehended and the charas was recovered, search and sealing process was completed on the spot. In his cross-examination, he admitted that no search memo about their personal search was prepared.

11. PW-8 Const. Sanjeev Kumar, deposed that on 30.6.2010, MHC PS Rampur Laiq Ram handed over one parcel having seal impression "O" alongwith the NCB form and samples of seal to him vide RC No. 64/2010. He delivered it in FSL, Junga on 1.7.2010 and obtained its receipt on the RC which he handed over to MHC.

12. PW-9 HC Laiq Ram, deposed that he recorded FIR Ext PW-9/B on the basis of rukka. On the same day at 10:35 PM Insp. Sangat Ram deposited the case property of this case alongwith the sample of seal and NCB form in triplicate in malkhana of the Police Station. He incorporated the entries in the malkhana register at Sr. No. 734. On 30.6.2010, he sent the case property to FSL Junga through Const. Sanjeev Kumar vide RC 64/2010 who after depositing the same handed over its receipt on the RC to him.

13. PW-10 const. Devi Dass, also deposed the manner in which the accused was apprehended and the charas was recovered, search and sealing process was completed on the spot. He has carried the rukka which he delivered to MHC Laiq Ram.

14. PW-11 Insp. Sangat Ram, was the I.O. He also deposed the manner in which the accused was apprehended and the charas was recovered, search and sealing process was completed on the spot. He filled up NCB form. He deposited the case property alongwith the NCB form with MHC Laiq Ram at 10:35 PM. He prepared DD 46 to this effect. The case property was produced during the recording of his statement. The seals were found intact. He identified parcel cover Ext. P-1, bag Ext. P-2, socks Ext. P-3, P-4 and P-5. In his cross-examination, he admitted that in the rukka and special report and the statements of the witnesses, there was no specific mention about option of being searched in the presence of Magistrate or the Gazetted Officer.

15. The copy of the consent is mark A. The accused was not apprised that it was his legal right to be searched before the Executive Magistrate or the Gazetted Officer. It is mandatory to apprise the accused of his legal right to be searched before the Executive Magistrate or the Gazetted Officer.

16. The police has cited two independent witnesses, PW-2 Pawan Katoch and PW-3 Pal Singh. They have not supported the case of the prosecution but they have admitted their signatures on mark A, B and C. They were declared hostile and cross-examined by the learned P.P. PW-2 Pawan Katoch has not seen the police apprehending the accused person. According to him, the police also did not make enquiry about the name and particulars of the accused. The police also did not inform the accused person that they were suspecting the accused of carrying some narcotic substance and as such, it was intended to carry his personal search and that of his bag. He denied specifically when cross-examined by the learned P.P. that he alongwith Pal Singh were present alongwith the police on the spot. He has also denied that NCB form were filled in his presence. He also denied that the charas was recovered and put back into the same bag and sealed with seal impression "O". It was handed over to Pal Singh after its use. In his cross-examination by

the Advocate on behalf of the accused, he testified that when he reached on the spot, at that time, Pal Singh was not present and he reached after five minutes. Similarly, PW-3 Pal Singh, has not supported the case of the prosecution. He was also cross-examined by the learned Public Prosecutor. He denied that charas was recovered from the bag of the accused. He also denied that charas recovered from the bag was put into the same bag which was made into parcel and sealed with seal impression "O".

17. The case property was produced when the statement of PW-11 Sangat Ram was recorded. The copy of the malkhana register is Ext. PW-9/D. There is entry of the deposit of the contraband on 27.6.2010 and when it was received back from the FSL Junga. There is no entry when the case property was taken out from the malkhana and produced in the Court. There is no DDR recorded when the case property was produced before the trial Court. Similarly, there is no entry when the case property after production in the trial Court was re-deposited in the malkhana register. It is necessary for the prosecution to prove that the case property was taken out from the malkhana for the production in the Court and also preparing DDR to this effect and the same process is to be undergone when the case property after its production in the Court is taken back and deposited in the malkhana. There has to be entry in the malkhana register when it is re-deposited and DDR is also prepared. The production of the case property in the Court is mandatory. There is doubt whether the case property which was produced in the Court was the same which was recovered from the accused and sent to FSL, Junga in the absence of any corresponding entries made at the time of taking it and re-deposit in the malkhana register. It has caused serious prejudice to the accused. The nabbing of the accused, recovery and sealing is doubtful, since the case of the prosecution has not been supported by the independent witnesses. The accused has not been told specifically that he has legal right to be searched before the Executive Magistrate or the Gazetted Officer. The case property when produced in the Court, there is no reference who brought the case property to the Court from malkhana and by whom it was taken back.

18. Their lordships of the Hon'ble Supreme Court, in a recent decision in the case of ***Makhan Singh vrs. State of Haryana,*** reported in ***JT 2015 (4) SC 222,*** have held that it is well settled that conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In that case, it was not as if independent witnesses were not available. Independent witness PW1 and another independent witness examined as DW-2 had spoken in one voice that the accused person was taken from his residence. In such circumstances, their lordships have held that the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version. Their lordships have held as under:

> "10. For recording the conviction, the Sessions Court as well as the High Court mainly relied on the testimony of official witnesses who made the recovery, i.e. H.C. Suraj Mal-PW2 and Inspector Raghbir Singh-PW6, and found them sufficiently strengthening the recovery of the possession from the appellant. In our considered view, the manner in which the alleged recovery has been made does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the

accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available. Independent witnesses PW1 and another independent witness examined as DW2 has spoken in one voice that the accused person was taken from his residence. In such circumstances, in our view, the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version."

19. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. 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.

20. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 26.3.2012, rendered by the learned Special Judge-II, Kinnaur at Rampur, H.P., in RBT No. 33-AR-3 of 2010/2011, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

21. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

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

Smt. Seema Mehta ..... Petitioner

Vs.

Chairman-cum-Deputy Commissioner and another ..... Respondents

CWP No. 5318 of 2013
Date of decision: 8.5.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as clerk-cum-typist in Indian Red Cross Society- she claimed regularization of her services- claim was denied by the Labour Court on the ground that Red Cross Society is not a State and the petitioner is not an employee of the State Government- held, that Red Cross Society falls within the definition of State under Article 12 of the Constitution of India- it cannot deny regularization to its employee for 26 years, whereas employees in the State Government are regularized after 7 years – petition allowed and the respondent directed to consider the case of the petitioner for regular appointment.(Para-8 to 16)

Cases referred:

Pant Raj Sachdev vs. The Indian Red Cross Society and others, 1986 (1) SLR 675

The District Red Cross Society, Sirsa vs. Radha Kishan Rajpal and another, 2005 (1) SLR, 781
Om Parkash Sharma vs. Indian Red Cross Society, Punjab and another, 2005 (3) PLR, 271
Swaran Sharma vs. State of Haryana, 2007 (4) PLR, 526

For the petitioner	:	Mr. Deepak Kaushal, Advocate.
For the respondents	:	Mr. Virender Kumar Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner is aggrieved by the award passed by the learned Industrial Tribunal-cum-Labour Court, Shimla (for short 'Tribunal') dated 28.3.2013 whereby her claim for regular appointment to the post of PBX Clerk has been denied and has therefore, filed this writ petition seeking the following substantive relief:

> *"That the award dated 28.03.2013 (Annexure P-2) may kindly be quashed and set aside and same may kindly be declared illegal and the respondents may kindly be directed to give regular appointment to the petitioner in the post of PBX Clerk on regular basis as per the policy of the State."*

2. On 10.1.1989 the petitioner was appointed in Indian Red Cross Society (for short 'Society') as Clerk-cum-Typist. This appointment was given by the Deputy Commissioner, Solan in the capacity of the Chairman of the Society and the emoluments of the petitioner were fixed at Rs.750/- per month.

3. Indisputably, the petitioner has been working in the said capacity till date. The petitioner had earlier approached the Tribunal for regularization of her services and reference was decided in her favour vide award dated 16.1.2007. However, the said award was challenged by the respondents by medium of CWP No. 259 of 2007 and the matter was remitted back to the Tribunal for considering two communications annexed as Annexures R-6 and R-7, respectively. The Tribunal below vide its award dated 28.3.2013 rejected the claim of the petitioner on the ground that she is an employee of Red Cross Society, and therefore, her services cannot be regularized.

4. The petitioner has challenged this award on the ground that after having worked w.e.f. 10.1.1989, it was legitimate that her services to be regularized even if they had been rendered with the Indian Red Cross Society of which the Deputy Commissioner is the Chairman.

5. In response to the petition, the respondents in their reply have raised preliminary objection regarding maintainability of the petition and on merits, the factual averments have not been denied and the only ground to deny the claim of the petitioner is that she has never been on the pay role of the State.

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

7. The only reason which outweigh all other considerations before the Tribunal to deny the benefit of regularisation to the petitioner was that the petitioner was not an employee of the State Government and, therefore, her services could not be regularised. Even before this Court, the only contention raised by the respondents to defeat the legitimate claim of the petitioner is that respondent No.1 i.e. the Indian Red Cross Society is not the State within the meaning of Article 12 of the Constitution of India and thus is not amenable to the writ jurisdiction of this Court.

8. The issue regarding the Indian Red Cross Society being a State and amenable to writ jurisdiction is no longer *res-integra* in view of the judgment of the learned Single Judge of Punjab and Haryana High Court in ***Pant Raj Sachdev*** *vs.* ***The Indian Red Cross Society and others, 1986 (1) SLR 675,*** which in turn has been affirmed by a Division Bench of Punjab and Haryana High Court in ***The District Red Cross Society, Sirsa*** vs***. Radha Kishan Rajpal and another, 2005 (1) SLR, 781***, ***Om Parkash Sharma*** vs***. Indian Red Cross Society, Punjab and another, 2005 (3) PLR, 271***, ***Swaran Sharma*** vs***. State of Haryana, 2007 (4) PLR, 526*** and Division Bench judgment in ***Alka Ghai*** vs. ***J.R.Verma and others, LPA No. 176 of 2008,*** decided on 16.4.2009.

9. In view of the exposition of law laid down by the Punjab and Haryana High Court, it can conveniently be held that respondent No.1 is amenable to the writ jurisdiction of this Court and if that be so, it cannot shirk from its responsibility and liability for ensuring that a fair and reasonable treatment be meted out to the petitioner.

10. Indisputably, insofar as the State Government and other Boards/Corporations of the State are concerned, a decision to regularise the services of all daily waged employees after completion of seven years of service, is already in vogue, but then can the petitioner, who has rendered nearly 26 years of service be denied her legitimate claim of regularisation? Can the Red Cross Society headed by the Deputy Commissioner, indulge in exploitation on the sheer strength of its unequal bargaining power?

11. A learned Division Bench of this Court in ***LPA No. 132 of 2014*** titled ***Dr. Lok Pal vs. State of H.P.,*** decided on 18.12.2014 was seized of a similar matter where the appointment of the person was though on a consolidated salary of Rs.43000/- per month but after his appointment he was actually paid Rs.21000/- per month and the learned Division Bench held this to be exploitation on the sheer strength of the unequal bargaining power and it was held as under:

> "7. This case reflects a sorry state of affairs where the respondents on the sheer strength of its bargaining power have taken advantage of their position and imposed wholly un-equitable and unreasonable condition of employment on their prospective employees, who did not have any other choice but to accept the employment on the terms and conditions offered by the respondents. This action of the respondents is violative of Article 14 of the Constitution. Here it is apt to reproduce relevant observations of the Hon'ble Supreme Court in the celebrated decision of **Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly and another, (1986) 3 SCC 156**, which reads as under:-
>
> > "88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at least in certain areas of the law of contracts, that there can be

unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages.....which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.

89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under-foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Art. 14. This principle is that, the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the

> bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its, own facts and circumstances."

In terms of the aforesaid exposition of law, it is clear that this Court has the jurisdiction and power to strike or set aside the unfavourable term of contract of employment which purports to give effect to unreasonable bargain violating Article 14 of the Constitution.

8. The undertaking obtained from the appellant is so unfair and unreasonable that it shocks the conscious of this Court. It reflects the inequality of the bargaining power between the appellant and the respondents which emanates from the great disparity in the economic strength between the job seeker and job giver.

9. The appellant was compelled by circumstances to accept the offer made by the respondents, but then the mere acceptance of this offer would not give it a stamp of approval regarding its validity. It is an age old maxim that "*necessity knows no law*" and a person sometimes may have to succumb to pressure of the other party to bargain who is in stronger position. Although, it may not be strictly in place, but the Court cannot shut its eyes to this ground reality.

10. At this stage, it shall be apt to quote the following observations of the Hon'ble Supreme Court in ***Chairman and MD NTPC Ltd. Vs. Rashmi Construction Builders and Contractors (2004) 2 SCC 663***:-

> "28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

11. Notably the respondents herein are none other than the functionaries of the State who are expected to function like a model employer. A model employer is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit its employees and take advantage of their helplessness and misery. The conduct of the respondents falls short of expectation of a model employer.

12. The Hon'ble Supreme Court in its decision in ***Bhupendra Nath Hazarika and another Vs. State of Assam and others, (2013) 2 SCC 516*** has succinctly explained this position in the following terms:-

> "61. Before parting with the case, we are compelled to reiterate the oft stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.
>
> 62. Almost a quarter century back, this Court in Balram Gupta V. Union of India 1987 Supp SCC 228 had observed thus: (SCC p. 236, para 13)
>
> > "13.... As a model employer the Government must conduct itself with high probity and candour with its employees."
>
> In State of Haryana V. Piara Singh (1992) 4 SCC 118 the Court had clearly stated: (SCC p. 134, para 21).
>
> > "21....The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16."
>
> 63. In State of Karnataka V. Umadevi (3) (2006) 4 SCC 1 (SCC P. 18, para 6) the Constitution Bench, while discussing the role of State in recruitment procedure, stated that if rules have been made under Article 3089 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.
>
> 64. In Mehar Chand Polytechnic V. Anu Lamba (2006) 7 SCC 161 (SCC p. 166, para 16) the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to al the citizens of India entitled for being considered for recruitment in the vacant posts.
>
> 65. We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretised. We say no more."

12. In view of the aforesaid decision which otherwise is binding on this Court, it can conveniently be concluded that only on account of unequal bargaining power, the

petitioner cannot be exploited. The respondent-society cannot be permitted to act with a total lack of sensitivity and indulge in 'begar', which is specifically prohibited under Article 23 of the Constitution of India.

13. Once the Deputy Commissioner is heading the Indian Red Cross Society, then there is a flavour of public element and duty attached to the office. It, therefore, is expected to be function like a model employer, who is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation.

14. It has to be borne in mind that it is not even the case of the respondents that the petitioner has not been discharging her duties diligently, honestly and faithfully. It is also not the case of the respondents that the petitioner is lacking any qualification or has any blemished record during her employment of more than two and half decades. Rather, the Deputy Commissioner himself had sought the permission of the Government for regularizing the services of the petitioner vide communication Ex.R-7, which reads:

"To

The F.C.-cum-Secretary(Revenue) to the
Government of Himachal Pradesh.

Subject: Representation regarding regularisation of services of the employees of the Red Cross Society Distt. Branch, Solan, Distt. Solan, in accordance with the policy of the State Govt. and in the light of the decisions Court of India.

Sir,

Kindly refer to your office letter No. Rev.A(B)1- 12/2002(SLN) dated 10.2.2003 on the above cited subject.

In this connection, I have the honour to say that reply in this regard has already been sent to your office vide this office letter No. Estt./4-4/72 dated 27.10.2001, (Copy enclosed) further it is intimated that Smt. Seema Devi was appointed as Clerk on 10.1.89 by the Indian Red Cross Society, Solan Branch @ Rs.750/- now which has been increased @ Rs.3000/- per month. She is continuing her service in this society since 10.1.89 but she has not been regularised by the said Society till date.

You are, therefore, requested to consider her case sympathetically for regularisation of her service. At present 14 posts of Clerks are lying vacant in this office and this office has no objection if her service are regularised against the vacant post of Clerk.

Sd/-
For Deputy Commissioner,
Solan."

15. Once the Deputy Commissioner, Solan, being the Chairman of respondent No.1-Society, himself has recommended the case of the petitioner for regularisation, it does not stand to reason that now he can turn around and oppose the same.

16. In view of the aforesaid discussion, I find merit in this petition and accordingly the award passed by the learned Tribunal below dated 28.3.2013 is quashed and set-aside and the respondents are directed to consider the case of the petitioner for regular appointment to the post of PBX Clerk on the pattern of State Government with all actual consequential benefits. The parties are left to bear their own costs.

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

Smt. Shankari Devi ..... Petitioner

Vs.

State of H.P. & ors. ..... Respondents

CWP No. 2074 of 2008
Date of decision: 8.5.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as Part Time Water Carrier- her services were terminated- petitioner claimed that no notice was served upon her prior to the termination of her services – respondent stated that date of birth of the petitioner was recorded as 1940 in the family register- therefore, she had attained the age of superannuation ever prior to her appointment- when this fact came to the notice of the respondent, petitioner was retired from the services- held, that order retiring the services of the petitioner involved civil consequences, therefore, a notice was required to be served upon the petitioner prior to the passing of the order- since no notice was served upon the petitioner, therefore, petition allowed and the order passed by the respondent set aside. (Para6 to 10)

Case referred:
P.D. Dinakran (1) vs. Judges Inquiry Committee and others (2011) 8 SCC 380

For the petitioner : Mr. Dalip K. Sharma, Advocate.
For the respondents : Mr. Virender Kumar Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner is aggrieved by the order dated 26.9.2008 whereby her services came to be terminated and has filed the present writ petition claiming therein the following substantive reliefs:

(a) That a writ of certiorari may be issued for quashing and setting aside the impugned order dated 26.9.2008 whereby the services of the petitioner has been terminated without any notice/reasons/show cause, in the interest of justice and fair play.

(b) That writ of mandamus may be issued directing the respondent to allow the petitioner to perform her duties Govt. Primary School, Kuftoo, Tehsil Kandaghat, District Solan, H.P.

2. The facts lie in narrow campus. The petitioner applied for the post of Part Time Water Carrier and on 19.5.2000 was appointed in Govt. Primary School, Kuftoo. She joined her services on 22.5.2000. However, her services came to be terminated on 26.9.2008. The precise grievance of the petitioner is that before terminating her services, no notice/reasons/show cause notice was issued to her and she is not even aware as to why and on what basis her services came to be terminated.

3. The respondents in their reply have stated that as per the information received from the Block Primary Education Officer, Kandaghat, the petitioner's date of birth in the family register was entered as 1940 and, therefore, she had attained the age of superannuation even prior to her appointment and when this fact came to the notice of the department, the petitioner was retired from service on 26.9.2008.

4. When the matter came up for consideration on 27.10.2008, it passed the following orders:

"**CWP No. 2074 of 2008**

Heard Mr. Dalip Kumar Sharma, learned counsel for the petitioner . Issue notice. Notice on behalf of respondents No. 1 to 5 is being accepted by learned Advocate General. Necessary instructions have to be obtained by learned Advocate General by 3.11.2008 to apprise this Court whether notice before termination in terms of the conditions of appointment letter was given to the petitioner or not. Liberty is also given to file short reply by the learned Advocate General."

5. In compliance to the above directions, respondents filed affidavit, the copy whereof is though not available on the record but however, learned counsel for the petitioner has made available a copy thereof which shall now form part and parcel of the records of this case. Para-2 of the reply affidavit reads thus:

"That in this regard it is submitted that as per the information received from the Block Elementary Education Officer, Kandaghat, i.e. respondent No.4, the petitioner Smt. Shankari Devi was working as part time water carrier in Govt. Primary School, Kuftoo, as per entry of the family register of Gram Panchayat, Podhana, her date of birth is entered 1940, therefore, she was retired on 26.09.2008 on superannuation. This fact is also clear from Annexure P/7, wherein word retired in Hindi is also written. So there was no need to issue notice to her."

6. The moot question which arises for consideration is as to whether the services of the petitioner could have been terminated/ retired from service in the manner aforesaid? Has not the impugned order visited her with civil and evil consequences? Was not the petitioner required to be afforded atleast a reasonable opportunity of being heard before the impugned order could have been passed?

7. The natural justice is a branch of public law. It is a formidable weapon which can be wielded to secure justice to citizens. Rules of natural Justice are 'basic Values' which a man has cherished throughout the ages. Principles of natural justice control all actions of

public authorities by applying rules relating to reasonableness, good faith and justice, equity and good conscience. Natural justice is a part of law which relates to administration of justice. Rules of natural justice are indeed great assurances of justice and fairness. The underline object of rules of natural justice is to ensure fundamental liabilities and rights of citizens. They thus served public interest. The golden rule which stand firmly established is the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice.

8. Treaties on the subject is the judgment of the Hon'ble Supreme Court in ***P.D. Dinakran (1)*** *vs.* ***Judges Inquiry Committee and others (2011) 8 SCC 380,*** wherein the Hon'ble Supreme Court held as under:

> *"32. The traditional English Law recognised the following two principles of natural justice:*
>
> > *"(a) "Nemo debet esse judex in propria causa: No man shall be a judge in his own cause, or no man can act as both at the one and the same time - a party or a suitor and also as a judge, or the deciding authority must be impartial and without bias; and*
> >
> > *(b) Audi alteram partem: Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority."*
>
> *However, over the years, the Courts through out the world have discovered new facets of the rules of natural justice and applied them to judicial, quasi-judicial and even administrative actions/decisions. At the same time, the Courts have repeatedly emphasized that the rules of natural justice are flexible and their application depends upon the facts of a given case and the statutory provisions, if any, applicable, nature of the right which may be affected and the consequences which may follow due to violation of the rules of natural justice.*
>
> *33. In Russel v. Duke of Norfolk (1949) 1 All ER 109, (CA), Tucker, L.J. observed: (All ER p.118 D-E)*
>
> > *"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."*
>
> *34. In Byrne v. Kinematograph Renters Society Limited (1958) 2 All ER 579, Lord Harman made the following observations: (WLR p. 784)*
>
> > *"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more."*

35. *In Union of India v. P.K. Roy AIR 1968 SC 850, Ramaswami, J. observed: (AIR p.858, para 11)*

> *" 11. ....The extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."*

36. In Suresh Koshy George v. University of Kerala AIR 1969 SC 198, K.S. Hegde, J. observed: (AIR p.201, para 7)

> *"7. .....The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."*

37. A.K. Kraipak v. Union of India (1969) 2 SCC 262 represents an important milestone in the field of administrative law. The question which came up for consideration by the Constitution Bench was whether Naqishbund who was a candidate seeking selection for appointment to the All India Forest Service was disqualified from being a member of the selection board. One of the issues considered by the Court was whether the rules of natural justice were applicable to purely administrative action. After noticing some precedents on the subject, the Court held: (SCC pp. 268-69, para 13)

> *" 13. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi- judicial power."*

38. The Court then considered whether the rules of natural justice were applicable to a case involving selection for appointment to a particular service. The learned Attorney General argued that the rules of natural justice were not applicable to the process of selection. The Constitution Bench referred to the judgments of the Queen's Bench in re H.K. (An infant) (1967) 2 QB 617 and of this Court in State of Orissa v. Dr.(Miss) Binapani Dei (1967) 2 SCR 625 and observed: (A.K. Kraipak case, SCC pp. 272-73, para 20)

> *"20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (Nemo debet esse judex propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem) . Ver y soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi- judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi- judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. University of Kerala the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case." (emphasis supplied)*

39. In Maneka Gandhi v. Union of India (supra), a larger Bench of seven Judges considered whether passport of the petitioner could be impounded without giving her notice and opportunity of hearing. Bhagwati, J, speaking for himself and for Untwalia and Fazal Ali, JJ, gave a new dimension to the rule of audi alteram partem and declared that an action taken in violation of

that rule is arbitrary and violative of Articles 14 and 21 of the Constitution. The learned Judge referred to Ridge v. Baldwin (1964) AC 40, State of Orissa v. Dr.(Miss) Binapani Dei (supra), In re H.K.(An Infant) (supra) and A.K. Kraipak v. Union of India (supra) and observed: (Maneka Gandhi case, SCC pp. 291-92, para 14)

> *"14. ....The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law "lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation". Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. .....A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure "established" by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article."*

40. In Olga Tellis v. Bombay Municipal Corporation (1985) 3 SCC 545, the Constitution Bench dealt with the question whether pavement and slum dwellers could be evicted without being heard. After adverting to various

precedents on the subject, Chandrachud, C.J. observed: (SCC pp. 577-78, para 40)

> *"40. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. Sir Raymond Evershed says that, "from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work". Therefore, 'He that takes the procedural sword shall perish with the sword.' "*

9. In view of the aforesaid exposition of law, the impugned action/order of the respondents cannot be sustained as the same is not only violative of principles of natural justice but also fair play. The least which was expected from the respondents was to serve a show cause notice upon the petitioner calling for her explanation and it was only after hearing the petitioner that her services could have been terminated that too if so warranted. Therefore, this Court has no option but to quash and set-aside the order dated 26.9.2008.

10. Accordingly, the writ petition is allowed and the order dated 26.9.2008 whereby the petitioner was ordered to be retired is quashed and set-aside. The petitioner shall be deemed to continue in service on the basis of her date of birth as reflected in the medical certificate of fitness (Annexure P-6) or till such time when the respondents hold an inquiry and establish the date of birth of the petitioner to be at variance to what is reflected in Annexure P-6. Since the petitioner's services have been illegally retired, she shall be entitled to all consequential benefits including arrears which shall be paid to her within a period of eight weeks, failing which, the respondents shall also be liable to pay interest on this amount at the rate of 9% per annum.

11. The writ petition is disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Shashi Kant. ....Petitioner
Versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 116 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application No. 59-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 59-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Lashkari Ram ..... Petitioner.
Vs.
State of H.P. & anr. ..... Respondents

Cr.MMO No. 56 of 2015.
Judgement reserved on: 7.5.2015.
Date of decision: 11.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition for quashing the FIR registered against him- respondent contended that final report has been presented before the Court; therefore, petition is not maintainable- petitioner contended that the dispute is essentially of a civil nature and is given a cloak of a criminal case, therefore, Court has jurisdiction to quash the criminal proceedings- held, that complaint can be quashed where a dispute is predominately of a civil nature and not when the allegation against the petitioner constitutes a criminal offence - these principles cannot be made applicable when a prima facie case is made out against the petition which has culminated into a charge-sheet- only the Court where the charge-sheet has been filed should be left to deal with the same- petition dismissed. (Para- 3 to 11)

Case referred:
Nancy Bhatt & another Vs. State of H.P. and another, ILR, H.P. Volume XLV- II, 2015, Page 550
Paramjeet Batra vs. State of Uttarakhand and others (2013) 11 SCC 673

For the petitioner	:	Mr. Subhash Sharma, Advocate.
For the respondents	:	Mr. Virender Kumar Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Addl. A.Gs. for respondent No. 1. Mr. Ashok Verma, Advocate, for respondent No.2. Mr. Pyare Lal, HC No. 21, Police Station, Bharari, Distt. Bilaspur.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner has prayed for quashing of FIR No. 61/2014 dated 9.6.2014, under sections 354, 451, 506 IPC registered against him at Police Station, Bharari, District Bilaspur, H.P.

2. It is contended that because of a civil dispute, inter se, the parties, a false case has been filed against the petitioner.

3. A preliminary objection has been raised by the respondent regarding the very maintainability of this petition in view of final report having been presented before the Magistrate. In support of his contention, the respondent has relied upon a judgement of this court in **Cr.MMO No. 183 of 2014** titled **Nancy Bhatt & another** vs. **State of H.P. decided on 6.4.2015**, where like in the present case the final report had been presented and this court held as follows:-

> "2. A preliminary objection has been raised by the respondents that once the FIR has culminated in charge-sheet, the present petition has been rendered infructuous, because it is not the FIR but the chargesheet which forms the basis of criminal trial.
>
> 3. I have heard learned counsel for the parties and gone through the records of the case carefully.

4. In ***State of Punjab vs. Dharam Vir Singh Jethi 1994 SCC (Cri.) 500***, the Hon'ble Supreme Court held that when the chargesheet was submitted, quashing of FIR is not permissible since it would be open to the Court to refuse to frame charge. It was observed as under:

> *"2. Heard learned counsel for the State as well as the contesting respondent. We are afraid that the High Court was not right in quashing the First Information Report on the plea that the said respondent had no role to play and was never the custodian of the paddy in question. In fact it was averred in the counter-affidavit filed in the High Court that the said respondent had acted in collusion with Kashmira Singh resulting in the latter misappropriating the paddy in question. At the relevant point of time the respondent concerned, it is alleged, was in overall charge of the Government Seed Farm, Trehan. This allegation forms the basis of the involvement of the respondent concerned. The High Court was, therefore, wrong in saying that the respondent concerned had no role to play. A specific role is assigned to him, it may be proved or may fail. In any case, pursuant to the First Information Report the investigation was undertaken and a charge sheet or a police report under Section 173(2) of the Code of Criminal Procedure was filed in the court. If the investigation papers annexed to the charge sheet do not disclose the commission of any crime by the respondent concerned, it would be open to the court to refuse to frame a charge, but quashing of the First Information Report was not permissible.*

5. In ***Vineet Narain and others*** vs. ***Union of India and another (1996) 2 SCC 199,*** the Supreme Court after refusing to quash the FIR, held that when a chargesheet was filed in the competent Court, it is that Court alone which will then deal with the case on merits, in accordance with law.

6. This legal position has been reiterated in number of cases. (See: ***Anukul Chandra Pradhan vs. Union of India and others (1996) 6 SCC 354*** and ***Jakia Nasim Ahesan and another vs. State of Gujarat and others (2011) 12 SCC 302).***

7. Admittedly the FIR is not a substantive piece of evidence. It is information of a cognizable offence given under Section 154 of the Code of Criminal Procedure (for short 'Code'). The legislature in its wisdom under the provisions of the Code has given limited/restrictive power to the Court to intervene at the stage of investigation by the police. Investigation is the exclusive domain of the police. Ordinarily, it is only when the charge sheet is filed that the Court is empowered either to take cognizance and to frame charge or to refuse to do the same.

8. The FIR is the sheet anchor on the basis of which the investigation ensues. However, once the FIR on the basis of which the investigation was initiated has culminated into a chargesheet, the FIR does not remain the sheet anchor because the same alone then cannot be read and has to be read along with the material gathered by the investigating agency during the course of the investigation.

> 9. It would, therefore, not be permissible for this Court to quash the FIR or else that would amount to annihilating a still born prosecution by going into the merits on the plea of proof of the prima facie case. Further, adverting to those facts and giving findings on merits would otherwise result in the grossest error of law because this Court in exercise of its jurisdiction under Section 482 of the Code cannot undertake pre-trial of a criminal case."

4. On the other hand, the learned counsel for the petitioner would argue that once the dispute is essentially of a civil nature and is given a cloak of a criminal offence, then court has every jurisdiction to quash the criminal proceedings irrespective of its stage. In support of his submission, the learned counsel has relied upon the judgement of the Hon'ble Supreme Court in **Paramjeet Batra** vs. **State of Uttarakhand and others (2013) 11 SCC 673,** wherein it was held as follows:-

> "12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash criminal proceedings to prevent abuse of process of court."

5. There is no quarrel with the proposition as canvassed by Sh. Subhash Sharma, learned counsel for the petitioner but the same will only apply in case the dispute would have been predominately of a civil nature, but then the allegations constituting the offence, under sections 354, 451 and 506 IPC can by no stretch of imagination be termed to be constituting an offence of civil nature.

6. The Hon'ble Supreme Court in **Paramjeet Batra's** case (supra) was seized of the matter which involved monetary consideration and a civil suit making similar grievance had already been filed and was pending adjudication. It is in this background that the observations as reproduced hereinabove were made by the Hon'ble Supreme Court. Whereas in the present case there are specific allegations against the petitioner which when taken on the face value, constitute an offence punishable under law.

7. The prosecutrix in her statement under section 154 Cr.P.C. has specifically stated that on 9.6.2014 at about 11 a.m. when she was all alone in the courtyard and washing clothes then the petitioner came there and threatened her that she should advise her husband not to set his eyes on the land or else he alongwith his son would kill him. Thereafter with the bad intention he caught hold of the prosecutrix and pushed her because of which she sustained injuries on her left leg as the same struck against the stairs resulting in further injuries to her knee. This statement of the prosecutrix is further corroborated by the Medico Legal Certificates (MLCs).

8. Though the learned counsel for the petitioner would argue that because the prosecutrix is a Staff Nurse, therefore, she has manipulated the MLCs and it was on the basis of such false documents that petitioner is sought to be involved in the present case.

9. The mere fact that prosecutrix is working as Staff Nurse would not in itself establish that MLCs are in any way false, however, these are the matters which are required to be considered during the course of the trial and at present the court is only required to consider the allegations as contained in the First Information Report and the final report, which as observed earlier, prima-facie, indicate and make out the commission of offence for which the petitioner has been charged.

10. In addition to the aforesaid, it would be noticed that after the investigation, the petitioner has not been charged with for lesser offence, but has been charged with this very offence for which he had been booked at the time of registration of FIR. That apart, the petitioner cannot take any advantage of the pendency of civil proceedings, because admittedly the civil proceedings were instituted after the registration of the FIR, that too, at the instance of the opposite party. The FIR in question was registered on 9.6.2014 while the civil suit came to be filed exactly after one month on 8.7.2014.

11. Having said so, I find no merit in this petition and the same is dismissed.

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

Nek Ram ...Petitioner

Versus

Financial Commissioner (Appeals) and others ...Respondents

CWP No. 2763 of 2014
Date of decision: 11.5.2015

Code of Civil Procedure, 1908 - Order 9 Rule 9- Petitioner was ordered to be ejected by Assistant Collector 1st Grade, Mandi- he filed an appeal which was dismissed in default for non-appearance- an application for restoration of appeal was filed, which was dismissed on the ground that it was filed after two years and three months - this order was challenged unsuccessfully in appeal and revision- held, that length of delay is not a decisive factor for condonation for delay, but sufficiency of satisfactory explanation is a material factor- petitioner had hired an advocate and he cannot be penalized for non-appearance of the advocate- authorities had not gone into the sufficiency of the explanation offered by the petitioner- further, application for restoration was decided after 10 years- hence, petition allowed and case remanded with a direction to decide the same afresh after giving reasons.

(Para-3 to 11)

Cases referred:

State of Punjab Vs. Shamlal Murari, AIR 1976 S.C. 1177

Sital Prasad Saxena Vs. Union of India and others, AIR 1985 SC 1

Collector, Land Acquisition Anantnag Vs. Katiji, AIR 1987 SC 1353

Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (dead) by LRS and others, (2008) 8 SCC 321

For the Petitioner: Mr. Surinder Saklani, Advocate.
For the Respondents: Mr.Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

Facts in brief, as are necessary for the adjudication of this writ petition are that, proceeding under Section 163 of the H.P. Land Revenue Act were initiated against the petitioner by Assistant Collector Ist Grade, Mandi and vide order dated 5.1.1993, the petitioner was ordered to be evicted. This order was challenged by the petitioner before the Sub Divisional Collector, Sadar, Mandi on various grounds, however, before the appeal could be heard on merits, the same was dismissed in default on 3.10.2000. Application for restoration came to be filed on 27.1.2003. However, the matter remained pending before respondent No. 3 and ultimately vide order dated 20.1.2012, this application for restoration was rejected. The petitioner filed appeal before the Divisional Commissioner, Mandi, who too dismissed the same and left with no other option he approached the Financial Commissioner, who too dismissed the Revision Petition. It is these orders, which have been challenged by the petitioner before this Court on the grounds that the authorities below should not have dismissed the appeal on mere technicalities and should have decide the case on merits.

2. In response to the petition, the respondents in their reply supported the impugned orders and have further contended that the petitioner for his lapses cannot blame the respondents. It is further contended that ample opportunity was afforded to the petitioner for being heard and sufficient time had been granted to him to defend the matter in the Courts below and the present petition has been filed only to prolong the eviction proceedings.

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

3. A perusal of the impugned orders would show that all the authorities below have been influenced by the fact that the application for restoration had been moved after more than two years and three months, little realizing that the decisive factor in condonation of delay, is not the length of delay, but sufficiency of satisfactory explanation. The legislature has conferred the power to condone delay to enable the authorities to do substantial justice to the parties by disposing of the mattes on merits. The authorities below appear to be oblivious and were expected to bear in mind that ordinarily the applicant applying for condonation of delay does not stand to benefit by lodging his claim late. Refusing to condone delay can result in meritorious matters to be thrown out at the very thresh hold and cause of justice being defeated.

4. It also cannot be lost site that a party, who as per the present adversary legal system, has selected his advocate, briefed him and paid his fee can remain supremely confident that his lawyer will look after his interest and such an innocent party who has done everything in his power has expected of him, should not suffer for the inaction, omission or misdemeanor of his counsel.

5. The procedural rules have to be liberally construed, and care must be taken, that so strict interpretation be not placed thereon, whereby, technicality may tend to

triumph over justice. It has to be kept in mind, that an overly strict construction of procedural provisions, may result in the stifling the best case of a party, even if, for adequate reasons, which may be beyond its control.

6. It has to be remembered that procedural law is not an obstruction, but an aid to justice. Procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant, in the administration of justice. If the breach can be corrected, without injury to the just disposal of a case, regulatory requirement should not be enthroned into a dominant desideratum. Above all, it has to be remembered that the object of Courts and Tribunals is to dispense justice, and not to wreck the end result, on technicalities.

7. In ***State of Punjab Vs. Shamlal Murari,*** *AIR 1976 S.C. 1177,* it was laid down by the Hon'ble Supreme Court as follows:-

> *"Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administrations of justice.... After all, Courts are to do justice, not to wreck this end product on technicalities."*

In ***Sital Prasad Saxena Vs. Union of India and others,*** *AIR 1985 SC 1,* while dealing the question of abatement under Order XXII of the Code and allowing substitution at the Supreme Court state, it was laid down as follows:

> *"Let it be recalled what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted and not to make them penal statutes for punishing erring parties."*

In ***Collector, Land Acquisition Anantnag Vs. Katiji,*** *AIR 1987 SC 1353,* the Hon'ble Supreme Court has observed as follows:-

> *"When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested rights in injustice being done because of a non-deliberate delay."*
>
> *xxxxxxx "It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."*

8. In ***Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (dead) by LRS and others,*** *(2008) 8 SCC 321*, the Hon'ble Supreme Court taking into consideration the law on the subject and laid down the following principles:-

> *"**13.** The principles applicable in considering applications for setting aside abatement may thus be summarized as follows:*
>
> *(i) The word "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words "sufficient cause" in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory*

tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refilling the appeal after rectification of defects.

(v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an application is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal."

9. In view of the aforesaid exposition of law, it can be conveniently held that the expression "sufficient cause" has to be liberally interpreted and there is no presumption that the delay is occasioned deliberately or on account of culpable negligence or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. In such circumstances, the approach of the authorities should be justice-oriented so as to advance the cause of justice and mere delay should not defeat the cause of justice. It is well settled that in matters of condonation of delay highly pedantic approach should be eschewed and justice-oriented approach should be adopted. Every endeavor has to be made to ensure that a party is not made to suffer on account of technicalities.

10. As already observed earlier, none of the authorities have gone into the sufficiency of the explanation offered by the petitioner and have been much influenced by the so called "inordinate delay" in filing of the application for restoration of appeal.

11. There is yet another disturbing feature of this case. The appeal was filed before the Sub Divisional Collector on 4.3.2010 and was dismissed in default on 3.10.2000. The application for restoration was filed on 27.1.2003, but then it took the Sub Divisional Collector nearly ten years i.e. 20.1.2012 to decide the same, that too by rendering self contradictory observations, inasmuch as in the earlier part of the order it appears that the

application for restoration was accepted and allowed, while in the next paragraph he rejects the application, that too by holding that the petitioner had not appeared intentionally. The relevant portion of the order is quoted below:-

> *"Feeling aggrieved and dissatisfied with the order of AC 1st Grade Tehsil Sadar the appellant preferred appeal before this court alleging therein that the Kanungo as well as the AC Ist Grade have not inspected the spot in the presence of the appellant. He also alleged that he has not been afforded an opportunity of being heard. Moreover the appellant has not been allowed to lead the evidence in order to establish his case and as such the learned court below has passed wrong and illegal order which is liable to be set aside. The appeal was dismissed in default on 3.10.2000 and the appellant has filed an application under order 9 rule 9(1) read with section 151 C.P.C. for restoration of appeal which was accepted and allowed.*
>
> *I have heard the ld. counsel for appellant and also gone through the lower court record and also record file of this court carefully. It has been found that the ld. counsel for the appellant appeared in the court regularly. The ld. counsel was given last opportunity to put forward his arguments on dated 29.03.2000. But inspite this fact, he did not appear intentionally on the said date. Hence application is rejected. A copy of this order be sent to the AC Ist Grade Tehsil Sadar Mandi District Mandi for compliance. Case file along with original file be consigned to GRR after due completion."*

That apart, it is also not understood as to from where the Collector has concluded that the petitioner had not appeared intentionally on 3.10.2000 when the case had been dismissed in default. Before arriving at such a conclusion, it was incumbent upon the Collector to have recorded reasons for the same.

12. In view of the detailed discussion above, I find merit in this petition and the same is accordingly allowed and the orders as contained in Annexures P-1 to P-4 are quashed and set aside and the matter is remanded to the Sub Divisional Collector, Sadar, District Mandi for decision afresh. Since these proceedings are pending for more than two decades, the Sub Divisional Collector is directed to decide the proceedings as expeditiously as possible and in no event later then **15th July, 2015**. The parties are left to bear their costs.

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

Hardeep Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 396 of 2012
Reserved on: May 08, 2015.
Decided on: May 12, 2015.

N.D.P.S. Act, 1985- Section 15- 138.500 kg of poppy husk was found in the vehicle of accused - PW-1 to PW-3 did not support the prosecution version- all the seals were not

found intact in the Court- no entry was made regarding taking out of the case property from Malkhana and depositing it - held, that in these circumstances, prosecution had failed to prove that contraband was recovered from exclusive and conscious possession of the accused- accused acquitted. (Para-23 to 26)

Case referred:
Makhan Singh vrs. State of Haryana, JT 2015 (4) SC 222

For the appellant: Mr. Vivek Sharma, Advocate, vice Mr. Satyen Vaidya, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 16.7.2012, rendered by the learned Special Judge, FTC, Una, H.P, in Sessions Case No. 12-VII-2011, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 16.1.2011 at about 4:20 AM, the police officials, namely, SI Shakti Singh alongwith ASI Sewa Singh and others were on patrolling in Govt. vehicle No. HP -20-C-0507. It was driven by Const. Rakesh Kumar from Haroli to Tahliwal side. HC Sanjay Kumar met the police party and got his statement Ext. PW-7/A recorded with SHO to the effect that when he was present at Tahliwal near Haroli road Chowk at about 4:10 AM, he received telephonic information about the indulgence of accused Hardeep Singh in illegal business of selling poppy husk and he has gone towards Hoshiarpur in his Car No. PB-08W-4849 for bringing contraband and accused often use Nhai Da Mour to Palkwah road for bringing the contraband and if naka is laid at Nichla road, he can be caught red handed. The information was well founded and trustworthy. Accordingly, the statement of HC Sanjay Kumar was sent to PS on the basis of which FIR Ext. PW-7/B was registered. Report Ext. PW-8/A under Section 42 (1)(ii) was prepared and sent to SP, Una through Const. Sanjay Kumar. Naka was laid near Nichla Palkwah road to Bhai da Mour and at about 5:30 AM, a car bearing No. PB-08W-4849 came from Bhai da mour side which was stopped. Accused was found in the vehicle. He disclosed his name as Hardeep Singh and consent memo Ext. PW-5/A under Section 50 was prepared and HC Sanjay Kumar was sent to bring the Pradhan of the Gram Panchayat. In the presence of the accused, vehicle was searched leading to recovery of four plastic sacks from its dicky. No independent witness was available on the spot and local witnesses were arranged. In the morning at about 7:40 AM, after arranging the electronic weighing scale, the sacks were checked and on smelling sacks were found to be containing poppy husk. The contraband was weighed in the presence of witnesses Heera Devi and Sandeep Kumar. Sack No. 1 contained 33.620 kg, 2nd sack contained 34.970 kg, 3rd sack contained 35.110 kg and 4th sack contained 38.800 kg. The total weight of the contraband was found to be

138.500 kgs. All the sacks were made homogeneous and four samples of 1 kg each Ext. SB-1 to SB-4 were taken. The samples and bulks were sealed with seal impression "J" and sample seal was separately drawn as Ext. PW-2/A on a piece of cloth. The IO filled in column Nos. 1 to 8 of the NCB forms. The seal was entrusted to witnesses Heera Devi and sack were marked as B-1 to B-4. Sacks, samples, vehicle, NCB forms and sample seal were taken into possession vide memo Ext. PW-2/B. The IO prepared the spot map. The accused was arrested and searched. The contraband was produced before SI Baldev Ram, who resealed the case property with seal "K". Special report was sent to the SP, Una. On 26.2.2011, IO moved an application Ext. PW-15/A before the learned JMIC, who prepared inventory Ext. PW-15/C. Samples were sent to chemical analysis and report was obtained. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 21 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case and has pleaded ignorance. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. Vivek Sharma, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, Asstt. AG, for the State has supported the judgment of the learned trial Court dated 16.7.2012.

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

6. PW-1 Satnam Singh, deposed that he did not remain associated with the investigation of this case nor any RC and insurance of Car was taken into possession by the police in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he denied that recovery memo Ext. PW-1/A was prepared in his presence. He volunteered that the police obtained his signatures on blank papers. He admitted that RC Ext. PA and insurance Ext. PB are the same which he had seen in the Police Station. He admitted that he put his signatures on memo Ext. PW-1/A after reading and understanding its contents.

7. PW-2 Heera Devi, deposed that she saw the accused inside the vehicle. Nothing has happened in her presence. She saw four sacks kept outside the vehicle lying on the road. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination, she denied that accused had told his name in her presence to the police. Volunteered that accusedmay have told his name as Hardeep alias Sonu to the police before she reached at the spot. She denied that the police told her that they wanted vehicle to be searched in her presence. She denied that boy named Sandeep Kumar was also present at the spot. Volunteered that many people had gathered on the spot at that time. She denied that Sandeep Kumar and ASI Sewa Singh were associated in the investigation as witnesses. She denied that Dicky of the car was opened by the accused in her presence and four plastic sacks containing contraband were recovered. She denied that the police checked the sacks. Volunteered that one police official put his hand in the sack to check the material contained therein. She admitted that the police told her that contraband was poppy husk. She denied that the police got weighing scale and weighed the contraband in her presence. She admitted that the contraband was weighed by police in her presence. Volunteered that she did not notice the exact weight of the sacks and she saw the

police weighing one sack only. She denied that the police had taken out the samples of contraband from each bag weighing 1 kg each. She deposed that samples were already prepared by the police in cloth parcel. She also denied that the police marked sacks with marks B-1 to B-4 in her presence. She also denied that cloth parcels containing samples of contraband were marked as mark SB-1 to SB-4. She did not know if sealed parcels containing samples of contraband were sealed with seal "J". She denied that the police has filled in NCB forms in her presence and put sample seal on the same and thereafter the seal was given to her. She denied that the police took into possession Ceilo Car PB-08-W-4849 alongwith four sacks of contraband, samples, NCB forms vide memo Ext. PW-2/B. Volunteered that the police obtained her signatures on the already prepared memo. She identified her signatures on memo Ext. PW-2/A. When her statement was recorded, the prosecution has produced four cloth parcels containing samples of contraband duly sealed by FSL and seal impression J. Each parcel bore her signatures. The sacks were opened. The seal was not readable.

8. PW-3 Sandeep Kumar, deposed that the police told him that a sikh gentleman sitting inside the Ceilo car was found possessing contraband. The police requested him to be a witness. The President of the Gram Panchayat reached on the spot after two hours. The police opened the dicky of the Car in his presence and four plastic sacks were taken out of it. The plastic sacks were weighed by the police in his presence. The police after checking told him that the contraband was poppy husk. The police mixed the contraband with their hands. Each bag was 30-35 kg. each. The police took out the samples from each sack. The police obtained his signatures on parcels containing samples and on plastic sacks B-1 to B-4, now Ext. P-1 to P-4. He did not remember sealed parcels containing samples of contraband were sealed by police with seal impression "J" in his presence. Volunteered that the same bears his signatures. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that the police sealed cloth parcels containing samples with seal and he did not remember that plastic sacks P-1 to P-4 were sealed with seal "J". Volunteered that Ext. PW-2/A bears his signatures encircled red. The total weight of the sacks was between 130-140 kgs. approximately. He admitted that Ceilo Car along with Key, contraband sacks Ext. P-1 to P-4 and samples Ext. P-5 to P-8 were taken into possession by the police vide memo Ext. PW-2/B in his presence and the memo bears his signatures encircled red. He identified his signatures upon that. He denied that the police got weighing scale on the spot in a vehicle. Volunteered that it was already in the police vehicle.

9. PW-4 Shiv Kumar, deposed that he was registered owner of vehicle No. PB-08W-4849, as per RC Ext. PA. He sold this vehicle to accused.

10. PW-5 Const. Rakesh Kumar, deposed that the statement of HC Sanjay Kumar was recorded in the vehicle in his presence. It was sent to the Police Station. It was also sent to the S.P. Una. The naka was laid at Palkwah Nichla road near cause way. HC Sanjay Kumar was sent to village Kante to arrange independent witnesses. After about 10-20 minutes from laying naka, Ceilo Car No. PB-08W-4849 came from Bhai Ka Mour side. The vehicle was stopped. The SHO told the accused that police wanted to search his vehicle and also to conduct his personal search. The SHO further told the accused whether he wanted to be searched by the police or gazetted officer or Magistrate. The accused consented to be searched by the police and memo Ext. PW-5/a was prepared. Nothing was found in the personal search of the police officials except govt. documents. Thereafter, SHO directed him and HC Santosh Kumar to bring weighing scale from village Samnal in the

government vehicle. Satnam Singh provided electric weighing scale which they brought to the spot. When they reached back at the spot Pradhan Heera and Sandeep Kumar were present.

11. PW-6 HHC Harmesh Kumar, deposed the manner in which the accused was apprehended, vehicle was searched and the contraband was recovered. The contraband was weighed. It was sealed. he also clicked the photographs with digital camera.

12. PW-7 Const. Ashok Kumar deposed that HC Sanjay Kumar signaled police party to stop and driver of govt. vehicle Rakesh Kumar stopped the vehicle. He talked with the SHO Pathania and got his statement under Section 154 Cr.P.C. recorded in the police vehicle vide Ext. PW-7/A.

13. PW-8 Const. Sanjay Kumar also deposed the manner in which the accused was apprehended and the contraband was recovered, search and sealing process was completed on the spot. His statement u/s 154 Cr.P.C. was reduced into writing vide Ext. PW-7/A. SHO prepared the information report u/s 42(2) of the ND & PS Act.

14. PW-10 ASI Sewa Singh, deposed the manner in which the vehicle was signaled, stopped and codal formalities were completed on the spot, including search and sealing of the contraband. The contraband was opened while recording his statement in the Court. He has seen the samples and sacks. He identified his signatures. Seals J, K, FSL on parcel were intact. The Court made the following observations:

> "**COURT OBSERVATIONS:**
>
> Parcel SB-1 contains three seals intact of FSL and one broken. This parcel also contains four intact seals. Two intact seals are having seal impression K. Two seals are partly broken. Mark on two seals are not visible.
>
> Parcel SB-2 contains four intact seals of FSl and six other seals. The mark K is only visible in one seal.
>
> Parcel SB-3 contains three seals of FSL and six other seals. Two seals are containing visible seal impression of seal K and one seal impression J. Other seals are not visible.
>
> Parcel SB-4 contains four seals of FSL, another two seals of impression J and one seal of impression K."

15. PW-11 SI Baldev Ram, deposed that at about 5:10 AM, he received rukka of HC Sanjay Kumar from Const. Ashok Kumar Ext. PW-7/A, on the basis of which FIR Ext. PW-7/B was recorded. At about 11:40 AM, HC Sanjay Kumar alongwith the police party came to PS and deposited case property four sacks weighing total 138.500 kgs. poppy husk, sealed each sack with seal J, sample seal, four samples one kg sealed with seal J bearing three seals on each sample, NCB form in triplicate. He reasealed the sacks Ext. P-1 to P-4 with seal impression K. Thereafter, the case property was handed over to MHC of PS Harolli.

16. PW-12 Const. Gurmail Singh, has taken the contraband to FSL Junga and returned RC to MHC Vipan Kumar on 20.1.2011.

17. PW-13 Const. Jasbir Singh, deposed that on 1.3.2011, MHC Vipan Kumar handed over to him four sealed parcels sealed with court seal (SJ), vide RC No. 62/2011.

The parcels were marked as S-1 to S-4 weighing 500 gms each which he deposited at FSL Junga the same day and returned RC to the MHC.

18. PW-14 HC Vipan Kumar, deposed that on 16.1.2011, SI Baldev Ram, SHO, PS Haroli deposited with him four plastic sacks Ext. P-1 to P-4 sealed with one seal J, resealed with one seal K, marked as B-1 to B-4, containing poppy husk. He entered the case property vide entry No. 507/11 in register No. 19 of Malkhana, Haroli. He filled in the NCB forms in triplicate. The samples alongwith the sample seals J and K, NCB forms in triplicate were sent to FSL, Junga vide RC No. 12/2011 dated 18.1.2011 through Const. Gurmail Singh. He proved copy of register No. 19 as Ext. PW-14/B. On 26.2.2011, four sacks of poppy husk were taken out alongwith the sample seals J and K by SI/SHO Shakti Singh for inventory and produced before the learned JMIC, Court No. 2, Una. The same day, four sacks and four homogeneous samples mark S-1 to S-4 sealed with court seal, alongwith sample seals J and K and sample seal of Court were again deposited with him in the malkhana by SHO. On 1.3.2011, homogeneous samples taken by the Court were sent to chemical test vide RC No. 62/2011 to FSL, Junga through Const. Jasbir Singh. On 11.3.2011, homogeneous samples sent to FSL Junga were received back through HHC Dharam Pal No. 314 alongwith the result. The result Ext. PW-14/E was given to SHO. He admitted in his cross-examination that there was no entry in register about date and returning RC to him. Volunteered that such entries are often made in DDR Register as per procedure. The first result was received on 26.1.2011 and only NCB form was received with result. He admitted that DDR No. are not mentioned when samples are sent to FSL. Volunteered that at the time of sending sample to FSL, separate RC is issued. He also admitted that as per record, number of impression of FSL seals is not mentioned. The entry regarding DD No. 22 dated 26.2.2011 mentioned in the register did not depict time. The case property was taken out of malkhana with the order of SHO, who may be having such order.

19. PW-15 Yajuvender Singh, JMIC, Court No. 2, Una, deposed that on 26.2.2011, SHO PS Haroli Shakti Singh Pathania moved an application Ext. PW-15/A in case FIR No. 16/2011 under Section 52 of the ND & PS Act, seeking certification of inventory and for drawing representative samples. He allowed the application and order is Ext. PW-15/B and certificate is Ext. PW-15/D.

20. PW-20 HC Sanjay Kumar, deposed that he went towards the area of PS Haroli in his private car in connection with detection of ND & PS Act and excise cases. At about 4:10 AM, on 16.1.2011, he reached at Tahliwal Haroli mod. He received secret information that accused Hardeep Singh was indulging in the sale of poppy husk and on that date he had gone to Hoshiarpur (Punjab) in his private vehicle PB-08W-4849, to bring it. He used to go by road Bhai ka mod to Pakwah road to bring the contraband. He came to the conclusion that if naka is laid at Nichla road, accused could be caught red handed. The secret information was well founded and trustworthy. He was going to PS Haroli when SI Shakti Singh Pathania met him at village Palakwah near Nichla Mod. He got recorded his statement u/s 154 Cr.P.C. vide Ext. PW-7/A. Naka was laid down. HC Santosh Kumar was sent by SHO to arrange for independent witnesses of the village. On the asking of SHO this witness told him that he could not arrange the witnesses. In the meanwhile a vehicle came from Bhaida mod side towards Palkwah. SHO signaled that vehicle to stop with the help of torch light. Driver stopped the vehicle. The accused was asked whether he wanted his vehicle to be searched by Magistrate or Gazetted Officer. Accused gave in writing his willingness to get his vehicle searched by the police officer. The President of Gram

Panchayat Palkwah was called on the spot. Another witness Sandeep Kumar was also standing on the spot. The contraband was recovered. It was weighed. NCB forms were filled up. The sacks were marked as B-1 to B-4. Samples were marked as SB-1 to SB-4.

21. PW-21 SI Shakti Singh Pathania, testified the manner in which the vehicle was stopped, accused was nabbed and contraband was recovered. The sampling process was completed on the spot including filling up of NCB forms. He also moved application Ext. PW-15/A before the JMIC, Una under Section 52-A of the Act. Inventory was prepared. In his cross-examination, he deposed that naka was laid at about 5:10/5:20 AM.

22. The case of the prosecution, precisely is that naka was laid down. Accused came in his car. He was apprehended. He was asked about his right to be searched by the Gazetted Officer or Executive Magistrate. The contraband was recovered from the dicky. It was weighed. Sampling process was completed on the spot including filling up of NCB forms. The case property was sealed with seal 'J" and thereafter it was produced before the SI Baldev Kumar. He resealed the same vide P-1 to P-4 with seal impression "K". The case property was sent for chemical analysis. The parcel was taken by Gurmail Singh to FSL Junga on 18.1.2011 and thereafter by PW-13 Jasbir Singh on 1.3.2011.

23. The case of the prosecution has not been supported in entirety by PW-1 Satnam Singh, PW-2 Hira Devi and PW-3 Sandeep Kumar, though they have identified their signatures on the memos. The contraband was deposited by PW-11 SI Baldev Ram before the MHC, PS Haroli after resealing the same with seal impression "K". PW-14 HC Vipan Kumar, has proved copy of malkhana register Ext. PW-14/B. There is entry when the case property was deposited with him and it was sent for chemical analysis through Const. Gurmail Singh. There is entry about the receipt of first report of FSL. The samples were taken out vide DD No. 22 for making inventory by the JMIC, Una. It was received back as per the entry made in the malkhana register vide Ext. PW-14/B. These samples were sealed with the court seal. DD was also prepared. The case property was produced in the court at the time of recording the statement of PW-10 ASI Seva Singh. According to PW-10 ASI Seva Singh, seals J, K, FSL on parcels were intact, however, as per the Court observation in parcel SB-1 only three seals of FSL were intact and one broken. The parcel contained four intact seals. Two intact seals were having seal impression K and two seals were partly broken. Mark on two seals were not visible. Parcel SB-2 contained four intact seals of FSL and six other seals. The mark K was only visible in one seal. Parcel SB-3 contained three seals of FSL and six other seals. Two seals were containing visible seal impression of seal K and one seal impression J. Other seals were not visible. Parcel SB-4 contained four seals of FSL, another two seals of impression J and one seal of impression K.

24. The contraband was sent for chemical analysis on two occasions. One by Gurmail Singh and another through Jasbir Singh. The report of FSL was received as per Ext. PW-14/B. However, there is no corresponding entry when the contraband was taken out from the malkhana to be sent to FSL Junga second time, though the report is Ext. PW-14/E. The case property is required mandatorily to be produced before the Court. There is a detailed procedure, the manner in which the case property is to be taken out from the malkhana after making corresponding entry in malkhana register and also by preparing DDR. The case property is sent through Constable to be placed before the Court. Similarly, the case property after its production in the Court is received back and entered in the malkhana by preparing separate DDR. In case the case property has been taken out from the malkhana, it was produced in the Court, there should have been the entry in the malkhana register when it was taken out and when it was re-deposited. The person who

has produced the contraband in the Court has not been produced. There is neither any entry in the malkhana register nor any DDR to this effect has been prepared. Thus, it cannot be said conclusively that it was the same case property which was recovered from the accused and sent for FSL examination twice and produced before the Court. Moreover, the case of the prosecution has also not been supported by the independent witnesses. PW-2 Heera Devi has denied that the dicky was opened in her presence and four plastic sacks were recovered. She has denied that the police weighed the contraband. She has also denied that the sampling and sealing process was completed on the spot including filling up of NCB forms. There is breach of mandatory provisions regarding deposit and re-deposit of the contraband in the malkhana register at the time of production and when it is sent back to malkhana.

25. Their lordships of the Hon'ble Supreme Court, in a recent decision in the case of ***Makhan Singh vrs. State of Haryana,*** reported in ***JT 2015 (4) SC 222,*** have held that it is well settled that conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In that case, it was not as if independent witnesses were not available. Independent witness PW1 and another independent witness examined as DW-2 had spoken in one voice that the accused person was taken from his residence. In such circumstances, their lordships have held that the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version. Their lordships have held as under:

> "10. For recording the conviction, the Sessions Court as well as the High Court mainly relied on the testimony of official witnesses who made the recovery, i.e. H.C. Suraj Mal-PW2 and Inspector Raghbir Singh-PW6, and found them sufficiently strengthening the recovery of the possession from the appellant. In our considered view, the manner in which the alleged recovery has been made does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available. Independent witnesses PW1 and another independent witness examined as DW2 has spoken in one voice that the accused person was taken from his residence. In such circumstances, in our view, the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version."

26. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 15 of the N.D & P.S., Act.

27. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 16.7.2012, rendered by the

learned Special Judge, FTC, Una, H.P., in Sessions Case No. 12-VII of 2011, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

28. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

****

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

Tripta Devi widow of Shri Jagdish & others. ....Appellants/Defendants

Versus

Krishan Chand (died) through LRs. Kadshi Devi and others .....Respondents/Plaintiffs.

RSA No. 235 of 2003
Order reserved on 30th April, 2015
Date of order of limited remand 13th May, 2015

Code of Civil Procedure, 1908- Order 22- Plaintiff No. 1 died during the pendency of the suit- no application was filed for bringing on record his legal representatives – plaintiff No. 8 was recorded to be owner of 1/3rd share- therefore, cause of action relating to plaintiff No. 8 was severable and the suit will abate qua him and not in its entirety. (Para-11)

Hindu Adoption and Maintenance Act 1956 - Section 12 – An adopted son gets transplanted into adoptive family with the same right as a natural born son, however, he continues to have his share in the coparcenary property of his natural father as he had acquired share in the property at the time of birth and would not be divested by subsequent adoption. (Para-13)

Cases referred:

Budh Ram and others vs. Bansi and others, 2010)11 SCC 476

Daya Singh and another vs. Gurdev Singh (dead) by LRs and others, (2010)2 SCC 194

For the Appellants: Mr. Ramakant Sharma, Advocate.

For the Respondents: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Order of limited remand under Section 107 of CPC

Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure 1908 by the appellants against the judgment and decree dated 31.3.2003 passed by learned Additional District Judge Solan in Civil Appeal No. 63-NL/13 of 1996 titled Tripta Devi and others vs. Krishan Chand and others.

2. Brief facts of the case as pleaded are that Sita Ram and others filed a suit for declaration with consequential relief of injunction pleaded therein that Majlashi predecessor-in-interest of parties had four sons namely Kali Dass, Shivia, Mansha Ram and Manu. It is pleaded that Manu had three sons namely Lajjya Ram @ Lajjya, Jhaiyan and Basu. It is pleaded that Mansha Ram had no issue and he was survived by his widow namely Phullman. It is pleaded that Shivia had two sons namely Ganu and Ganeshu. It is further pleaded that Kali Dass and his brothers were Hindu Brahmins and Kali Dass had adopted Basu as his son and Basu transplanted in the family of Kali Dass. It is pleaded that Phullman Devi widow of Mansha Ram was owner of land measuring 26 bighas 16 biswas and she died intestate leaving behind no legal heirs and after her death dispute arose between Lajjya Ram @ Lajjya, Jhaiyan and Basu on one hand and Ganu and Ganeshu sons of Shivia on the other hand. It is pleaded that thereafter Lajjya Ram @ Lajjya and others filed civil suit No. 41 titled Lajjya and others vs. Ganeshu and others in the Court of Civil Judge and civil suit No. 41 was decreed whereby 1/3rd share of estate of Phullman was mutated as per decree of Civil Court. It is pleaded that Basu was adopted by Kali Dass and he had no right title or interest in the estate of natural father Mr. Manu because Basu stood transplanted in the family of Kali Dass. It is pleaded that name of Basu was illegally recorded in the revenue record as legal heir of Manu. It is pleaded that Basu always represented himself to be adopted son of Kali Dass. It is pleaded that only Lajjya Ram @ Lajjya and Jhaiyan were legal heirs of estate of deceased Manu. It is pleaded that in case Lajjya Ram @ Lajjya and Jhaiyan predecessor-in-interest of plaintiffs are not held or proved to be only legal heirs of Manu and if Basu is not held to be adopted son of Kali Dass even then they have acquired the right of adverse possession qua share of Basu openly, continuously and uninterruptedly since 20.9.1979 BK. It is pleaded that consolidation proceedings started in the village and deceased defendant illegally claimed 1/3rd share in suit land on the basis of wrong and illegal revenue entries. It is pleaded that deceased defendant could not claim 1/3rd share in the suit land. It is pleaded that question of title was raised before consolidation officer for not effecting the partition of suit land on the basis of illegal revenue entries in revenue record. It is pleaded that plaintiff also requested the deceased defendant to admit the claim of plaintiffs but deceased defendant refused to admit the claim of plaintiff. Prayer for decree the suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of deceased defendant pleaded therein that suit is barred by time and plaintiffs are estopped to file the present suit due to their act conduct and acquiescence. It is pleaded that suit is barred by res-judicata and suit of plaintiffs is not maintainable and plaintiffs have no locus standi and cause of action to file the present suit. It is admitted that Manu had three sons namely Lajjya Ram @ Lajja, Jhaiyan and Basu. It is also admitted that Mansha Ram had no son and he was survived by his widow Phullma and Shivia had two sons namely Ganu and Ganeshu. It is also admitted that Kali Dass and his brothers are Brahmins. It is denied that Kali Dass had adopted Basu as his son. It is pleaded that transplantation of Basu in the family of Kali Dass does not arise. It is pleaded that Manu was father of Basu. It is pleaded that from Basu Swanu was born and from Swanu deceased defendant was born. It is pleaded that deceased defendant has inherited the suit property to the extent of his share in accordance with law. It is pleaded that civil suit No. 196 was decided on dated 7.10.1989 BK filed by predecessors-in-interest of deceased defendant against Puran, Lajjaya Ram, and Sita Ram etc and same was decreed in favour of Swanu and thereafter share of Kali Dass went to Swanu. It is pleaded that Kali Dass also executed gift deed qua his share in the name of predecessors-in-interest of deceased defendant. It is pleaded that Basu was not adopted by Kali Dass at any point of time. It is pleaded that Basu had legally inherited the share of Manu along with Lajjya Ram

and Jhaiyan. It is pleaded that suit property was devolved upon Swanu Ram and from Swanu it was devolved upon Jagdish deceased defendant. It is pleaded that after death of Manu his all three sons namely Lajjya Ram, Jhaiyan and Basu have inherited the suit property to the extent of 1/3rd share each and further pleaded that plaintiffs did not acquire the title in suit property by way of right of adverse possession. It is pleaded that plaintiffs could not challenge the entries of 80 years old revenue record and further pleaded that contesting deceased defendant was legally entitled to file partition proceedings before consolidation officer and contesting deceased defendant was also legally entitled to get his share separated from the plaintiffs. Prayer for dismissal of suit sought.

4. Plaintiffs also filed replication and re-asserted the allegations mentioned in plaint. As per the pleadings of parties learned trial Court framed following issues on dated 25.8.1992:-

1. Whether Kali Dass formerly adopted one Basu as his son as alleged if so its effect? OPP
2. Whether Shri Manu the predecessor-in-interest of plaintiffs was owner in possession of the land in lieu of which suit land was earmarked and carved out in consequence of first settlement as alleged? OPP
3. Whether there were any decree dated 26.9.1989 B.K. passed in civil suit No. 41 titled Lajja Ram and others vs. Ganeshu and others whereby 1/3rd share of estate of Phullmu (26bighas and 16 biswas) was mutated having been inherited by aforesaid Basu, as alleged? .....OPP
4. Whether entries in the revenue record qua the suit land previously showing Basu and thereafter the successor Sawanu and presently Jagdish were and are null and void as alleged in para No. 7 of the plaint? OPP
5. Whether Lajja Ram and Jhaiyan the predecessors of plaintiffs being the only heirs of Manu exclusively entered into possession of the whole estate of Manu as alleged? OPP
6. In case issue No. 5 is not proved in affirmative whether the plaintiffs have become owners in possession of 1/3rd share of the suit land by way of adverse possession through their predecessors as alleged? OPP
7. Whether suit is barred by limitation as alleged ?OPD
8. Whether plaintiffs are estopped to file the suit for their act and conduct as alleged? OPD
9. Whether suit is barred by res judicata, as alleged? OPD
10. Whether suit is not maintainable as alleged? OPD
11 Whether plaintiffs have no locus standi to file the suit, as alleged? OPD
12 Whether plaintiffs have no cause of action, as alleged? OPD
13 Whether plaintiffs have not affixed the proper court fee, as alleged? OPD
14 Relief.

5. Learned trial Court decided issue Nos. 1 to 5 in favour of the plaintiffs. Learned trial Court held issue No. 6 as redundant and learned trial Court decided issue Nos. 7 to 13 against contesting deceased defendant. Learned trial Court decreed the suit and also granted consequential relief of injunction as prayed for in favour of plaintiffs and against contesting deceased defendant Jagdish.

6. Feeling aggrieved against the judgment and decree passed by learned trial Court Tripta Devi and others (Legal heirs of deceased contesting defendant) filed Civil Appeal

No. 63-NL/13 of 1996 titled Tripata Devi and others vs. Krishan Chand and others. Learned Additional District Judge on dated 31.3.2003 dismissed the appeal filed by appellants.

7. Thereafter feeling aggrieved against the judgment and decree passed by learned first Appellate Court in Civil Appeal No. 63-NL-13 of 1996 Tripata Devi and others (Legal representatives of deceased contesting defendant) filed RSA No. 235 of 2003 which was admitted by Hon'ble High Court on dated 22.8.2003 on the following substantial question of law:-

> 1. Whether learned lower Appellate Court is right in not recording any findings with respect to the question of abatement of a suit as a whole especially when one of the plaintiff had died during the pendency of the appeal before the learned lower Appellate Court?

Court take judicial notice of pleadings and oral and documentary evidence placed on record and framed additional substantial question of law under proviso of Section 100 of Code of Civil Procedure 1908 because Court is satisfied that RSA involves additional substantial question of law:-

> (2) Whether adopted son could inherit coparcenary property of natural father as per Section 12(b) of Hindu Adoption and Maintenance Act 1956?

8. Court heard learned Advocate appearing on behalf of parties and also perused the entire record carefully.

9. Parties examined following oral witnesses in supported of their case:-

Sr. No.	Name of witness
PW1	Bansi Ram
PW2	Madan Lal
PW3	Chet Ram
PW4	Chajju Ram
PW5	Devi Ram
PW6	Dwarka
PW7	Sunder Singh
PW8	Chhotu Ram
DW1	Jagdish

10. Oral evidence adduced by the parties:-

10.1 PW1 Bansi Ram has stated that Moti was his father and he died 54 years ago. He has stated that he has seen the suit property and further stated that Sita Ram had cultivated the suit land. He has stated that Sita Ram etc. are in settled possession of suit property and deceased defendant did not possess the suit land at any point of time. He has stated that his village is situated at a distance of ½ K.m. from suit property. He has admitted that Sita Ram and deceased Jagdish belonged to same family. He has stated that Sita Ram is in possession of his own land and deceased Jagdish was in possession of his own land. He has denied suggestion that he has deposed falsely at the instance of plaintiffs.

10.2 PW2 Madan Lal has stated that Fakiriya was his great grandfather who had died and he has further stated that his father had also died. He has stated that he has seen the suit property and same is in possession of Sita Ram and further stated that deceased

Jagdish did not remain in possession of suit property. He has admitted that parties are Hindu by religion and belong to same family. He has stated that he does not know whether partition took place inter se the parties or not. He has admitted that Sita Ram and deceased Jagdish remained in settled possession of property as per their shares.

10.3 PW3 Chet Ram has stated that his maternal grandfather Ganga Ram had died who was resident of Dhar village.

10.4 PW4 Chajju record keeper, record room Nalagarh has tendered the record.

10.5 PW5 Devi Lal has stated that he had seen the suit property. He has stated that Sita Ram is in settled possession of suit land and deceased defendant Jagdish did not remain in possession of suit land. He has stated that Girdawari is conducted which is verified by Tehsildar and he has further stated that no objection was raised relating to preparation of jamabandis and Girdawari. He has stated that he does not know that deceased Jagdish remained co-owner of suit property.

10.6 PW6 Dwarka has stated that he had seen the suit property and further stated that Majlashi was owner of suit property. He has stated that Majlashi was Hindu by religion and was having four sons namely Kali Dass, Shivia, Mansha Ram and Manu. He has stated that Manu had three sons namely Lajjya Ram, Jhaiyan and Basu. He has stated that Basu was adopted by Kali Dass and further stated that factum of adoption was informed to him by Ganu and Ganeshu. He has stated that after adoption of Basu by Kali Dass the title of Basu extinguished in the share of his natural father Manu. He has stated that Phulma was widow of Mansha Ram. He has stated that civil suit relating to share of Pulma was filed. He has stated that share of Kali Dass was inherited by Basu on the basis of adoption. He has stated that share of Manu remained in possession of plaintiffs and further stated that deceased defendant Jagdish did not inherit rights over the share of Manu. He has stated that he does not know that how the property of Manu was devolved after his death. He has stated that no objection relating to preparation of revenue record was raised. He has stated that Basu, Lajjya and Jhaiyan used to live jointly earlier and thereafter Basu separated himself. He has stated that Kali Dass had died prior to his birth. He has stated that he could not state the date and month when Basu was adopted by Kali Dass. He has admitted that Khasra Girdawari and jamabandis are prepared after verification by Tehsildar. He has stated that no objection was raised relating to preparation of revenue record.

10.7 PW7 Sunder Singh has stated that he had translated the documents in Hindu language which are Ext.PW7/A-1, Ext.PW7/B-1, Ext.PW7/C-1, Ext.PW7/D-1, Ext.PW7/E-1, Ext.PW7/F-1, Ext.PW7/G-1, Ext.PW7/H-1, Ext.PW7/J-1, Ext.PW7/K-1, Ext.PW7/L-1 & Ext.PW7/M-1 correctly. He has stated that he has translated the documents as per direction of Krishan. He has stated that documents Ext.PW7/A-1 to Ext.PW7/M-1 have been prepared from revenue record.

10.8 PW8 Chhotu Ram has stated that he is general attorney of Sita Ram copy of which is Ext.PW8/A. He has stated that Majlashi was ancestor of the parties. He has stated that parties are Hindu Brahmins by religion. He has stated that Majlashi had four sons namely Kali Dass, Shivia, Mansha Ram and Manu. He has stated that Mansha Ram had no issue and Phullma was his widow. He has stated that Manu had three sons namely Lajjya, Jhaiyan and Basu and Shivia had two sons namely Ganu and Ganeshu and further stated that Kali Dass was issueless and he adopted Basu as his adopted son. He has stated that Manu and his wife had given Basu in adoption to Kali Dass according to religious customs.

He has stated that thereafter Basu became the adopted son of Kali Dass. He has stated that after the death of Phullma civil litigation started which was decided on dated 29.9.1989. He has stated that contesting deceased defendant Jagdish was wrongly recorded in revenue record and he did not remain in possession of suit property. He has stated that entries of contesting deceased defendant Jagdish to the extent of 1/3rd share was illegally recorded in revenue record. He has stated that Jagdish threatened to dispossess the plaintiffs and thereafter plaintiffs filed the present suit. He has stated that his father remained sick for a long time. He has stated that after death of Majlashi his property was devolved between Manu, Shivia, Mansha Ram and Kali Dass. He has stated that he had not seen Manu, Shivia and Kali Dass. He has stated that initially they used to reside jointly and thereafter they separated. He has stated that he does not know when they separated. He has stated that he does not know when Manu had died. He has stated that property of Manu was devolved upon Lajjya and Jhaiyan. He has stated that Lajjya and Jhaiyan did not file any suit against Basu. He has stated that after death of Manu his property was devolved upon his legal heirs. He has stated that property of Shivia was devolved upon Ganu and Ganeshu and property of Mansha Ram was devolved upon Phullma. He has stated that he does not know when Kali Dass died. He has stated that no document of adoption of Basu was prepared. He has stated that property of Kali Dass was devolved upon Basu. He has admitted that Lajjya, Jhaiyan, Ganu, Ganeshu, Basu have inherited the ancestral property. He has stated that no objection was raised when Girdawari was prepared. He has stated that suit property has not been partitioned and remained joint property.

10.9 DW1 Jagdish has stated that Manu was son of Majlashi. He has stated that Manu had three sons namely Lajjya, Jhaiyan and Basu. He has stated that property of Manu was devolved upon his three sons namely Lajjya, Jhaiyan and Basu. He has stated that thereafter share of Basu was devolved upon Sawanu and thereafter share of Sawanu was devolved upon deceased defendant Jagdish. He has stated that Sita Ram and Asha Ram were born from Jhaiyan. He has stated that Basu had inherited 1/3rd share of Manu. He has stated that he is in settled possession of suit property as co-sharer. He has stated that share of Kali Dass was devolved upon Basu on the basis of gift deed. He has stated that Ganu and Ganeshu have filed a suit against Kali Dass and Basu had died during pendency of civil suit. He has stated that Basu was his great grandfather. He has stated that parties are Hindu Brahmins by religion and Lajjya and Jhaiyan and Basu are three sons of Manu. He has stated that he does not know whether Phullma was widow of Mansha Ram. He has stated that he does not know that Ganu and Ganeshu were sons of Shivia. He has denied suggestion that Basu was adopted by Kali Dass according to religious customs. He has denied suggestion that Basu was adopted son of Kali Dass. He has denied suggestion that Basu had inherited the property of Kali Dass as adoptee son. He has stated that property of Kali Dass was inherited by Basu on the basis of gift deed. He has denied suggestion that Basu was not legally entitled to inherit share of Manu because he was transplanted in the family of Kali Dass as adoptee son. He has denied suggestion that defendants are not in settled possession of suit property and further denied suggestion that wrong revenue record was prepared.

Findings on Point Nos. 1 and 2 of Substantial questions of law

11. Submission of learned Advocate appearing on behalf of the appellants that co-plaintiff No. 8 Brahma Nand son of Phipharu son of Lajjya Ram died during the pendency of appeal and his legal representatives were not brought on record and suit filed by plaintiffs be abated as a whole due to death of Brahma Nand co-plaintiff No. 8 is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that on dated

13.12.1996 Tripta Devi filed application under Order 22 Rule 4 read with Rule 9 of CPC for dismissing the suit on the ground of abatement. Tripta Devi pleaded in application that Process Server reported that plaintiff Brahma Nand co-plaintiff No. 8 was dead at the time of passing the decree and during the continuation of trial the other co-plaintiffs did not file any application under Order 22 Rule 3 CPC to implead his LRs and proceedings in the trial Court continued against a dead person and decree was passed by learned trial Court against a dead person which is nullity in law. It is also proved on record that thereafter reply was filed on behalf of contesting plaintiffs and it is admitted that Brahma Nand co-plaintiff died. It is pleaded that Brahma Nand had joined the company of saint on account of religious feelings and his whereabouts were not known to contesting plaintiffs. It is pleaded that share of Brahma Nand co-plaintiff No. 8 was severable and it is denied that contesting plaintiffs have no independent and distinct cause of action to maintain and continue the suit. It is also proved on record that thereafter learned first Appellate Court on dated 16.10.1997 framed following issues:-

1. Whether suit has abated due to death of Shri Brahma Nand plaintiff No. 8 as alleged? ...OPA
2. Whether Shri Brahma Nand had become Saint renounced the world as alleged, if so its effect?OPA

   ....Corrected as Non-OPA(Corrected by High Court suo motu being clerical mistake in nature).
3. Relief.

It is also proved on record that thereafter first Appellate Court recorded the statement of Ramesh Kumar and Chhotu Ram. It is also proved on record that on dated 19.5.2000 Shri Kashmiri Lal learned Advocate appeared on behalf of respondents/plaintiffs had stated in Court that he relinquished the claim qua share of deceased Brahma Nand and he has also given the statement that qua share of Brahma Nand suit be abated. It is also proved on record that thereafter Shri H.R. Sharma Advocate who appeared on behalf of the appellants/defendants has also given statement on dated 19.5.2000 that he heard statement of Shri Kashmiri Lal Advocate and same is correct and according to statement given by Shri Kashmiri Lal Advocate application filed under Order 22 Rule 4 be decided. It is also proved on record that thereafter learned first Appellate Court passed a consent order on dated 19.5.2000 which is quoted in toto:-

"19.5.2000

Present:- Sh. H.R. Sharma, Ld. Adv. for appellants.

Sh. Kashmiri Lal, Ld. Adv.for respondents.

At this stage, learned counsel for respondents-plaintiffs stated at Bar that he abandoned the claim of share of plaintiff Brahma Nand. Learned counsel for appellants has admitted the statement of Sh. Kashmiri Lal, Advocate. Separate statements of learned counsel for both the parties to this effect recorded which are placed on record. In view of above statements of learned counsel for the parties, it is ordered that the suit qua the share of plaintiff Brahma Nand son of Sh. Phipharu is abated. Argument in the main appeal heard today. Now it be listed for final orders at Solan on 30.5.2000.

Sd/-
Addl.District Judge, Solan
Camp at Nalagarh."

It is proved on record that learned Appellate Court in view of statements of learned Advocates abated the suit qua share of Brahma Nand only. Court has also perused latest jamabandi for the year 1992-93 Ext.P8 placed on record qua the suit property. In jamabandi for the year 1992-93 it has been specifically mentioned that Brahma Nand was recorded as owner of 1/3rd share, Sita Ram was recorded as owner of 1/3rd share and Jagdish was recorded as owner of 1/3rd share in the suit property. It is proved on record that shares of Brahma Nand, Sita Ram and Jagdish have been specifically defined. In view of the fact that shares of Brahma Nand, Sita Ram& Jagdish have been separately mentioned as 1/3rd each and in view of the fact that cause of action relating to Brahma Nand is severable hence it is held that learned first Appellate Court has rightly abated the suit qua share of Brahma Nand only as per statements of learned Advocates. It is well settled law that abatement depends upon facts and circumstances of an individual case. It is well settled law that where one of the parties has an independent and distinct right of his own not interdependent upon one or other then appeal would be abated only qua the deceased. ***(See (2010)11 SCC 476 titled Budh Ram and others vs. Bansi and others)*** Hence in present case Brahma Nand, Sita Ram and Jagdish have independent and distinct rights of their own in suit property and right of deceased Brahma Nand was not interdependent upon Sita Ram and Jagdish. It is held that Brahma Nand was having independent ownership right of 1/3rd share in the suit property.

12. Another submission of learned Advocate appearing on behalf of the appellants that present suit is barred by limitation because plaintiffs have challenged the revenue record which is in existence for long period is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that plaintiffs have filed the present suit when deceased defendant threatened to dispossess the plaintiff from suit land during consolidation operation and when deceased defendant filed application for partition of suit land before consolidation authorities. It is held that cause of action accrued to the plaintiffs to file the present suit when deceased defendant moved the consolidation authorities for partition of suit land. It is held that cause of action accrued to plaintiffs to file the present suit when deceased defendant namely Jagdish filed partition proceedings before the consolidation authorities and when deceased defendant threatened to dispossess the plaintiffs from suit land. It is well settled law that limitation starts from date of cause of action. ***(See (2010)2 SCC 194 titled Daya Singh and another vs. Gurdev Singh (dead) by LRs and others)***

13. Another submission of learned Advocate appearing on behalf of the appellants that in para No. 5 of written statement it was pleaded by deceased defendant in positive manner that suit property was inherited by Lajjya Ram, Jhaiyan and Basu from Manu and Manu had inherited the property from Majlashi and suit land is coparcenary property and learned Advocate appearing on behalf of appellants further submitted that in coparcenary property person has right by birth and even after adoption the adoptee son could not be divested his interest in coparcenary property of natural father as per Section 12 of Hindu Adoption and Maintenance Act 1956 is accepted for the reasons hereinafter mentioned. It is well settled law that on adoption adoptee gets transplanted into adopting family with the same right as that of natural born son. It is well settled law that after adoption adoptee is deemed to be child of adoptive father and mother for all purposes with effect from the date of adoption. It is also well settled law that adopted son continued to have his share in coparcenary property of his natural father and it is well settled law that on adoption the adopted son is not divested from his share in the coparcenary property of his natural father. It is well settled law that share of adopted son in coparcenary property

continued to vest in favour of the adopted son even after adoption. As per Section 12 of Hindu Adoption and Maintenance Act 1956 any property which vested in the adopted child before adoption shall continue to vest in such person subject to obligation if any attaching to the ownership of such property including the obligation to maintain relatives in the family of his birth. It is well settled law that person acquired share in the coparcenary property by birth in the natural family. Hence it is held that share of adopted son in coparcenary property could not be divested after adoption in view of Section 12 of Hindu Adoption and Maintenance Act 1956. Section 12 of Hindu Adoption and Maintenance Act 1956 is quoted in toto:-

> "12.**Effects of adoption**-An adopted child shall be deemd to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:
>
> Provided that-
>
> (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
>
> (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
>
> (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

14. Submission of learned Advocate appearing on behalf of the respondents that learned trial Court and learned first Appellate Court have held that Basu was adopted by Kali Dass and his relations in natural family were severed and Basu was not legally entitled to inherit the property from Manu because he was already adopted by Kali Dass and in view of concurrent findings of adoption by learned trial Court appeal filed by appellants be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that learned trial Court and learned first Appellate Court have not decided the material issue involved inter se the parties whether Basu was legally entitled to inherit the coparcenary property owned by Manu. Even learned trial Court did not frame any issue whether suit property was coparcenary property between Lajjya Ram, Jhaiyan and Basu despite specific pleading in written statement that suit property was initially owned by Majlashi and thereafter same was inherited by Kali Dass, Shivia, Mansha Ram and and Manu and thereafter share of Manu was inherited by Lajjya Ram, Jhaiyan and Basu in equal shares. It is well settled law that under Order XIV Rule 5 of the Code of Civil Procedure, 1908 Court can at any time before passing of decree could amend the issue or frame the additional issue as it deems fit for determining the matter in controversy between the parties. It is held that framing of additional issue is necessary for determining the controversy between the parties as per provisions of Order XIV Rule 5 of Code of Civil Procedure 1908. In view of above stated facts following additional issue No. 13A is framed by High Court in order to decide the case properly and effectively and in order to impart substantial justice inter se the parties and in the ends of justice.

> ***Additional Issue No. 13-A framed by High Court of H.P.***
>
> 13A. Whether suit land was coparcenary property between Lajjya Ram, Jhaiyan and Basu and whether Basu had inherited the coparcenary property

by birth and whether right of Basu did not divest in coparcenary property as per Section 12 of Hindu Adoption and Maintenance Act 1956 even after adoption by Kali Dass? OPD

15. In view of above stated facts judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court are reversed and case is remanded back to learned trial Court under Section 107 of Code of Civil Procedure 1908 for limited purpose only. It is held that limited retrial is necessary in the ends of justice. Learned trial Court will re-admit the suit under its original number in the register of civil suits. Observations will not effect merits of case in any manner. Learned trial Court after giving due opportunity to both the parties to lead evidence in support of additional issue No. 13-A framed by High Court will decide the case afresh in accordance with law within two months after receiving the file because present civil suit is pending since 1990 and require expeditious disposal. Evidence recorded during original trial shall subject to all just exceptions be evidence during trial after remand. Observations will not effect merits of case in any manner. Parties are left to bear their own costs. Memo of costs be prepared by the Registrar (Judicial) and thereafter file of learned trial Court and file of learned first Appellate Court along with certified copy of this order and memo of costs will be transmitted forthwith. Appeal stands disposed of. Pending application(s) if any also stands disposed of.

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

Kamal Dev Verma son of Sh. R.C.Verma & others ....Petitioners

Versus

H.P. University & others ....Non-petitioners

CWP No. 5767 of 2014
Order Reserved on 8th May 2015
Date of Order 14th May, 2015

Constitution of India, 1950- Article 226- Petitioner pleaded that more than 50% of the paper was out of syllabus –Registrar, H.P. University submitted a report that some questions were out of syllabus- held, that students should not suffer for the fault of the university- University directed to award marks regarding the questions set out of syllabus to the students. (Para-5 to 7)

For the Petitioner: Mr. Suneet Goel, Advocate.
For Non-petitioners 1,3 and 4: Mr. J.L. Bhardwaj, Advocate.
For Non-petitioner No.2: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India pleaded therein that on dated 22.4.2014 examination of BCA 3rd year Database Management System (BCA 303) paper was held. It is pleaded that question paper was not in

conformity with the prescribed syllabus and questions having 64 marks were out of prescribed syllabus. It is pleaded that more than 50% of the question paper was out of prescribed syllabus. It is further pleaded that petitioner immediately filed a complaint with regard to the aforesaid act with the request to look into the matter and factum of 50% of question paper being out of syllabus was admitted by Principals of various colleges as per the report. It is pleaded that petitioners among other students represented to respondent No. 3 to award them appropriate grace marks in order to enable them to take admission in MCA course. It is pleaded that matter was also taken up with Vice Chancellor of H.P. University with request to award grace marks as they were not able to attempt more than 50% questions which were out of prescribed syllabus and further pleaded that thereafter decision was taken to give five percent grace marks to students and thereafter H.P. University declared the result after giving five percent grace marks to students. It is pleaded that due to acts of omission and commission on the part of respondents the career of petitioners is at stake and entire year would be wasted. Prayer for acceptance of writ petition sought.

2. Per contra response filed on behalf of non-petitioners Nos. 1, 3 and 4 pleaded therein that on receipt of complaint the concerned Chairman was requested to look into the complaint and submitted his comments/recommendations in the matter. It is pleaded that papers setter was also requested to give his comments. It is pleaded that in the meantime decision was taken not to declare the result and University received the reply from paper setter on dated 4.6.2014 wherein it was stated that no question was set out of syllabus. It is pleaded that Chairman of the department pointed out that few questions were out of syllabus and he opined that five percent grace marks be given to students. It is pleaded that out of 1485 students 1184 students have cleared the paper of BCA-303 (Data Base Management System) and maximum marks obtained by candidates were 70 out of 80. It is pleaded that opinion given by Chairman to award five percent grace marks was approved by Vice Chancellor of University on dated 24.7.2007 and consequently result was declared. It is pleaded that decision taken by Vice Chancellor of University was in consonance with recommendations submitted by Chairman of the department. It is pleaded that all petitioners have cleared all other papers except BCA-III year (Data Base Management System) held in April 2014. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioners and learned Advocate appearing on behalf of non-petitioners Nos. 1, 3 and 4 and learned Additional Advocate General appearing on behalf of the non-petitioner No.2 and Court also perused the entire record carefully.

4. Following points arise for determination in this civil writ petition:-

1. Whether petitioners are legally entitled for full marks in questions Nos. 3 and 4 of Unit II, question Nos. 7 and 8 of Unit IV and questions Nos. vii, viii, ix and x of Sub Paper of Unit V relating to examination of BCA III year (Database Management System) BCA-303?

2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing for the petitioners that petitioners are students and their career is involved and they should not be suffered for their no fault is accepted for the reasons hereinafter mentioned. On dated 16.4.2015 Court directed the respondents to file an affidavit that how many percentages of questions were out of syllabus

in order to dispose of the petition properly and effectively and to impart substantial justice inter se the parties. In compliance of order dated 16.4.2015 respondents filed affidavit placed on record. Respondents did not mention in affidavit how much percentage of questions were out of syllabus despite positive direction of Court and respondents have intentionally concealed the percentage of questions which were out of syllabus in affidavit. There is recital in affidavit filed by learned Registrar H.P. University that Chairman/Subject expert had submitted report that questions Nos. 3 and 4 of Unit II, questions Nos. 7 and 8 of Unit IV and questions Nos. vii, viii, ix and x of sub part of Unit V were out of syllabus. It is well settled law that question setter was under legal obligation to set questions in question paper strictly as per syllabus prescribed to students. Court is of the opinion that students cannot be allowed to suffer for fault of question paper setter.

6. Submission of learned Advocate appearing on behalf of respondents that five percent grace marks were given to students and on this ground civil writ petition filed by petitioners be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that decision to give five percent grace marks to students is not reasonable in view of the fact that respondents did not mention the percentage of questions which were out of syllabus and in view of admission of learned Registrar H.P. University in affidavit placed on record verified on dated 29th April 2015 that as per report of Chairman/subject expert questions Nos. 3 and 4 of Unit II, question Nos. 7 and 8 of Unit No. IV and questions Nos. vii, viii, ix and x of Sub part of Unit V were out of syllabus. It would be expedient in the ends of justice that full marks of these questions should be awarded to petitioners which were out of syllabus. Point No. 1 is decided accordingly.

Point No.2 (Final Order)

7. In view of findings on point No. 1 it is held that co-respondents Nos. 1, 3 and 4 will award whole marks to petitioners qua questions Nos. 3 and 4 of Unit II, questions Nos. 7 and 8 of Unit IV and questions Nos. vii, viii, ix and x of sub part of Unit V which were out of syllabus and thereafter co-respondents Nos. 1,3,4 and 5 will declare the result of petitioners forthwith. It is further ordered that if the petitioners would qualify the BCA 3rd year Course BCA-303 (Data Base Management System) then petitioners would be deemed to be admitted in MCA Course commencing as of today with all consequential legal benefits. Order passed in ends of justice keeping in view that petitioners are students and their future is involved. No order as to costs. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

State of Himachal Pradesh. .....Appellant.

Vs.

Nomu Ram and others. ....Respondents.

Cr. Appeal No.483 of 2009.
Judgment reserved on: 5.5.2015
Date of Decision: May 14, 2015.

Indian Penal Code, 1860- Sections 302 and 201 read with Section 34- Marriage of the deceased was settled with the daughter of co-accused 'N'- deceased had given Rs. 50,000/-

to 'N' as marriage consideration amount- the daughter of 'N' stayed with deceased at Kullu-Manali for about 10-12 days – 'N' brought back his daughter from Manali and got her married somewhere else- deceased used to demand money from 'N'- accused used to quarrel with deceased- deceased went to the house of 'N' for demanding money but did not return- his dead body was found in the water of a dam – accused were arrested- clothes and stick were recovered at their instance- Medical Officer opined that deceased could have died by infliction of injury with a stick- case of the prosecution is based upon circumstantial evidence- dead body was found in a dam and the possibility of the involvement of 3rd person could not be ruled out- co-accused had sustained injuries which were not explained by the prosecution, which means that prosecution has concealed the genesis of the incident- witnesses to the disclosure statement did not support the prosecution version- blood group of the blood detected on the clothes was not determined and, therefore, it is not sufficient to connect the accused with the commission of crime- suspicion howsoever strong cannot take place of proof – held, that in these circumstances, acquittal of the accused was justified.

Cases referred:

Prakash vs. State of Rajasthan (Apex Court DB), 2013 Cri.L.J. 2040
Sakharam Vs. State of Madhya Pradesh, AIR 1992 SC 2045
Ashish Batham Vs. State of Madhya Pradesh, AIR 2002 SC 3206
Musheer Khan and another Vs. State of Madhya Pradesh, AIR 2010 SC 762
State of Maharashtra Vs. Annappa Bandu Kavatage, AIR 1979 SC 1410
S.P.Bhatnagar and another Vs. The State of Maharashtra, AIR 1979 SC 826
Ashok Kumar Chatterjee Vs. State of Madhya Pradesh, AIR 1989 SC 1890
Sakharam Vs. State of Madhya Pradesh, AIR 1992 SC 758
State of Maharashtra Vs. Champalal Punjaji Shah, AIR 1981 SC 1675
Dharm Das Wadhwani Vs. The State of Uttar Pradesh, AIR 1975 SC 241
Bhagat Ram Vs. State of Punjab, AIR 1954 SC 621
Anjlus Dungdung Vs. State of Jharkhand, (2005) 9 SCC 765
Nanhar Vs. State of Haryana, (2010) 11 SCC 423
Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116
Charan Singh Vs. The State of Uttar Pradesh, AIR 1967 SC 520
Gian Mahtani Vs. State of Maharashtra AIR 1971 SC 1898
State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382
Bhugdomal Gangaram and others Vs. The State of Gujarat, AIR 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
Mookkiah and another Vs. State, (2013) 2 SCC 89
State of Rajashthan Vs. Talevar and another, 2011 (11) SCC 666
Surendra Vs. State of Rajasthan, AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt, 2012 (1) SCC 602
Balak Ram and another Vs. State of UP, AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat, (2002) 3 SCC 57
Raghunath Vs. State of Haryana, (2003) 1 SCC 398
State of U.P Vs. Ram Veer Singh and others, AIR 2007 SC 3075
S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others, (2008) 11 SCC 186
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, AIR 2008 SC 2066,
Arulvelu and another Vs. State, (2009) 10 SCC 206

Perla Somasekhara Reddy and others Vs. State of A.P., (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh, (2010) 2 SCC 445

For the appellant:	Mr. Ashok Chaudhary and Mr.V.S.Chauhan, Addl. Advocate Generals and Mr.J.S.Guleria, Assistant Advocate General.
For the respondents:	Mr.Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by learned Additional Sessions Judge Sirmour District at Nahan in Sessions trial No.1-N/7 of 2008 titled State of HP Vs. Nomu Ram and others.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that deceased Sadhu Ram son of Smt. Kamla Devi and brother of Puran was labourer. It is further alleged by prosecution that marriage of deceased Sadhu Ram was settled with the daughter of co-accused Nomu Ram and deceased Sadhu Ram had given Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram as marriage consideration amount. It is further alleged by prosecution that Reena Devi daughter of co-accused Nomu Ram stayed with deceased Sadhu Ram at Kullu/Manali for about 10/12 days. It is further alleged by prosecution that after some time co-accused Nomu Ram brought back his daughter Reena Devi from Manali and got her married somewhere else due to which the relation between co-accused Nomu Ram and deceased Sadhu Ram became strained. It is further alleged by prosecution that whenever deceased Sadhu Ram used to demand back his money then accused persons used to quarrel with deceased and also used to threaten deceased to kill him. It is further alleged by prosecution that on dated 18.9.2007 at about 9 PM deceased Sadhu Ram came to the house of co-accused Nomu Ram for demand of his money and thereafter deceased Sadhu Ram did not return to his house. It is further alleged by prosecution that on dated 19.9.2007 at about 11.25 AM co-accused Jogi Ram filed a criminal complaint in Police Station Shillai regarding quarrel which took place in the evening on dated 18.9.2007 with deceased Sadhu Ram on the basis of which rapat in daily diary Ext PW10/A was recorded by PW10 Constable Tapender. It is further alleged by prosecution that thereafter medical examination of co-accused Jogi Ram was also conducted by PW12 Dr.Rajeev Chauhan the then Medical Officer CHC Shillai on dated 19.9.2007 and he was found to have sustained three injuries which were simple in nature caused with blunt weapon regarding which MLC Ext PW12/A was issued. It is further alleged by prosecution that on dated 23.9.2007 a telephonic message was received at about 4 PM by PW1 Inspector Narveer Singh that a dead body was seen in the water of Echadi dam and thereafter rapat in the daily diary Ext PW16/A was recorded. It is further alleged by prosecution that thereafter on receipt of information PW19 HC Arjun Singh went to the spot along with police officials and found that a dead body was floating in the water which was fully decomposed. It is further alleged by prosecution that both legs and one hand of the body was tied with the help of a rope. It is further alleged by prosecution that thereafter photographs of dead body were obtained which are Ext PW19/C-1 to Ext PW19/C-10 and inquest report Ext PW19/A and Ext PW19/B were prepared and the dead body was brought

to Civil Hospital Paonta Sahib for post mortem examination. It is further alleged by prosecution that thereafter PW1 Inspector Narveer Singh also examined dead body and on examination of dead body it appears to be a case of murder and thereafter rukka Ext PW1/A was prepared which was forwarded to Police Station. It is further alleged by prosecution that body of deceased Sadhu Ram was fully decomposed and thereafter same was sent for post mortem examination. It is further alleged by prosecution that on dated 25.9.2007 PW2 Kamla Devi came to know regarding recovery of dead body and identified the dead body of deceased. It is further alleged by prosecution that as per post mortem report deceased had died due to antemortem head injury and duration between death and injury was instantaneous and between death and post mortem was 7 to 10 days. It is further alleged by prosecution that post mortem report is Ext PW21/A. It is further alleged by prosecution that viscera of the deceased along with clothes were handed over to police for chemical examination and as per report of chemical examiner Ext PA no poison was detected in the viscera. It is further alleged by prosecution that as per report of chemical examiner Ext PX human blood was detected on the vest, trouser and T-shirt of deceased Sadhu Ram. It is further alleged by prosecution that thereafter dead body was handed over to PW3 Puran vide memo Ext PW3/A. It is further alleged by prosecution that thereafter PW2 Smt Kamla Devi expressed suspicion for the commission of murder of deceased Sadhu Ram upon co-accused Nomu Ram and co-accused Jogi Ram. It is further alleged by prosecution that co-accused Nomu Ram and co-accused Jogi Ram were arrested on dated 27.9.2007. It is further alleged by prosecution that FIR Ext PW17/A was recorded. It is further alleged by prosecution that disclosure statement of accused persons were recorded and as per disclosure statement clothes which were worn at the time of incident and stick were recovered. It is further alleged by prosecution that trouser Ext P2 and shirt Ext P3 were also took into possession vide memo Ext PW7/C. It is further alleged by prosecution that stick Ext P1 was also took into possession vide memo Ext PW7/B. It is further alleged by prosecution that as per chemical examination report Ext PX human blood was found on the trouser. It is further alleged by prosecution that akas tatima Ext PW5/A and copy of Jamabandi Ext PW5/D were also took into possession and copy of family register Ext PW6/A was also took into possession. It is further alleged by prosecution that as per opinion of PW21 Dr.Piyush Kapila the injury sustained by deceased on his head could be caused with stick Ext P9 which was sufficient to cause death. Learned Additional Sessions Judge Nahan framed charge against accused persons under Sections 302 and 201 read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as twenty one witnesses in support of its case.

Sr.No.	Name of Witness
PW1	Inspector Narveer singh
PW2	Smt. Kamla Devi
PW3	Puran @ Pardeep
PW4	Jati Ram
PW5	Dinesh Sharma
PW6	Surat Singh
PW7	Kalyan Singh
PW8	Balbir Singh
PW9	Kalyan Singh

PW10	Constable Tapender
PW11	Dhani Ram
PW12	Dr. Rajeev Chauhan
PW13	Veer Singh
PW14	Kanwar Singh
PW15	Constable Surender Tomar
PW16	Constable Dinesh Kumar
PW17	SI Balak Ram
PW18	Gulasher Ahmed
PW19	HC Arjun Singh
PW20	Inspector Shyam Lal
PW21	Dr. Piyush Kapila

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext. PW1/A	*Rukka*
Ext. PW1/B	*Statement of Smt. Kamla Devi*
Ext. PW1/C	*Statement of Somani*
Ext. PW1/D	*Statement of Sant Ram*
Ext. PW1/E	*Statement of Puran.*
Ext. PW1/F	*Letter*
Ext. PW3/A	*Memo*
Ext. PW4/A	*Memo regarding place of occurrence.*
Ext. PW4/B	*Memo regarding recovery of stick and clothes etc.*
Ext. PW5/A	*Akas Tatima*
Ext. PW5/B	*Memo of demarcation*
Ext. PW5/C	*Memo regarding throwing of dead body in Tons river.*
Ext. PW5/D	*Jamabandi of the spot.*
Ext. PW6/A	*Copy of family register*
Ext. PW7/A	*Memo regarding recovery of stick.*
Ext. PW7/B	*Recovery memo of stick*
Ext. PW7/C	*Recovery memo of trouser and shirt.*
Ext. PW7/D	*Recovery memo of clothes.*
Ext. PW7/E&F	*Recovery memo of trouser, shirt and stick.*
Ext. PW7/G	*Recovery memo of under shirt and trouser of Jogi Ram.*
Ext. PW10/A&B	*Rapat No.10 and 18 respectively*
Ext. PW12/A	*MLC of Jogi Ram*

Ext. PW13/A	*Memo regarding recovery of stick, Shirt and trouser.*
Ext. PW15/A	*Rapat*
Ext. PW16/A	*Copy of rapat No.9 Dated 23-9-2007*
*Ext.*PW16/B&C	*Copy of rapat No. 20 dated 24-9-2007. and rapat No.7 dated 28-9-2007*
Ext. PW17/A	*FIR*
Ext. PW17/B	*Endorsement on the back of Ext.* PW1/F
Ext. PW19/ A&B	*Inquest reports*
Ext. PA	*Rapat*
Ext. PW20/A	*Site plan*
Ext. PW20/B	*Site plan*
Ext. PW20/C	*Statement of Balbir Singh*
Ext. PW20/D&E	*Statements of kanwar singh & Veer Singh.*
Ext. PW21/A	*Post mortem report*
Ext. PW21/B	*Final opinion*
Ext. PX	*Report of chemical examiner*
Ext. P1	*Stick.*
Ext. P2	*Trouser*
Ext. P3	*Shirt*
Ext. P4	*Trouser*
Ext. P5	*Shirt*
Ext. P6	*Stick*
Ext. P7	*Undershirt.*
Ext. P8	*Trouser*
Ext. P9	*Stick.*

5. Statement of accused persons also recorded under Section 313 Cr.PC. Accused persons did not lead any defence evidence. Learned trial Court acquitted all accused persons.

6. Feeling aggrieved against the judgment passed by learned Additional Sessions Judge Sirmour District at Nahan State of HP filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of the respondents and also perused entire record carefully.

8. Point for determination in the present appeal is whether learned trial Court did not properly appreciate the oral as well as documentary evidence adduced by the parties and caused miscarriage of justice to the appellant.

9. ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1. PW1 Inspector Narveer Singh has stated that during the year 2007 he was posted as Investigating Officer at Police Station Paonta Sahib. He has stated that on dated

23.9.2007 at about 4.00 PM a telephonic message was received in Police Station Paonta Sahib that a dead body of unknown person was floating in the water of Echadi dam and he informed incharge Police Post Rajban and directed him to visit at spot. He has stated that HC Arjun was sent by Incharge Police Post Rajban to visit at the spot who brought dead body to Civil Hospital Paonta Sahib for conducting post mortem. He has stated that dead body was brought to hospital by HC Arjun Singh on dated 24.9.2007 in the evening. He has stated that he personally examined dead body in the mortuary house and dead body had started decomposing. He has stated that deceased was having injury mark on his forehead. He has stated that deceased was wearing green colour T-shirt and grey jeans trouser and deceased was naked from hip portion. He has stated that feet and left hand of deceased Sadhu Ram were tied with rope. He has stated that after examination of dead body it appears to be a case of murder and thereafter he wrote rukka for registration of case at Police Station Paonta Sahib. He has stated that rukka Ext PW1/A was sent through Constable Hira Singh. He has stated that dead body was identified by the relatives of deceased Sadhu Ram. He has stated that he also obtained photographs of the dead body. He has stated that he recorded statements of Smt. Kamla Devi, Smt. Shimani, Sant Ram and Puran which are Ext PW1/B to Ext PW1/E. He has stated that since the case pertains to Police Station Shillai the case was handed over to Police Station Shillai vide letter Ext PW1/F for further investigation. He has stated that on dated 27.9.2007 he arrested co-accused Nomu Ram and co-accused Jogi Ram. He has stated that on dated 28.9.2007 the file was handed over to Police Station Shillai. He has stated that thereafter co-accused Nomu Ram and co-accused Jogi Ram were brought from their house. He has stated that on inspection of dead body only one injury was found on the forehead of deceased Sadhu Ram.

9.2. PW2 Smt. Kamla Devi has stated that deceased Sadhu Ram was her son. She has stated that deceased performed labour work. She has stated that some time deceased went to Kullu/Manali in connection with labour work and co-accused Nomu Ram also used to accompany with deceased Sadhu Ram to Manali. She has stated that there was proposal of marriage of Reena Devi daughter of co-accused Nomu Ram with her son deceased Sadhu Ram. She has stated that Reena Devi daughter of co-accused Nomu Ram had also visited at Manali and stayed at Manali for about 10/12 days with her son deceased Sadhu Ram. She has stated that thereafter co-accused Nomu Ram married his daughter somewhere else in Haryana and relation between deceased Sadhu Ram and co-accused Nomu Ram became strained after the marriage of Reena Devi. She has stated that her son deceased Sadhu Ram had given Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram. She has stated that on dated 18.9.2007 deceased Sadhu Ram went to the house of co-accused Nomu Ram to demand his money at about 9.00 PM and thereafter deceased Sadhu Ram did not return. She has stated that she inquired from her relatives but no information was received regarding her son deceased Sadhu Ram. She has stated that thereafter she thought that her son deceased Sadhu Ram might have gone to Kullu/Manali in connection with labour work. She has stated that whenever her son deceased Sadhu Ram went to the house of co-accused Nomu Ram to demand his money co-accused Nomu Ram and his family members used to threat deceased Sadhu Ram. She has stated that thereafter on dated 25.9.2007 she came to know that police official had recovered a dead body in Echadi dam on dated 24.9.2007. She has stated that thereafter she along with her son and relatives went to the mortuary house at Paonta Sahib and identified the dead body. She has stated that the feet and one hand of deceased Sadhu Ram was tied with rope and she expressed suspicion on co-accused Nomu Ram and co-accused Jogi Ram for the commission of murder of her son deceased Sadhu Ram. She has stated that the age of deceased Sadhu Ram was 19 years. She has stated that she has four sons and three daughters. She has stated that

deceased Sadhu Ram was the eldest son. She has stated that her deceased son Sadhu Ram came to village from Manali on dated 24.9.2007 and brought Rs.50,000/- (Fifty thousand) with him. She has stated that deceased Sadhu Ram had given amount to the tune of Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram at the house co-accused Nomu Ram. She has stated that deceased Sadhu Ram only used to bear expenses of entire family as there was no other earning member in her family. She has stated that deceased Sadhu Ram had gone to Manali in connection with labour work in the month of July 2007. She has stated that co-accused Nomu Ram had also gone with deceased Sadhu Ram. She has stated that deceased Sadhu Ram had given Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram as consideration amount for marriage of Reena Devi with her deceased son Sadhu Ram. She has stated that her house is situated at a distance of about 7 Kms. from the house of co-accused Nomu Ram. She has stated that co-accused Nomu Ram did not visit at her house prior to the death of deceased Sadhu Ram. She has stated that when deceased Sadhu Ram did not return back from the house of co-accused Nomu Ram thereafter she went to the house of co-accused Nomu Ram to inquire about deceased Sadhu Ram. She has stated that co-accused Bhagat is the brother of co-accused Nomu Ram. She has denied suggestion that Reena Devi daughter of co-accused Nomu Ram had not visited at Manali. She also denied suggestion that Reena Devi daughter of co-accused Nomu Ram had not stayed with deceased Sadhu Ram at Manali. She has denied suggestion that co-accused Nomu Ram had not promised to marry his daughter with deceased Sadhu Ram. She has denied suggestion that deceased Sadhu Ram did not pay Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram.

9.3 PW3 Puran has stated that deceased Sadhu Ram was his brother. He has stated that deceased Sadhu Ram used to perform labour work and some time deceased used to visit Kullu/Manali in connection with labour work. He has stated that marriage of deceased Sadhu Ram was settled with the daughter of co-accused Nomu Ram. He has stated that his brother deceased Sadhu Ram had given Rs.40,000/- to Rs.50,000/- to co-accused Nomu Ram as marriage consideration amount. He has stated that Reena Devi daughter of co-accused Nomu Ram stayed at Kullu/Manali for about 10/12 days. He has stated that after some time co-accused Nomu Ram brought back his daughter from Manali. He has stated that on dated 18.9.2007 deceased Sadhu Ram went to the house of co-accused Nomu Ram at about 9 PM to bring back money from co-accused Nomu Ram. He has stated that co-accused Nomu Ram had married his daughter in Haryana with some other person. He has stated that his brother deceased Sadhu Ram did not return home from the house of co-accused Nomu Ram. He has stated that whenever deceased Sadhu Ram used to demand back his money co-accused Jogi Ram, co-accused Nomu Ram, co-accused Shupa Ram and co-accused Bhagtu Ram used to quarrel with deceased Sadhu Ram and used to threaten deceased Sadhu Ram to kill him. He has stated that on dated 25.9.2007 he came to know that police had recovered a dead body from Echadi dam which was kept in Civil hospital Paonta Sahib. He has stated that he along with his mother and relatives visited at civil hospital and identified the dead body of his brother deceased Sadhu Ram. He has stated that after post mortem dead body was handed over to him and memo Ext PW3/A was prepared which bears his signature. He has stated that photographs of dead body are marked A1 to A9. He has stated that his brother deceased Sadhu Ram had not given an amount of Rs. 40,000/- (Forty thousand) to co-accused Nomu Ram in his presence. He has stated that he did not visit the house of co-accused Nomu Ram to inquire about his brother deceased Sadhu Ram. He has denied suggestion that Reena Devi did not remain with his brother deceased Sadhu Ram at Manali. He has denied suggestion that no amount was given by his brother deceased Sadhu Ram to co-accused Nomu Ram.

9.4. PW4 Jati Ram has stated that he was associated by the police in the investigation. He has stated that on dated 29.9.2007 co-accused Nomu Ram had given a disclosure statement to the police that he could locate the place where the incident took place. He has stated that memo Ext.PW4/A was prepared by him which bears his signature. He has stated that on dated 3.10.2007 co-accused Bhagtu disclosed to the police that he could locate the place where the dead body of deceased Sadhu Ram was thrown in Tons river. He has stated that co-accused Bhagtu had also given disclosure statement that he could produce stick used in the incident and clothes which were worn by him at the time of incident. He has stated that memo Ext PW4/B was prepared which was signed by him and Chattar Singh. He has stated that co-accused Nomu Ram had also given disclosure statement that he could produce the stick used in the incident. He has stated that he could not tell who wrote disclosure statement. He has denied suggestion that no disclosure statement was given by co-accused Nomu Ram and co-accused Bhagat Ram.

9.5. PW5 Dinesh Sharma has stated that on dated 29.9.2007 on the direction of Tehsildar Shillai he went to village Mohrad to prepare tatima. He has stated that co-accused Nomu Ram located the place of incident and he prepared Akas Tatima Ext PW5/A. He has stated that co-accused Nomu Ram had also shown place where the dead body was thrown in Tons river and memo Ext PW5/C was prepared. He has stated that incident took place in khasra No.1412/601 and he also prepared jamabandi Ext. PW5/D. He has stated that Tons river is situated at a distance of 3 Kms. from the house of co-accused Nomu Ram. He has stated that there was no evidence of throwing of dead body near Tons river. He has stated that police officials have inquired from co-accused Nomu Ram in his court yard about the place of incident.

9.6. PW6 Surat Singh has stated that he was working as Panchayat Assistant Secretary Gram Panchayat Balikoti and on the request of police officials he prepared copy of family register which is Ext PW6/A. He has denied suggestion that he had not given copy of birth register because in the birth register the age of co-accused Jogi Ram was less then 18 years.

9.7. PW7 Kalyan Singh has stated that on dated 29.9.2007 he remained associated in the investigation. He has stated that in his presence co-accused Nomu Ram has produced one stick and one trouser and shirt to police officials. He has stated that he does not know whether any seal was placed on the parcel or not. Witness was declared hostile. He has stated that on dated 29.9.2007 co-accused Nomu Ram had disclosed to police that he could recover stick from his house and thereafter memo Ext PW7/A was prepared. He has admitted that co-accused Nomu Ram produced one stick Ext P1 from his house which was took into possession by investigating agency. He has admitted that recovery memo of stick Ext PW7/B was prepared by police. He has admitted that co-accused Nomu Ram had produced one trouser and shirt to the investigating agency which were kept in a parcel by police. He has stated that trouser Ext P2 and shirt Ext P3 are the same which were took into possession by investigating agency from co-accused Nomu Ram. He has stated that memo Ext PW7/C was prepared at the spot. He has stated that co-accused Shupa Ram had given disclosure statement that he could produce clothes which he had worn at the time of incident and memo Ext PW7/D was prepared. He has stated that thereafter co-accused Shupa Ram had handed over his shirt and trouser to the investigating agency. He has stated that a parcel of clothes was also prepared by investigating agency. He has stated that trouser of co-accused Shupa Ram Ext P4 and shirt Ext P5 were took into possession by the investigating agency. He has stated that co-accused Jogi Ram had also

handed over his clothes to the investigating agency. He has stated that all the proceedings had taken place in the court yard of co-accused Nomu Ram. He has stated that undershirt of co-accused Jogi Ram is Ext P7 and trouser is Ext P8. He has stated that he was sent by police officials to his house to bring tea for them and when he came back from his house the parcels were already prepared. He has stated that when he came back his signatures were obtained on various papers already written by police officials.

9.8. PW8 Balbir Singh has stated that co-accused Nomu Ram had not given any disclosure statement in his presence. Witness was declared hostile by the prosecution. He has denied suggestion that on dated 29.9.2007 co-accused Nomu Ram had given disclosure statement that he could recover stick and clothes kept by him in his house. He has denied suggestion that police officials prepared memo Ext PW7/A in his presence. He has admitted that co-accused Nomu Ram had brought one stick from his house and in this regard seizure memo Ext PW1/B was prepared. He has admitted that co-accused Nomu Ram handed over his trouser Ext P2 and shirt Ext P3 to police officials. He has denied suggestion that police officials had sealed the clothes in a parcel. He denied suggestion that co-accused Shupa Ram disclosed to the police that he could recover clothes which were worn by him at the time of incident. He has admitted that co-accused Shupa Ram handed over stick Ext P6 to police which was took into possession vide seizure memo Ext PW7/F. He has denied suggestion that police officials had sealed articles in his presence. He has admitted that co-accused Nomu Ram is his real maternal uncle and co-accused Shupa Ram and co-accused Jogi Ram are his brother-in-law. He denied suggestion that in order to save accused persons he resiled from his earlier statement.

9.9. PW9 Kalyan Singh has stated that he remained posted as MHC at Police Station Shillai from 2006 to May 2007. He has stated that on dated 29.9.2007 SI Shayam Lal had handed over him three parcels sealed with seal impression 'ADS' and two sticks sealed with seal impression 'ADS'. He has stated that again on dated 3.10.2007 SI Shayam Lal had handed over a parcel sealed with seal impression 'P' and a bamboo stick along with seal impression 'P'. He has stated that on dated 5.10.2007 HC Chattar Singh handed over viscera in a Jar and entries were recorded in the register. He has stated that thereafter he sent articles through Constable Dhani Ram to FSL Junga for chemical analysis vide RC No.50 of 2007. He has stated that case property remained intact in his custody.

9.10. PW10 Constable Tapender Singh has stated that he remained posted as MC at Police Station Shillai w.e.f 2005 to March 2008. He has stated that on dated 19.9.2007 he was present at Police Station along with SI Jeet Singh at about 11.25 AM. He has stated that one co-accused Jogi Ram came to Police Station and lodged a criminal complaint regarding quarrel with deceased Sadhu Ram. He has stated that he recorded entry in daily diary at serial No.10 copy of which is Ext PW10/A which was written by him. He has stated that thereafter complainant Jogi Ram was sent for medical examination at CHC Shillai. He has stated that all injuries sustained by co-accused Jogi Ram were simple in nature. He has stated that thereafter on dated 28.9.2007 SHO Paonta Sahib sent to rukka for registration of case against accused persons and thereafter FIR No.56 of 2007 dated 28.9.2007 was registered at Police Station Shillai.

9.11. PW11 Constable Dhani Ram has stated that he was posted at Police Station Shillai since 2006. He has stated that on dated 7.10.2007 MHC Kalyan Singh Police Station Shillai handed over five parcels sealed with seal impression 'SDA'. He has stated that he deposited all parcels at FSL Junga vide RC No.50 of 2007. He has stated that case property remained intact in his custody.

9.12. PW12 Dr. Rajeev Chauhan has stated that he was posted as Medical Officer at CHC Shillar from 2006. He has stated that on dated 19.9.2007 co-accused Jogi Ram son of Nomu Ram was brought by police for medico legal examination with the alleged history of assault. He has stated that on examination he observed that lacerated wound on upper part of left pinna measuring 3 cm in length involving whole thickness clotted blood was present. He has stated that contusion of size 3 cm x 1 cm obliquely placed on left mallor region red in colour with clear interming space skin was abbreted and contusion of size 2 cm x 1 reddish blue in colour on left lower eye lid was present. He has stated that injuries were simple caused by blunt object. He has stated that he issued MLC Ext PW12/A which bears his signature. He has stated that injuries mentioned in MLC Ext PW12/A could be caused within duration of 15 hours. He has stated that injury No.1 was located on a delicate part of body and it could cause contusion and ultimately caused in unconsciousness. He has stated that weapon was used by force. He has stated that injuries No. 1 to 3 could be caused with stick blows.

9.13. PW13 Veer Singh has stated that he was up-Pradhan Gram Panchayat Balikoti. He has stated that on dated 3.10.2007 he along with Sh Kanwar Singh Pardhan Gram Panchayat Balikoti were associated by the police and a stick was shown by police officials of Police Station Shillai. He has stated that he does not know from where the sticks were recovered. He has stated that accused persons are known to him who are resident of Gram Panchayat Balikoti. He has stated that accused persons are not related to him. He has stated that he is Rajput by caste and accused persons are Harijon by caste. He has denied suggestion that on dated 3.10.2007 he along with Kanwar Singh and co-accused Bhagtu were associated by police and sticks were recovered at the instance of co-accused Bhagtu. He denied suggestion that on the same day co-accused Bhagtu has produced one shirt and trouser from his house and told that he was wearing the aforesaid clothes on dated 18.9.2007 at the time of incident. He denied suggestion that co-accused Bhagtu had told that injury was caused upon deceased Sadhu Ram by a stick. He denied suggestion that he resiled from his earlier statement in order to save accused persons. He has stated that he signed memo Ext PW13/A at Police Station Shillai.

9.14 PW14 Kanwar Singh has stated that he was Pardhan Gram Panchayat Balikoti since 2005 and he was called on dated 3.10.2007 by police at Police Station Shillai and was shown to him a shirt, stick and trouser. He has stated that he does not know anything about the case and the same was not recovered in his presence. Witness was declared hostile. He has stated that co-accused Bhagtu is known to him. He has denied suggestion that on dated 3.10.2007 co-accused Bhagtu took police officials to his house and trouser, shirt and sticks were recovered at his instance. He denied suggestion that co-accused Bhagtu had also given disclosure statement that stick was used in beating deceased Sadhu Ram. He denied suggestion that he resiled from his earlier statement in order to save accused persons.

9.15 PW15 Constable Surender Tomar has stated that he remained posted at Police Station Paonta Sahib from September 2006 to September 2008. He has stated that on dated 24.9.2009 he was performing duty at about 8.15 PM and HC Arjun Singh came from Police Post Rajban and lodged rapat Ext PW15/A.

9.16 PW16 Constable Dinesh Kumar has stated that he was posted as MC at Police Post Rajban from April 2006. He has stated that on dated 23.9.2007 on telephonic message received from Station House Officer Paonta Sahib regarding presence of dead body in Echhadi dam he recorded entry in daily diary at serial No.9 and again recorded entry in

rapat No.20 on dated 24.9.2007 regarding departure of HC Arjun Singh along with other staff towards Echhadi dam. He has stated that on dated 28.9.2007 a rapat No.7 was entered in daily diary register about arrival of HC Arjun Singh and other police officials. He has stated that copy of rapat No.9 is Ext PW16/A, copy of rapat No.20 is Ext PW16/B and copy of rapat No.7 is Ext PW16/C which are true according to original record.

9.17 PW17 SI Balak Ram has stated that he remained posted at Police Station Shillai from 2006 to 2007. He has stated that on dated 28.9.2007 Constable Hira Singh Police Station Paonta Sahib brought a rukka Ext PW1/A and he registered FIR No. 56 of 2007 Ext PW17/A and endorsement is Ext PW1/F.

9.18 PW18 Gul Sher Ahmad has stated that he is running photographs shop at Paonta Sahib. He has stated that on dated 25.9.2007 he went to mortuary house and clicked photographs of dead body of deceased Sadhu Ram. He has stated that thereafter he handed over photographs along with negatives to police officials.

9.19 PW19 HC Arjun Singh has stated that he was posted at Police Post Rajban from 2007. He has stated that on dated 24.9.2007 information was received that a dead body was floating in Echadi dam. He has stated that he along with police officials went at the spot and found that dead body was floating in the water. He has stated that dead body was brought with the help of boat. He has stated that after inspection of dead body it was observed that dead body was a male person and same was fully decomposed. He has stated that both legs and one hand were tied with the help of rope. He has stated that photograph of dead body was obtained. He has stated that dead body was brought in a private vehicle at Civil Hospital Paonta Sahib. He has stated that dead body was placed in the mortuary house for post mortem. He has stated that Medical Officer posted at civil hospital Paonta Sahib advised for the conduct of post mortem from IGMC Shimla because the body was fully decomposed. He has stated that on dated 26.9.2007 brother of deceased Pardeep Kumar and mother Amla Devi came there and identified dead body of deceased Sadhu Ram. He has stated that thereafter dead body was brought to IGMC Shimla for post mortem and post mortem was conducted in IGMC Shimla. He has stated that after post mortem dead body was handed over to the relative of deceased and receipt Ext PW3/A was prepared. He has stated that photographs are Ext PW19/C-1 to Ext PW19/C-10 and negatives are Ext PW19/C-11. He has stated that he noticed only one injury upon the dead body above the ear.

9.20. PW20 Inspector Shayam Lal has stated that in the year 2007 he remained posted as Station House Officer at Police Station Shillai. He has stated that investigation of the case was conducted by him. He has stated that case was registered in Police Station Paonta Sahib. He has stated that later on it was observed that occurrence took place in the jurisdiction of Police Station Shillai and thereafter case was referred to Police Station Shillai. He has stated that co-accused Nomu Ram was arrested by police officials posted at Police Station Paonta Sahib. He has stated that on dated 29.9.2007 co-accused Nomu Ram had given disclosure statement that he could identify the place of incident where the dead body was thrown in the river. He has stated that disclosure statement of co-accused Nomu Ram was recorded. He has stated that thereafter co-accused Nomu Ram took police officials and witnesses to the place of incident and identify the place where the deceased was thrown in the river. He has stated that he also prepared site plan Ext PW20/A and Ext PW20/B. He has stated that co-accused Nomu Ram had also given disclosure statement that he had concealed sticks in his house and thereafter sticks were recovered from the house of co-accused Nomu Ram. He has stated that stick is Ext P1. He has stated that co-accused

Shupa Ram and co-accused Jogi Ram were arrested by him on dated 29.9.2007. He has stated that clothes were also took into possession as per disclosure statement of co-accused Shupa Ram. He has stated that stick Ext P9, Shirt Ext P7 and trouser Ext P8 were recovered as per disclosure statement given by co-accused Bhagtu. He has stated that Akas Tatima Ext PW5/A was got prepared from Halqua Patwari. He has stated that medical of co-accused Jogi Ram was also got conducted in Civil Hospital Shillai and MLC Ext PW12/A was obtained. He has stated that he recorded the statements of the prosecution witnesses as per their versions and nothing was added or deleted by him. He has stated that co-accused Nomu Ram given disclosure statement and located the place of incident where the dead body of deceased Sadhu Ram was thrown. He has denied suggestion that no disclosure statement was given by accused persons. He denied suggestion that accused persons did not locate the place. He denied suggestion that co-accused Bhagtu and co-accused Nomu Ram were not present and they have gone outside for performing labour work.

9.21. PW21 Dr. Piyush Kapila has stated that he was posted in the department of Forensic Medicine IGMC Shimla since September 1998. He has stated that on dated 27.9.2007 a dead body of Sadhu Ram was brought for post mortem examination along with inquest papers. He has stated that dead body was identified by Pardeep Kumar and Shupa Ram. He has stated that dead body was recovered from Echhadi dam in District Sirmour. He has stated that after examination of dead body of deceased Sadhu Ram he observed that height of dead body was 5 feet 5 inches and hands from left side on both legs were tied with a plastic rope and the body was in decomposed condition and maggots all over the body were present. He has stated that skin slippage and ligature marks were present on legs and hands which were parchmentised. He has stated that multiple folds of the rope were kept on the body. He has stated that he observed following anti mortem injuries 3x2 cm. laceration was present on left side of forehead. He has further stated that he also observed following antemortem injuries 5 cm back to left eyebrow and supraorbital ridge, bone deep, radiating fracture directing from the point on frontal bone, parietal bone reaching up to temporal bone with separation of sagittal suture, with vital line of hemorrhage. He has stated that there was gross extradural hemorrhage at the site of fracture however rest of brain tissue was decomposed below the dural space. He has further stated that he also observed parchmentisation of ligature mark on the legs and left hand were ante mortem in nature. He has stated that deceased had died as a result of ante mortem head injury. He has stated that probable time between injury and death was instantaneous. He has stated that clothes of the deceased were preserved, sealed and handed over to police officials. He has stated that he issued post mortem report Ext PW21/A which bears his signature. He has stated that post mortem report contains four leaves and five pages. He has stated that after receiving chemical examiner report Ext PA he issued final opinion report Ext PW21/B. He has stated that the cause of death remained same. He has stated that injury observed by him at the time of post mortem upon the head of deceased could be caused with stick Ext P9. He has stated that sole injury was sufficient to cause death.

10. Submission of learned Additional Advocate General appearing on behalf of the State that it is proved on record beyond reasonable doubt that accused persons have motive to eliminate deceased Sadhu Ram in order to escape repayment of Rs.50,000/- (Fifty thousand) and on this ground appeal filed by State of HP be accepted is rejected being devoid of any force for the reason hereinafter mentioned. It is held that prosecution is under legal obligation to prove whether accused persons have committed murder of deceased Sadhu Ram on dated 18.9.2007 as alleged by prosecution. Case of the prosecution is not based upon oral eye witness but is based upon circumstantial evidence only. It is well

settled law that in circumstantial evidence the chain of circumstances should be completed in order to connect accused persons with the commission of criminal offence. The mere fact that deceased Sadhu Ram had given Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram in lieu of marriage of his daughter with deceased Sadhu Ram is not sole sufficient fact to hold that accused persons have committed murder of deceased Sadhu Ram.

11. Another submission of learned Additional Advocate General appearing on behalf of the State that it is proved on record that deceased on dated 18.9.2007 went to the house of co-accused Nomu Ram in order to bring back Rs.50,000/- (Fifty thousand) which he had advanced as marriage consideration amount to co-accused Nomu Ram and in view of the fact that rapat No.10 Ext PW10/A was recorded at the instance of co-accused Jogi Ram wherein co-accused Jogi Ram son of Nomu Ram had specifically admitted that on dated 18.9.2007 at about 9 PM deceased Sadhu Ram came to the house of co-accused Nomu Ram and thereafter quarrel took place and thereafter dead body of the deceased was found floating in Echhadi dam on dated 24.9.2007 and on this ground appeal filed by the State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is not the case of the prosecution that dead body of deceased was found in the residential house of accused persons. On the contrary it is the case of the prosecution that dead body of deceased Sadhu Ram was found in Echhadi dam on dated 24.9.2007 which was in floating condition.In the present case the dead body was found in Echhadi dam in a floating manner in open public place and possibility of access of third person could not be ruled out beyond reasonable doubt. It is well settled law that last seen theory comes into play only when time gap between the point of time when accused persons and deceased were last seen together and when deceased was found dead was so small that possibility of any person other then accused being author of the crime becomes impossible.In the present case in view of the fact that deceased went to the house of co-accused Nomu Ram on dated 18.9.2007 during night period at 9 PM and in view of the fact that dead body of the deceased was found on dated 24.9.2007 in Echhadi dam in a floating manner in an open place the possibility of any person other then the accused being author of the crime could not be ruled out. See AIR 2008 SC 2819 titled Kusuma Ankama Rao Vs. State of A.P.

12. Another submission of learned Additional Advocate General appearing on behalf of the State that it is proved on record that deceased Sadhu Ram had gone to residential house of co-accused Nomu Ram on dated 18.9.2007 at 9 PM and it is proved on record that thereafter quarrel took place and rapat No.10 Ext PW10/A was lodged by co-accused Jogi Ram and co-accused Jogi Ram had also sustained three injuries and on this ground appeal filed by State be allowed is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that rapat No.10 Ext PW10/A was recorded by co-accused Jogi Ram and there is recital in rapat No.10 Ext PW10/A that deceased came in the residential house of co-accused Jogi Ram on dated 18.9.2007 at about 9 PM and quarrel took place and thereafter co-accused Jogi Ram had sustained injuries. It is proved on record that co-accused Jogi Ram was examined by Medical Officer posted in Civil Hospital Shillai on dated 19.9.2007 at 11.45 AM and it is proved on record that co-accused Jogi Ram had sustained three injuries i.e. lacerated wound on upper part of left pinna measuring 3 cm in length involving whole thickness clotted blood. It is proved on record that co-accused Jogi Ram had also sustained contusion injuries of 3 cm x 1 cm size obliquely placed on left mallor region red in colour with clear interming space. It is also proved on record that co-accused Jogi Ram had also sustained contusion of 2 cm x 1 cm reddish blue in colour on left lower eye lid. As per medical examination report all the injuries were simple caused with blunt object during 24 hours. Prosecution has not explained

contusion injuries sustained by co-accused Jogi Ram and prosecution has concealed genesis of the present case. No explanation has been given by the prosecution as to how co-accused Jogi Ram had sustained three injuries i.e. lacerated and contusion injuries. It is held that simply filing of rapat No.10 Ext.PW10/A did not prove the case of the prosecution that accused persons have caused murder of deceased Sadhu Ram with sticks.

13. Another submission of learned Additional Advocate General appearing on behalf of the State that on the basis of disclosure statement given by accused persons the appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. PW8 Balbir Singh member Gram Panchayat when appeared in witness box has specifically stated that co-accused Nomu Ram did not give any disclosure statement in his presence. Similarly PW13 Veer Singh Up-Pradhan Gram Panchayat has also stated in positive manner that co-accused Bhagtu had not given any disclosure statement in his presence. PW14 Kanwar Singh Pradhan Gram Panchayat has also stated in positive manner that co-accused Bhagtu did not give any disclosure statement in his presence. The independent witness of the disclosure statement relied by the prosecution did not support the prosecution story in the present case which creates doubts in the mind of court.

14. Another submission of learned Additional Advocate General appearing on behalf of the State that accused persons after committing murder of deceased Sadhu Ram threw the dead body of deceased in Tons river which was situated at a distance of about 3 Km. from the house of accused persons and thereafter dead body was recovered from Echhadi dam on dated 24.9.2007 wherein two legs, left hand and waist of deceased Sadhu Ram were tied with plastic rope and on this ground appeal filed by the State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is the case of the prosecution that Tons river is situated at a distance of 3 Km. from the house of accused persons and there is no evidence in order to prove on record that in what manner accused persons took the dead body of deceased Sadhu Ram to a distance of 3 Km. from their house to Tons river. Even there is no finger prints or feet prints of accused persons collected by the prosecution in order to connect the accused persons with place Tons river and in order to connect accused persons with weapon of attack i.e. stick.

15. Another submission of learned Additional Advocate General appearing on behalf of State that conduct of accused persons is covered under Section 8 of the Evidence Act and on this ground appeal filed by State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that suspicion is not sufficient to convict the accused persons in criminal case. It is well settled law that in circumstantial evidence offence against accused persons should be proved by prosecution beyond reasonable doubt and there should be completion of chain of criminal offence.

16. Another submission of learned Additional Advocate General appearing on behalf of the State that in view of criminal analyst report placed on record appeal filed by State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused chemical analyst report placed on record. As per chemical analyst report Ext PX and PA placed on record no poison was detected in the stomach and small intestine of the deceased and no poison was detected in the liver, spleen and kidney of the deceased Sadhu Ram. Even as per chemical analyst report Ext PX placed on record that though human blood was detected on exhibit 4a waist of deceased Sadhu Ram, exhibit 5b, exhibit 7a lower trouser of co-accused Jogi Ram and exhibit 8a shirt of co-accused Bhagtu but the blood grouping results on these exhibits were found inconclusive. It is well settled law that in order to connect accused persons with the commission of

criminal offence blood group of accused persons or deceased should be proved on exhibits 4a, 5b, 7a and 8a. It is held that simply on the ground that human blood was detected it is not sufficient to convict the accused persons in the absence of blood group of accused persons and deceased upon the exhibits connecting accused persons with the commission of criminal offence. Even as per chemical analyst report blood was not detected on Ext 5a shirt, exhibit 6a trouser of co-accused Nomu Ram, exhibit 6b shirt of co-accused Nomu Ram, exhibit 7b T-shirt of co-accused Jogi Ram and exhibit 8b trouser of co-accused Bhagtu. Even as per chemical analyst report blood was detected on exhibit 4b T-shirt of deceased Sadhu Ram and exhibit 4c pant of deceased Sadhu Ram which was disintegrated for further examination. It is held that chemical analyst report did not connect accused persons in the commission of crime in the absence of blood group of accused persons or deceased Sadhu Ran upon exhibits. In the present case it is proved on record that dead body of deceased Sadhu Ram was not recovered as per prior disclosure statement given by accused persons. On the contrary dead body of deceased as per prosecution story was recovered on dated 24.9.2007 in Echhadi dam and disclosure statements of accused persons under Section 27 of Indian Evidence Act 1872 were recorded on dated 29.9.2007 and 3.10.2007 after the recovery of dead body of deceased Sadhu Ram on dated 24.9.2007 from Echhadi dam. It is also well settled law that in order to convict the accused in circumstantial evidence five golden principles should be proved (i) That circumstances from which the conclusion of guilt is to be drawn should be fully established and the accused must be and not merely may be guilty (ii) That facts so established should be consistent only with guilt of the accused (iii) That circumstances should be of a conclusive nature. (iv) That chain of evidence should be complete (v) That innocence of accused should be ruled out. *(See 2013 Cri.L.J. 2040, titled Prakash vs. State of Rajasthan (Apex Court DB).* It is well settled law that circumstantial evidence means combination of facts creating a network through which accused could not escape**.** See AIR 1992 SC 2045 titled Sakharam Vs. State of Madhya Pradesh, also see AIR 2002 SC 3206 titled Ashish Batham Vs. State of Madhya Pradesh, also see AIR 2010 SC 762 titled Musheer Khan and another Vs. State of Madhya Pradesh, also see AIR 1979 SC 1410 titled State of Maharashtra Vs. Annappa Bandu Kavatage, also see AIR 1979 SC 826 titled S.P.Bhatnagar and another Vs. The State of Maharashtra, also see AIR 1989 SC 1890 titled Ashok Kumar Chatterjee Vs. State of Madhya Pradesh, also see AIR 1992 SC 758 titled Sakharam Vs. State of Madhya Pradesh, also see AIR 1981 SC 1675 titled State of Maharashtra Vs. Champalal Punjaji Shah, AIR 1975 SC 241 titled Dharm Das Wadhwani Vs. The State of Uttar Pradesh, Also see AIR 1954 SC 621 titled Bhagat Ram Vs. State of Punjab.

17. It is well settled law that circumstantial evidence under Section 27 of the Evidence Act is not substantive evidence it is only corroborative evidence. In the present case weapon of attack i.e. sticks were not sent by prosecution for chemical examination in order to prove that deceased had sustained head injury through sticks Ext P9. It is not proved on record beyond reasonable doubt that blood group of deceased was found upon sticks Ext P9 in order to connect the accused persons with the commission of crime as alleged by the prosecution. It was held in case reported (2005) 9 SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defense. Also See: (1984) 4 SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra. It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 Charan Singh Vs. The State of Uttar Pradesh. *Also See:* AIR 1971 SC 1898 Gian Mahtani Vs. State of Maharashtra. It was held in case reported in AIR

1979 SC 1382 State (Delhi Administration) Vs. Gulzarilal Tandon that even where the circumstances raise a serious suspicion against the accused it cannot take the place of legal proof. Also See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others**.** It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned Sessions Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned Courts below are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned Courts below failed to take into consideration any admissible fact (iv) That learned courts below took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P. See: (2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

18. In view of the above stated facts it is held that learned trial Court had properly appreciated oral as well as documentary evidence placed on record and it is held that learned trial Court did not cause miscarriage of justice to the appellant. Appeal filed by the State is dismissed and judgment passed by learned trial Court is affirmed. Benefit of doubt is given to accused persons. Case property will be confiscated to the State of Himachal Pradesh after expiry of period of limitation for filing further proceedings. Records of learned trial Court along with certified copy of judgment be sent back forthwith. Appeal is disposed of. Pending application(s) if any are also disposed of.

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

Anupam Kumar ...Appellant.

Versus

Harmeet Singh Ghai & others ...Respondents.

FAO No. 458 of 2007

Decided on: 15.05.2015

Motor Vehicle Act, 1988- Section 169- First petition was consigned to record room- it was contended that second petition is not maintainable- held, that even if first petition had been dismissed in default, second petition is maintainable. (Para-5 and 6)

For the appellant: Mr. Dinesh Bhanot, Advocate.

For the respondents: Nemo for respondent No. 1.

Mr. B.M. Chauhan, Advocate, for respondent No. 2.
Mr. Ashwani Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

There is no representation on behalf of respondent No. 1 despite service. Hence, he is set ex-parte.

2. Challenge in this appeal is to the judgment and award, dated 19.09.2007, made by the Motor Accident Claims Tribunal (III), Shimla, (for short "the Tribunal") in MACT No. 36-S/2 of 2006/99, titled as Sh. Anupam Kumar versus Harmeet Singh Ghai and others, whereby the claim petition filed by the appellant-claimant came to be dismissed (for short "the impugned award").

3. The Tribunal has dismissed the claim petition on the grounds that the claimant-injured has failed to satisfactorily prove that the accident was outcome of the rash and negligent driving of the offending vehicle by its driver and that the first claim petition filed by the claimant-injured was consigned to records and second claim petition was not maintainable.

4. Heard.

5. It is apt to record herein that the first claim petition filed by the appellant-claimant-injured has not even dismissed in default and was simply consigned to records. The appellant-claimant-injured was well within his rights to file second claim petition or to lay a motion for calling the file of the first claim petition from the records.

6. In a case titled as **Jagdish versus Rahul Bus Service & others,** being **FAO No. 524 of 2007,** decided on 15.05.2015, this Court has discussed the issue and held that the second claim petition is maintainable in case the first claim petition came to be dismissed in default. While applying the ratio to the instant case, second claim petition was maintainable.

7. Having said so, the findings recorded by the Tribunal on issue No. 5 are set aside and it is held that the second claim petition is maintainable.

8. Coming to issue No. 1, it appears that the Tribunal has not discussed the entire evidence and the pleadings of the parties. While going through the record, it , *prima facie,* appears that the Tribunal has fallen in an error in holding that there was no satisfactory evidence on record suggesting that the appellant-claimant-injured had suffered injuries because of rash and negligent driving of the offending vehicle by its driver, without even discussing the entire evidence.

9. Accordingly, the appeal merits to be allowed and the impugned award is to be set aside.

10. However, keeping in view the fact that the accident has taken place in the year 1994 and the appellant-claimant-injured has been dragged from pillar to post and post to pillar and is litigating right from the year 1999, has not even received interim award under 'No Fault Liability' in terms of the provisions of Section 140 of the Motor Vehicles Act,

1988 (for short "the MV Act"), I deem it proper to conclude the lis here by awarding Rs. 25,000/- under 'No Fault Liability' with interest @ 7.5% per annum from the date of the impugned judgment and award till its realization in favour of the appellant-claimant-injured and against the insurer-respondent No. 2.

11. Insurer-respondent No. 2 is directed to deposit the awarded amount before this Registry within three weeks. On deposit, the said amount be released in favour of the appellant-claimant-injured after proper identification.

12. Accordingly, the appeal is allowed, the impugned award is set aside and the claim petition is granted, as indicated hereinabove.

13. Send down the record after placing copy of the judgment on Tribunal's file.

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

Balkar Singh & others ...Appellants.

Versus

Ram Pal alias Sanju & others ...Respondents.

FAO No. 153 of 2007
Decided on: 15.05.2015

Motor Vehicle Act, 1988- Section 166- Deceased was drawing salary of Rs. 13,315/-- Tribunal had wrongly assessed his monthly income as Rs.12,455/-- amount of 50% was wrongly deducted towards his personal expenses, whereas 1/3rd amount was to be deducted towards personal expenses- compensation enhanced to Rs.14,02,800/-. (Para-9 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

For the appellants: Mr. R.K. Gautam, Senior Advocate, with Mr. Gaurav Gautam, Advocate.

For the respondents: Mr. T.S. Chauhan, Advocate, for respondents No. 1 and 2.
Mr. G.D. Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award, dated 28.02.2007, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh, (for short "the Tribunal") in M.A.C. Petition No. 9 of 2006, titled as Balkar Singh and others versus Ram Pal alias Sanju and others, whereby compensation to the tune of Rs. 9,06,760/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in

favour of the appellants-claimants (for short "the impugned award"), on the grounds taken in the memo of appeal.

Brief facts:

2. Smt. Kashmir Kaur became the victim of a vehicular accident, which was allegedly caused by the driver, namely Shri Ram Pal alias Sanju, who had driven Mohindra Pick-up, bearing registration No. HP-36-4320, rashly and negligently on 21.01.2006, at about 6.40 p.m., near Arniala Bazar, Una, hit the scooter, bearing registration No. HP-20 A-8077, on which Smt. Kashmir Kaur was a pillion rider. She sustained injuries and succumbed to the injuries on the spot.

3. Deceased-Kashmir Kaur left behind her husband, namely Shri Balkar Singh, and two minor sons, namely Khushpaul Singh and Tarunjeet Singh, who invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs.20,00,000/-, as per the break-ups given in the claim petition.

4. The respondents, i.e. the owner-insured, the driver and the insurer, contested the claim petition on the grounds taken in the respective memo of objections.

5. Following issues came to be framed by the Tribunal on 02.06.2006:

> *"1. Whether Kashmir Kaur died in a motor accident caused by rash and negligent driving of a Jeep (No. HP-36-4320) by Ram Pal (respondent 1) on January 21, 2006? OPP*
>
> *2. Whether petitioners are entitled to compensation. If so, to what amount and from whom? OPP*
>
> *3. Whether the accident was attributable to rashness and negligence of the scooterist (deceased Kanta Devi). If so, to what effect? OPP*
>
> *4. Whether the petition is bad for non-joinder of the owner and the insurer of the scooter (No. HP-20A-8077)? OPR*
>
> *5. Whether the respondent No. 1 was not holding a valid and effective driving licence at the time of accident? OPR-3*
>
> *6. Whether the jeep in question was being driven in violation of the terms and conditions of the insurance policy? OPR*
>
> *6. Relief."*

6. Parties led evidence and the Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the driver, namely Shri Ram Pal alias Sanju, had driven the offending vehicle rashly and negligently on 21.01.2006, at about 6.40 p.m., near Arniala Bazar, caused the accident, in which Smt. Kashmir Kaur sustained injuries and succumbed to the injuries. All the issues were decided in favour of the claimants and against the respondents.

7. The respondents, i.e. the owner-insured, the driver and the insurer, have not questioned the findings recorded by the Tribunal on any count. Neither they have filed any appeal nor cross-objections. Accordingly, the impugned award has attained finality, so far it relates to them.

8. The appellants-claimants have questioned the impugned award only on the ground of adequacy of compensation.

9. Admittedly, the age of the deceased was 41 years at the time of the accident, as her date of birth has been recorded as 31.05.1965 in her matriculation certificate, Mark-X. She was a government employee and was drawing salary to the tune of Rs. 13,315/- in terms of salary certificate, Ext. PW-2/A. The Tribunal has fallen in an error in holding that the monthly income of the deceased was Rs.12,455/-.

10. Keeping in view the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "the MV Act") read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** multiplier of '13' is applicable. Viewed thus, the Tribunal has fallen in an error while applying the multiplier of '12'.

11. It appears that the Tribunal has adopted the novel procedure in assessing the salary of the deceased. By guess, it can be safely said that deceased would have been spending one third towards her personal expenses. The Tribunal has wrongly deducted 50% towards her personal expenses. At best, one third was to be deducted towards the personal expenses of the deceased while keeping in view the principles laid down by the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra).**

12. In view of the above, it is held that the claimants have lost source of income/dependency to the tune of Rs.8800/- per month, i.e. Rs.8800/- x 12 = Rs.1,05,600/- per annum. Thus, the claimants are entitled to compensation to the tune of Rs.1,05,600/- x 13 = Rs.13,72,800/-. The claimants are also held entitled to Rs.10,000/- under the head 'funeral expenses', Rs.10,000/- under the head 'loss of consortium' and Rs.10,000/- under the head 'loss of estate'.

13. Having glance of the above discussions, the claimants are held entitled to compensation to the tune of Rs.13,72,800/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.14,02,800/- with interest @ 7.5% per annum from the date of the claim petition till its finalization.

14. The insurer is directed to deposit the enhanced awarded amount before the Registry within six weeks from today. On deposition, the entire awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award.

15. The appeal is disposed of accordingly. The impugned award is modified, as indicated hereinabove.

16. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Jagdish ...Appellant.

Versus

Rahul Bus Service & others ...Respondents.

FAO No. 524 of 2007
Reserved on: 01.05.2015
Decided on: 15.05.2015

Motor Vehicle Act, 1988- Section 169- It was contended that claimant had not lodged FIR and therefore, claim petition is not maintainable- held, that lodging of FIR, dismissal of criminal case or acquittal cannot be ground to deny compensation. (Para- 42 to 50)

Motor Vehicle Act, 1988- Section 166- Claim petition was dismissed on the ground that claimant had earlier filed a claim petition which was dismissed in default- held, that provisions of Code of Civil Procedure are not applicable to MACT- procedural technicalities cannot be used to decline the claim of a person- petition was dismissed in absence of both the parties and, therefore, second petition was maintainable. (Para-51 to 82)

Motor Vehicle Act, 1988- Section 168- Claimant had claimed the compensation of Rs.12,00,000/-, whereas, he was entitled for more compensation- held, that it is permissible for MACT to grant more compensation than claimed- it is duty of Claim Tribunal to award just compensation. (Para- 85 to 101)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, n 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627

Oriental Insurance Co. Ltd. versus Shri Kishan Chand & others, ILR, HP, 2015 Volume-III,

New India Assurance Co. Ltd. versus C. Padma and another, AIR 2003 Supreme Court 4394

Mantoo Sarkar versus Oriental Insurance Company Limited and others, (2009) 2 Supreme Court Cases 244,

Hussain Pasha versus Andhra Pradesh State Road Trans. Corpn. & Anr., II (2007) ACC 454

Karmi Devi versus Satendra Kumar Singh and another, reported in 2010 ACJ 1661

Savitri and others versus M.A.C.T.-cum-District and Sessions Judge, Jhunjhunu and others, 2013 ACJ 1361
New India Assurance Co. Ltd. versus R. Srinivasan, AIR 2000 Supreme Court 941
Sheodan Singh versus Daryao Kunwar, AIR 1966 Supremem Court 1332
Erach Boman Khavar versus Tukaram Shridhar Bhat and another, 2014 AIR SCW 61
United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174
Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674
State of Haryana and another versus Jasbir Kaur and others, AIR 2003 Supreme Court 3696
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213
Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717
Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916
Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800
Smt. Savita versus Bindar Singh & others, 2014 AIR SCW 2053

For the appellant: Ms. Archana Dutt, Advocate.
For the respondents: Respondents No. 1 and 2 already ex-parte.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Appellant-claimant-injured has invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, 1988 (for short "the MV Act") and has questioned the judgment/award, dated 6th October, 2007, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba,(H.P.) (for short "the Tribunal") in M.A.C. Petition No. 75 of 2004, titled as Jagdish versus Rahul Bus Service and others, whereby the claim petition filed by the claimant came to be dismissed (for short "the impugned award").

2. Before I give the brief resume of the case, I deem it proper to record herein that the appellant-claimant-injured has been driven from pillar to post and post to pillar by the authorities including the Tribunal and the insurer, who have succumbed to the procedural wrangles and tangles and this is how the purpose of granting of compensation in terms of the mandate of Chapters X, XI and XII of the MV Act stands defeated.

3. The appellant-claimant-injured had filed a claim petition before the Tribunal, which was diarized as MAC Petition No. 54 of 2002, and came to be dismissed on 27th May, 2004. He filed a fresh claim petition on 3rd June, 2004, which was dismissed vide the impugned award on the ground that claim petition was barred in view of the dismissal of first claim petition.

4. The core points for consideration involved in this appeal are:

(i) Whether the appellant-claimant-injured has pleaded and proved that the driver, namely Shri Som Raj, had driven the offending

vehicle, i.e. bus, bearing registration No. HP-38-7596, rashly and negligently on 3rd July, 2002, at about 1.30 p.m. near Loona Pul (Gehra), and caused the accident, of which he is victim?

(ii) Whether registration of First Information Report (for short "FIR") was required for maintaining the claim petition?

(iii) Whether second claim petition was not maintainable and was barred in view of the fact that the first claim petition filed by the appellant-claimant-injured was dismissed in default in absence of both the parties, vide order, dated 27th May, 2004?

5. In order to determine all these issues, it is necessary to give brief resume of the lis, which has given birth to the appeal in hand.

6. Shri Jagdish, appellant-claimant-injured filed a claim petition before the Tribunal for grant of compensation to the tune of Rs.12,00,000/-, as per the break-ups given in the claim petition, on the ground that he became the victim of a vehicular accident, which was caused by the driver, namely Shri Som Raj, while driving the offending vehicle, i.e. bus, bearing registration No. HP-38-7596, rashly and negligently on 3rd July, 2002, at about 1.30 p.m. near Loona Pul (Gehra).

7. The claim petition was resisted by respondents No. 1 and 3, i.e. the owner-insured and the insurer on the grounds taken in the respective memo of objections.

8. It is apt to record herein that respondent No. 2, i.e. the driver of the offending vehicle has not contested the claim petition and was set ex-parte.

9. After examining the pleadings and the documents, the Tribunal framed following issues on 3rd December, 2004:

"1. Whether the accident took place due to the rash and negligent driving of bus No. HP-38-7596 by its driver in which petitioner received injuries as alleged? OPP

2. Whether the petitioner is entitled to compensation, if so, to what amount and from whom? OP Parties

3. Whether the petition is not maintainable and the petitioner has no cause of action to file the present petition as alleged? OPR

4. Whether the vehicle was being used in contravention of the provisions contained in the Motor Vehicles Act as well as the terms and conditions of the Insurance Policy as alleged? OPR-3

5. Whether the driver of the vehicle was not holding a valid and effective driving licence at the time of accident as alleged? OPR

6. Relief."

10. Appellant-claimant-injured has examined Dr. Rakesh Verma as PW-2, Shri Mulkh Raj as PW-3, Shri Sonu as PW-4, Shri Natho Ram as PW-5, Shri Mohan Lal as PW-6, Dr. S.K. Jain as PW-7, Shri Manoj Davis as PW-8, Dr. Maharaj Krishan Man as PW-9, himself appeared in the witness box as PW-1 and placed on record the disability certificate

as Ext. PW-2/A, prescription slips as Ext. PW-7/A & Ext. PW-7/B, treatment summary as Ext. PW-9/A to Ext. PW-9/C, Medical bills as Ext. PA to Ext. PH, Ext. PJ to Ext. PM, Ext. P-1 to Ext. 155, Other medical bills and bus tickets and taxi receipts as Mark X-1 to X-20, X-28 to 30, X-42 to X-44, X-58, 60, 61, 67, 71 to 74, X-96, 101, 105, 109, 127, 137, 138, 139, X-148, 151, 160, 176, 180 to 183, X-186, X-197, X-208, X-211, 212, 217, 218, X-221 to 458.

11. Respondents have not led any evidence and have placed on record the copies of insurance policy as Ext. R-1, route permit as Ex. R-2, Registration certificate as Ext. R-3 and driving licence as Ext. R-4. Thus, the evidence led by the claimant-injured has remained unrebutted.

Issue No. 1:

12. Respondents No. 1 and 3 have not denied the averments contained in the claim petition specifically, but evasively. The claimant-injured has specifically averred in para 24 of the claim petition that the accident was outcome of the rash and negligent driving of the offending vehicle by its driver, which has not been specifically denied by respondents No. 1 and 3 in their replies. The driver, against whom rashness and negligence has been alleged, has not contested the claim petition.

13. It is beaten law of land that evasive denial is deemed to be admission in terms of the mandate of Order VIII of the Code of Civil Procedure, 1908 (for short "CPC").

14. The claimant-injured in paras 13 and 22 of the claim petition has given details how he is entitled to compensation. The said details and figures have not been denied by respondents No. 1 & 3 and, as stated hereinabove, respondent No. 2 has not contested the same.

15. It has come in the evidence that the claimant-injured is a motor mechanic by profession, was requested by the driver to repair his vehicle, accordingly, he accompanied the driver, made the repairs and the bus was set in motion, the driver was in a position to drive the said vehicle and started to ply, the claimant-injured also boarded the said bus and unfortunately, that vehicle met with the accident at Loona Pul (Gehra), in which the claimant-injured sustained injuries, was taken to Hospital at Chamba, thereafter was shifted to Sanjivani Hospital, Chamba, where he was admitted on 3rd July, 2002, was referred to CMC Ludhiana on 4th July, 2002, where he remained admitted from 4th July, 2002, to 10th July, 2002. He has undergone treatment and has placed on record the documents, details of which have been given hereinabove, and has proved that he was in hospital. The doctors have stated that the claimant-injured was in hospital as a case of Road Traffic Accident (RTA).

16. PW-2, Dr. Rakesh Verma, stated that he has issued the disability certificate, which has been exhibited as Ext. PW-2/A, and has proved that the claimant-injured has suffered permanent disability to the extent of 40%.

17. PW-9, Dr. Maharaj Krishan Man, who has treated the claimant-injured at CMC Ludhiana, has proved the discharge summary, Ext. PW-9/A, which does disclose that the claimant-injured was admitted in hospital on 4th July, 2002, and was discharged on 10th July, 2002. It is specifically recorded in Ext. PW-9/A that the claimant-injured has sustained injuries in a road traffic accident. Ext. PW-9/B is treatment summary and Ext.PW-9/C is a medical certificate, which do disclose that the claimant-injured was treated

with screw fixation with across knee exfix on 4th July, 2002, bone clearance on 7th August, 2002, flap coverage on 16th August, 2002, STSG on 10th September, 2002, Exfix removal on 26th October, 2002 and screw removal on 4th February, 2003.

18. Thus, the claimant-injured has proved that he has sustained injuries, which are outcome of a road traffic accident, which has rendered him permanently disabled to the extent of 40%. He was also under treatment for a pretty long time and all documents on the record from page 109 to 461 are the proof of the fact that he was under treatment and has spent a huge amount on his treatment.

19. The claimant-injured has also led evidence, oral as well as documentary, that he was a mechanic by profession, his services were hired by the driver of the offending vehicle for repairing the said vehicle, he had gone with the driver to the place where the vehicle was stationed, made repairs, vehicle was made functional and, thereafter, bus was in working condition, the driver started the vehicle, the mechanic also boarded the vehicle, met with the accident, in which he sustained injuries.

20. The owner-insured and the insurer have not led any evidence in rebuttal and the driver has not contested the claim petition. Thus, the evidence of the claimant-injured has remained unrebutted.

21. Having said so, the claimant-injured has proved that the driver, namely Shri Som Raj, while driving the offending vehicle, bus, bearing registration No. HP-38-7596, rashly and negligently on 3rd July, 2002, at about 1.30 p.m. near Loona Pul (Gehra), caused the accident, in which he sustained injuries. Accordingly, issue No. 1 is decided in favour of the claimant-injured and against the respondents. Point No. 1 is answered accordingly.

22. Before I deal with issues No. 2 and 3, I deem it proper to determine issues No. 4 and 5.

Issue No. 4:

23. The insurer has taken a stand that the offending vehicle was being driven in breach of the provisions of the MV Act and the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to discharge the onus. Even otherwise, there is not even a single iota of evidence on the record to suggest the fact that the driver had driven the offending vehicle in contravention of the provisions of the MV Act read with the insurance policy. Accordingly, issue No. 4 is determined against the insurer and in favour of the claimant-injured and the insured-owner.

Issue No. 5:

24. It was for the insurer to prove that the driver of the offending vehicle was not having a valid and effective driving licence, has not led any evidence, thus, has failed to discharge the onus. However, the driving licence is on the file as Ext. R-4, which does disclose that the driver was having a valid and effective driving licence. Accordingly, issue No. 5 is decided against the insurer and in favour of the claimant-injured, owner-insured and the driver.

Issue No. 2:

25. Shri Mulkh Raj has appeared in the witness box as PW-3 and deposed that the claimant-injured was working under him and was earning Rs.250/- - Rs.300/- per day.

The statement of PW-3 does support the plea of the claimant-injured and is suggestive of the fact that he would have been earning not less than Rs.9,000/- per month.

26. PW-2, Dr. Rakesh Verma, has stated that he was a member of the Medical Board which has issued the disability certificate in favour of the claimant-injured after examining him and proved the disability certificate, Ext. PW-2/A, in terms of which the claimant-injured has suffered permanent disability to the extent of 40%. Thus, it is a proved fact that it has affected his income to the extent of 40%. Meaning thereby, the claimant-injured has suffered loss of income to the tune of Rs.3,600/- per month.

27. Admittedly, the claimant-injured was 24 years of age at the time of accident. Thus, in order to assess just and appropriate compensation, multiplier of '15' is applicable in view of Schedule-II appended with the MV Act read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.** Thus, the claimant-injured is entitled to Rs. 3,600/- x 12 x 15 = Rs.6,48,000/- per annum under the head 'loss of income'.

28. The concept of granting compensation is outcome of Law of Torts. While considering the case for grant of compensation, particularly in injury cases, some guess work has to be done.

29. The Apex Court in case titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** has discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.*
>
> *10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this*

background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

11. In the case Ward v. James, 1965 (1) All ER 563, it was said:

> *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."*

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

> *"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."*

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

> *"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries,*

> *and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."*

30. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085,** while granting compensation in such a case. It is apt to reproduce para-7 of the judgment hereinbelow:

> *"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."*

31. The Apex Court in case titled as **Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same*

work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

32. The Apex Court in case titled as **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771,** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

"16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. .....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

33. The claimant-injured is also entitled to compensation, in view of the judgments (supra) under various heads, i.e. pecuniary damages and non-pecuniary damages. As discussed hereinabove, the claimant-injured is entitled to Rs.6,48,000/- under the head 'loss of income'.

34. In view of the the disability certificate and the medical record available on the file, it can be safely said that the claimant-injured has suffered for so many years and is suffering even now. Screws have been fixed and removed, has undergone pain and sufferings and has also to undergo such pain and sufferings throughout his life. Viewed thus, the claimant-injured is held entitled to Rs.1,00,000/- under the head 'pain and sufferings undergone' and Rs.1,00,000/- under the head 'pain and sufferings in future'.

35. The injury has affected the amenities of life of the claimant-injured and has made his life virtually a burden. It has shattered his physical frame. By guess, it can be held that the claimant-injured is also entitled to at least Rs.1,00,000/- under the head 'loss of amenities'.

36. The claimant-injured has claimed Rs.5,40,000/- under the head 'medical treatment' including Rs. 5,00,000/- for medicines and operation etc., Rs.30,000/- for transportation (taxi charges) and Rs.10,000/- for attendant charges. He has placed on record the medical documents and the medical bills, which comes to Rs.2,90,753.07/-. The claimant-injured has spent a huge amount on his treatment and has to go for treatment in future also. Accordingly, the claimant-injured is held entitled to

Rs.3,00,000/- under the head 'medical expenditure incurred' and Rs.1,00,000/- under the head 'medical expenditure in future'.

37. Admittedly, the claimant-injured was taken to Chamba Hospital, thereafter to Sanjivani Hospital, Chamba and from the said hospital, was taken to CMC Ludhiana for treatment and had to go to Ludhiana two-three times for follow-up, thus, claimant-injured has spent a lot of amount on transportation charges. He has claimed Rs.30,000/-, though meager, is awarded in favour of the claimant-injured under the head 'transportation charges'.

38. The treatment summary certificate, Ext. PW-9/C, is a proof of the fact that the claimant-injured was admitted and discharged from the hospital on different intervals with effect from 4th July, 2002 to 4th October, 2003, would have been dependent on the attendant. He has pleaded that he was attended upon by the attendants and claimed Rs.10,000/- as attendant charges, is held entitled to Rs.10,000/- under the head 'attendant charges'.

39. Ms. Archana Dutt, learned counsel for the claimant-injured, has stated that he was unmarried at the time of accident, was not in a position to get a suitable match and is dependent on his parents. The father of the claimant-injured, namely Shri Natho Ram, while appearing as PW-5, has deposed that after the accident, the claimant-injured was bed ridden, was and is totally dependent upon them. Thus, the claimant-injured has lost marriage prospects, i.e. was not in a position to get a suitable match, which he would have got, had he not become the victim of the said accident. Thus, I deem it proper to award Rs.1,00,000/- under the head 'loss of marriage prospects'.

40. The question is - who is to be saddled with liability? Admittedly, the offending vehicle was insured. The said factum has not been denied by the insurer-respondent No. 3, i.e. The New India Assurance Company and has failed to discharge the onus to prove issues No. 4 and 5. Viewed thus, the insurer-respondent No.3 has to indemnify and is, accordingly, saddled with entire liability.

Issue No. 3:

41. The next question is - whether the claim petition can be dismissed on the ground that the claimant-injured has not lodged the FIR.

42. I deem it proper to record herein that lodging of FIR or dismissal of criminal case or acquittal cannot be a ground to deny compensation. It was for the doctor at Chamba to inform the police, which he has miserably failed to do so. A question was put to the doctor, while he was appearing as PW-7, as to whether he had lodged FIR. He replied in negative. PW-7 has specifically stated that the documents i.e. the prescription slips, Ext. PW-7/A and Ext. PW-7/B, are not forged.

43. Can a claim petition be dismissed on the ground that FIR was not lodged when there is evidence on the file that the driver had driven the offending vehicle rashly and negligently or can a claim petition be dismissed on the ground of acquittal. The answer is in negative for the following reasons:

44. The findings recorded by the Criminal Court in acquittal cannot be a ground to defeat the rights of the claimants. Even, if the driver is acquitted in the criminal proceedings, that may not be a ground for dismissal of the claim petitions.

45. My this view is fortified by the judgment rendered by the Apex Court in **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354** wherein a bus hit an over-hanging high tension wire resulting in 26 casualties. The driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God. The Apex Court held that the plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rightly rejected by the Tribunal. It is apt to reproduce para 2 of the judgment herein:

> *"2. The Facts: A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their lives instantly; several lost their limbs likewise. The High Court, after examining the materials, concluded:*
>
> > *"We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of R. W. 1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant."*
>
> *The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirements of culpable rashness under Section 304A, I.P.C. is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to re-open the holdings on culpability and compensation."*

46. It is also profitable to reproduce relevant portion of para 8 of the judgment rendered by the High Court of Karnataka in a case titled **Vinobabai and others versus K.S.R.T.C. and another,** reported in **1979 ACJ 282:**

> *" 8. ..... Thus, the law is settled that when the driver is convicted in a regular trial before the Criminal Court, the fact that he is convicted becomes admissible in evidence in a civil proceeding and it becomes prima facie evidence that the driver was culpably negligent in causing the accident. The converse is not true ; because the driver is acquitted in a criminal case arising out of the accident, it is not established even prima facie that the driver is not negligent, as a higher degree of culpability is required to bring home an offence."*

47. Reliance is also placed on the judgment made by this Court in **Himachal Road Transport Corporation and another versus Jarnail Singh and others,** reported in **Latest HLJ 2009 (HP) 174,** wherein it has been held that acquittal of the driver in the

criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligent or not in causing the accident. It is apt to reproduce relevant portion of para 15 of the judgment herein:

> *"15. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court and the judgments cited hereinabove, it is now well settled law that the acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligence or not in causing the accident. ....."*

48. The purpose of granting compensation is just to come to the rescue of the victim of a traffic accident in order to ensure that he should not become victim of the social evils. The Tribunal has to exercise due care and caution and to take special care to see that the innocent victim does not suffer and the driver, owner-insured and the insurer do not escape their liability merely because some doubt here and some obscurity there.

49. The claim petition is to be determined summarily and that is why the CPC is not applicable. Some of the provisions of CPC have been made applicable in terms of the provisions of the Rules framed by the Central Government as well as State Government. The State of Himachal Pradesh has also framed the Himachal Pradesh Motor Vehicle Rules, 1999 (for short "the Rules") in terms of Sections 169 and 176 (b) of the MV Act, and only some of the provisions of CPC have been made applicable.

50. The Tribunal should not throw out the claim petition on flimsy grounds and should not succumb to other niceties. Thus, lodging of FIR is no ground for dismissing the claim petition. Point No. 2 is accordingly determined.

51. The Tribunal has dismissed the claim petition vide the impugned award also on the ground that the claimant-injured had filed earlier claim petition, which was dismissed in default and accordingly point No. 3 was framed hereinabove, which relates to the issue.

52. Chapters X, XI and XII of the MV Act are really social legislation and its aim and object is to reach to the victim of a traffic accident. The legislature thought it proper to remove all technicalities and even to delete the limitation provision from the statute enabling the claimants to receive compensation. Sections 168 and 169 contained in Chapter XII of the MV Act specifically provide that the claim petition should be tried summarily and provisions of CPC are not applicable. Only some of the provisions are applicable, which are made applicable in terms of the Rules (supra). The claim petition cannot be dismissed on the ground that it is barred by some other provisions of law, which are not applicable, for the following reasons:

53. It is beaten law of land that granting of compensation is a welfare legislation and the hypertechnicalities, mystic maybes, procedural wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions and to defeat the social purpose of granting compensation.

54. My this view is fortified by the judgment of the Apex Court in **N.K.V. Bros.'s case (supra).** It is apt to reproduce relevant portion of para 3 of the judgment herein:

> *"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This*

> *proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard. Emphasis supplied"*

55. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

56. It is also apt to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

> *"12. .....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims*

of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

57. It is apt to reproduce Rule 232 of the Rules herein:

> *"**232. The Code of Civil Procedure to apply in certain cases:-***
>
> *The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."*

58. In terms of the provisions of the Rule 232 (supra), Order IX CPC is applicable.

59. Before I deal with the provisions relating to dismissal in default, restoration, limitation and other aspects, I deem it proper to reproduce the order of dismissal passed in the claim petition by the Tribunal on 27th May, 2004, herein:

> *"27.5.2004:*
> *Present: None.*
> *Be called again.*
> *Sd/-*
> *MACT, Chamba.*
>
> *Called again.*
> *Present: None.*
> *The case has been called thrice during the day, but none appeared on behalf of the parties. Therefore, the petition is dismissed in default. Be consigned to the record room after due completion.*
> *Announced in the open Court* *Sd/-*
> *this 27th day of May, 2004* *(P.D. Goel)*
> *Motor Accident Claims Tribunal*
> *Chamba Division, Chamba (HP)"*

60. The said claim petition was dismissed in absence of both the parties. Order IX Rule 4 CPC is applicable. It is apt to reproduce Order IX Rule 4 CPC herein:

> *"**Order IX. Appearance of Parties and Consequence of Non-appearance.***
>
> *.....*
>
> ***4. Plaintiff may bring fresh suit or Court may restore suit to file.** - Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfied the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."*

61. While going through this provision of law, it mandates that in case a suit is dismissed in default in absence of both the parties, is not barred from filing a fresh suit, but within the period of limitation. Thus, the only fetter/restriction contained in this provision of law is that fresh suit can be filed provided it is not barred by time.

62. Admittedly, the fresh claim petition has been filed on 3rd June, 2004, i.e. within one month from the date of dismissal of the first claim petition and claim petition relates to accident, which has occurred on 3rd July, 2002.

63. Whether the second/fresh claim petition was barred? The answer is in the negative for the following reasons:

64. The application for restoration can be made in terms of Order IX Rule 4 CPC within thirty days. In the instant case, fresh claim petition has been filed on 3rd June, 2004. If we treat this as an application, it is within time, but instead of application for restoration, fresh claim petition came to be filed.

65. This Court in a latest judgment, dated 1st May, 2015, in the case titled as **Oriental Insurance Co. Ltd. versus Shri Kishan Chand & others,** being **FAO No. 186 of 2008,** held that fresh claim petition can be filed. It is apt to reproduce paras 12 and 15 of the judgment herein:

> *12. The next argument of the learned counsel for the appellant-insurer that the claim petition was not maintainable because the first claim petition came to be dismissed in default, was not restored, is not tenable for the reason that in terms of Order IX Rule 4 CPC, a fresh suit can be filed, provided it is not hit by limitation.*
>
> *13. .....*
>
> *14. .....*
>
> *15. The claim petition is to be taken to its logical end without any delay, that too, summarily. The cumbersome procedure is not to be followed in view of the mandate of Sections 169 and 176 (b) of the MV Act."*

66. The MV Act has been amended in the year 1994, it has gone through a sea change and provisions of Section 166 (3) of the Act stand deleted, which prescribed limitation period for filing claim petition. The purpose of deletion of the said provision was

that the victim should get compensation and delay in filing the petition and limitation period should not come in his way. The Apex Court dealt with this issue in the case titled as **Sohan Lal Passi's case (supra).**

67. The limitation period is not prescribed for filing claim petition in terms of the mandate of Section 166 of the MV Act after deletion of Section 166 (3) of the MV Act. Therefore, claim petition can be filed at any time. Viewed thus, second claim petition was not barred in terms of mandate of Order IX Rule 4 CPC read with other laws applicable.

68. The Apex Court, while dealing with Section 166 (3) of the MV Act, in a case titled as **New India Assurance Co. Ltd. versus C. Padma and another,** reported in **AIR 2003 Supreme Court 4394,** held that Court should be untrammelled by the technicalities and reach the injured-victim in order to achieve the goal of social legislation, the aim of which is to provide cheap, fast and speedy compensation to them in order to save them from social evils. It is apt to reproduce paras 7 and 12 of the judgment herein:

> *"7. In the instant case, at the time when the respondents had filed claim petition on 2-11-1995, the situation was completely different. Sub-section (3) of Section 166 of the Act had been omitted by Act 53 of 1994 w.e.f. 14-11-1994. The result of the Act 53 of the Motor Vehicles (Amendment) Act, 1994 is that there is no limitation prescribed for filing claim petitions before the Tribunal in respect of any accident w.e.f. 14-11-1994.*
>
> *8 to 11. .....*
>
> *12. Learned counsel for the appellant, next contended that since no period of limitation has been prescribed by the Legislature. Article 137 of the Limitation Act may be invoked, otherwise, according to him, stale claims would be encouraged leading to multiplicity of litigation for non-prescribing the period of limitation. We are unable to countenance with the contention of the appellant for more than one reason. Firstly, such an Act like Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, if otherwise the claim is found genuine. Secondly, it is a self contained Act which prescribes mode of filing the application, procedure to be followed and award to be made. The Parliament, in its wisdom, realised the grave injustice and injury being caused to the heirs and legal representatives of the victims who suffer bodily injuries/die in accidents, by rejecting their claim petitions at the threshold on the ground of limitation, and purposely deleted sub-section (3) of Section 166, which provided the period of limitation for filing the claim petitions and this being the intendment of the Legislature to give effective relief to the victims and the families of the motor accidents untrammelled by the technicalities of the limitation, invoking of Article 137 of the Limitation Act would defeat the intendment of the Legislature."*

69. The Apex Court in a case titled as **Mantoo Sarkar versus Oriental Insurance Company Limited and others,** reported in **(2009) 2 Supreme Court Cases 244,** held that MV Act is a special statute; the jurisdiction and powers of the Tribunal are wider

than Civil Court and it is for the Tribunal-Presiding Officer to try to achieve the goal as early as possible while keeping in view the mandate of Section and the words used. It is apt to reproduce relevant portion of para 11 herein:

> *"11. .....*
>
> *The said Act is a special statute. The jurisdiction of the Tribunal having regard to the terminologies used therein must be held to be wider than the civil court."*

70. The Andhra Pradesh High Court in a case titled as **Hussain Pasha versus Andhra Pradesh State Road Trans. Corpn. & Anr.,** reported in **II (2007) ACC 454,** held that second claim petition is maintainable and dismissal of earlier claim petition cannot be the ground for dismissing the latter one. It is apt to reproduce relevant portion of para 4 of the judgment herein:

> *"4. .....Therefore, I hold that the Tribunal was in error in dismissing the O.P. of the appellant on the ground that the earlier O.P. was dismissed for default and that his remedy is to file a petition for the restoration of earlier O.P. If a petition for restoration of the earlier O.P. were to be filed, either that O.P. or this O.P. has to be withdrawn because two O.Ps. are not maintainable in respect of same accident. Because the earlier O.P. was dismissed for default for non-prosecution, appellant can proceed with the prosecution of this O.P. the point is answered accordingly."*

71. The High Court of Jharkhand at Ranchi in a case titled as **Karmi Devi versus Satendra Kumar Singh and another, reported in 2010 ACJ 1661,** held that plaintiff/claimant has two remedies, i.e. filing of fresh suit or application for restoration of the suit. It is apt to reproduce para 15 of the judgment herein:

> *"15. In the light of the provisions contained in Order 9 and the law discussed hereinabove, it can be safely concluded that in case of dismissal of suit under Order 9, rule 4, C.P.C. the plaintiff has both the remedies of filing of fresh suit or application for restoration of the suit. If he chooses one remedy he is not debarred from availing himself of the other remedy. Both these remedies are simultaneous and would not exclude either of them."*

Applying the principle to the instant case, limitation is not applicable. Thus, the claimant has rightly filed fresh/second claim petition.

72. The High Court of Rajasthan, Jaipur Bench in a case titled as **Savitri and others versus M.A.C.T.-cum-District and Sessions Judge, Jhunjhunu and others,** reported in **2013 ACJ 1361,** held that when a claim petition has not been decided on merits and was dismissed in default without entering into the merits, the Court should take pragmatic view rather than going into the technicalities and should decide the claim petition on merits enabling the claimant to reap the fruits. It is apt to reproduce relevant portion of para 5 of the judgment herein:

> *"5. The Act of 1988 being a beneficial legislation, the court has to, in a situation like this, take a pragmatic view of the matter rather than being too technical and, in the facts of this case, when it is clear that*

there was no adjudication on merits, the claimants cannot be left in the lurch without any remedy."

73. The Apex Court, in a case tilted as **New India Assurance Co. Ltd. versus R. Srinivasan,** reported in **AIR 2000 Supreme Court 941,** while dealing with a case of similar facts, which had arisen from a complaint under the Consumer Protection Act (68 of 1986), held that it is permissible to file a second case. It is apt to reproduce relevant portion of para 16 and para 20 of the judgment herein:

> *"16. .....The fact that the case was not decided on merits and was dismissed in default of non-appearance of the complainant cannot be overlooked and, therefore, it would be permissible to file a second complaint explaining why the earlier complaint could not be pursued and was dismissed in default.*
>
> *17 to 19. .....*
>
> *20. In the instant case, the vital fact of there being an insurance cover in favour of the respondent is not disputed. The loss suffered by the respondent is not disputed and the claim of the respondent is also not questioned. The only point urged before the State Commission as also before the National Commission and, for that matter, before us is that on account of the first complaint having been dismissed in default and the complaint having not been restored, the second complaint would not lie. The interest of justice, in our opinion, cannot be defeated by this rule of technicality. The rules of procedure, as has been laid down by this Court a number of times, are intended to serve the ends of justice and not to defeat the dispensation of justice. The respondent had suffered loss which was squarely covered by the Policy of Insurance granted by the appellant. Since his claim is not being questioned before us on merits and is being sought to be defeated on the technical plea referred to above. We are not prepared to interfere with the orders passed by the District Forum, the State Commission and the National Commission, particularly as it is stated before us that the whole of the claim amount has already been paid to the respondent."*

74. Having said so, the second claim petition was maintainable and the Tribunal has fallen in an error in holding that it was barred by time and was not maintainable.

75. The argument of the learned counsel for insurer that the claimant is caught by doctrine of *res judicata,* is not tenable for the reason that the doctrine of *res judicata* is applicable when there is a decision on merits.

76. It is apt to reproduce relevant portion of Section 11 of the CPC herein:

> *"**11. Res Judicata.** - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit*

or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

....."

77. The claim petition was dismissed in default without entering into and discussing the merits. On the plain reading of Section 11 (supra), one comes to an inescapable conclusion that the doctrine of *res judicata* is not applicable.

78. However, this question was raised before the High Court of Jharkhand at Ranchi in **Karmi Devi's case (supra).** It is apt to reproduce paras 17 and 20 of the judgment herein:

"17. The principle of res judicata is based on the common law maxim nemo debet bis vexari pro una et eadem causa, which means that no man shall be vexed twice over the same cause of action. It is a doctrine applied to give finality to a lis. According to this doctrine, an issue or a point once decided and attains finality, should not be allowed to be reopened and re-agitated in a subsequent suit. In other words, if an issue involved in a suit is finally adjudicated by a court of competent jurisdiction, the same issue in a subsequent suit cannot be allowed to be re-agitated. It is, therefore, clear that for the application of principle of res judicata, there must be an adjudication of an issue in a suit by a court of competent jurisdiction.

18. .....

19. .....

20. From a plain reading of the term 'decree', it is manifestly clear that to constitute a decree, there must be a formal expression of an adjudication which conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit, but the decree shall not include any adjudication from which an appeal lies as an appeal from an order or any order of dismissal for default. It is, therefore, evidently clear that a dismissal of a suit or application for default particularly under Rule 2 or Rule 3 of Order 9, C.P.C., is not the formal expression of an adjudication upon any right claimed or the defence set up in a suit. An order of dismissal of a suit or application in default is also not appealable order as provided under Order 43 of the Code of Civil Procedure. If we read Order 43, C.P.C., we will find that orders passed under Order 9, Rule 9, C.P.C. or Order 9, Rule 13, C.P.C., are made appealable but an order passed under Order 9, Rule 4, C.P.C. is not appealable. It is, therefore, clear that an order of dismissal of a suit or application in default under Rule 2 or Rule 3 of Order 9, C.P.C, is neither an adjudication or a decree nor it is an appealable order. If that is so, such order of dismissal of a suit under Rule 2 or Rule 3 of Order 9, C.P.C, does not fulfil the requirement of the term 'judgment' or 'decree', inasmuch as there is no adjudication. In my considered opinion, therefore, if a fresh suit is filed, then such an order of dismissal cannot and shall not operate as res judicata."

79. The Apex Court has dealt with this issue in a case titled as **Sheodan Singh versus Daryao Kunwar,** reported in **AIR 1966 Supremem Court 1332.**

80. The Apex Court in a latest judgment in the case titled as **Erach Boman Khavar versus Tukaram Shridhar Bhat and another,** reported in **2014 AIR SCW 61,** held that there should be a conscious adjudication of an issue and the plea of *res judicata* cannot be taken aid of unless there is an expression of an opinion on merits. It is apt to reproduce relevant portion of para 34 of the judgment herein:

> *"34. From the aforesaid authorities it is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of opinion on the merits....."*

81. Thus, the argument of the learned counsel for the insurer that the claim petition is caught by law of *res judicata* and barred by limitation and other provisions of law, is devoid of any force and is rejected.

82. Viewed thus, it is held that the Tribunal has fallen in an error in dismissing the claim petition. Point No. 3 is replied and decided accordingly.

83. Delay has crept-in because of the fact that the Tribunal has wrongly applied the procedure and rules, which have defeated the very purpose of the MV Act. Rules and procedure are meant for achieving the purpose of the Act and not to defeat the same. Unfortunately, rules have been applied, which have not only defeated the very purpose of the Act, but has made the claimant-injured to run from pillar to post and post to pillar. The delay caused in the case in hand is really a terrible commentary and suggests how we have reached the claimant-injured, who is the victim of a road traffic accident. It pains me to record herein that delay has taken away the settings of the law.

84. The claimant-injured has claimed compensation to the tune of Rs.12,00,000/-, as per the details given in the claim petition, however, while making the assessment (supra), it appears that the claimant-injured is entitled to compensation more than claimed.

85. The question is - Whether the Tribunal or Appellate Court is/are within its/their jurisdiction to grant more compensation than what is claimed?

86. It would be profitable to reproduce Section 168 (1) of the MV Act herein:

> *"**168. Award of the Claims Tribunal.** - On receipt of an application for compensation made under section 166 , the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:*

....."

87. The mandate of Section 168 (1) (supra) is to 'determine the amount of compensation which appears to it to be just'.

88. The word "just' has been defined in the **Webster's Encyclopedic Unabridged Dictionary of the English Language, Deluxe Edition,** at page No. 1040, herein:

> "**just,** adj. **1.** guided by truth, reason, justice, and fairness: *We hope to be just in our understanding of such difficult situation.* **2.** done or made according to principle; equitable; proper: *a just reply.* **3.** based on right; rightful; lawful; *a just claim.* **4.** in keeping with truth or fact; true; correct: *a just analysis.* **5.** given or awarded rightly; deserved, as a sentence, punishment, or reward: *a just penalty.* **6.** in accordance with standards or requirements; proper or right: *just proportions.* **7. (**esp. in Biblical use) righteous. **8.** actual, real, or genuine. -*adv.* **9.** within a brief preceding time; but a moment before: *The sun just came out.* **10.** exactly or precisely: *This is just what I mean.* **11.** by a narrow margin: barely: *The arrow just missed the mark.* **12.** only or merely: *he was just a clerk until he became ambitious.* **13.** actually; really; positively: *The weather is just glorious."*

89. In the **Oxford Advanced Learner's Dictionary,** the word "just" has been defined at page No. 702, as under:

> *"**just.** - adv. **1.** exactly, **2.** at the same moment as, **3.** as good,nice, easily, etc., **4.** after, beefore, under, etc. sth, **5.** used to say that you/sb did sth very recently, **6.** at this/that moment, **7.** about/going to do sth, **8.** simply, **9.** (informal) really; completely, **10.** to do sth only, **11.** used in orders to get sb's attention, give permission etc., **12.** used to make a polite request, excuse etc., **13.** could/might/may - used to show a slight possibility that sth is true to will happen, **14.** used to agree with sb.....*
>
> *adj. **1.** that most people consider to be morally fair and reasonable, **2.** people who are just **3.** appropriate in a particular situation."*

90. It is for the Tribunal or the Appellate Court to determine what is just compensation. The claimant-injured is a rustic villager, illiterate, hailing from a rural area, i.e. District Chamba, which is a tribal area, can he be deprived of the higher compensation, to which he is entitled to, which appears to the Court to be just. The answer is in negative.

91. Keeping in view the object of granting of compensation and the legislature's wisdom read with the amendment made in the MV Act in the year 1994, it is for the Tribunal or the Appellate Court to assess the just compensation and is within its powers to grant the compensation more than what is claimed for the following reasons:

92. This Court in a case titled as **United India Insurance Company Ltd. versus Smt. Kulwant Kaur,** reported in **Latest HLJ 2014 (HP) 174,** held that the Tribunal as well

as the Appellate Court is/are within the jurisdiction to enhance the compensation and grant more than what is claimed. It is apt to reproduce paras 41 to 45 of the judgment herein:

> "41. Before I determine what is the just and adequate compensation in the case in hand, it is also a moot question – whether the Appellate Court can enhance compensation, even though, not prayed by the medium of appeal or by cross-objection.
>
> 42. The Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") has gone through a sea change in the year 1994 and sub-section (6) has been added to Section 158 of the MV Act, which reads as under:
>
> > *"**158. Production of certain certificates, licence and permit in certain cases.** -*
> >
> > *.....*
> >
> > *(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."*
>
> In terms of this provision, the report is to be submitted to the Tribunal having the jurisdiction.
>
> 43. Also, an amendment has been carried out in Section 166 of the MV Act and sub-section (4) stands added. It is apt to reproduce sub-section (4) of Section 166 of the MV Act herein:
>
> > *"**166. Application for compensation.** -*
> >
> > *.....*
> >
> > *(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."*
>
> It mandates that a Tribunal has to treat report under Section 158 (6) (supra) of the MV Act as a claim petition. Thus, there is no handicap or restriction in granting compensation in excess of the amount claimed by the claimant in the claim petition.
>
> 44. Keeping in view the purpose and object of the said provisions read with the mandate of Section 173 of the MV Act, I am of the

view that the Appellate Court is exercising the same powers, which the Tribunal is having. Also, sub-clause (2) of Section 107 of the Code of Civil Procedure (hereinafter referred to as "the CPC") mandates that the Appellate Court is having all those powers, which the trial Court is having. It is apt to reproduce Section 107 sub-clause (2) of the CPC herein:

> *"**107. Powers of Appellate Court.** -*
>
> *.....*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."*

45. Thus, in the given circumstances, the Tribunal as well as the Appellate Court is within the jurisdiction to enhance the compensation. "

93. The same view was taken by the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

> *"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an*

> *application for compensation even though no such claim is made or no specified amount is claimed.*
>
> *8. .....*
>
> *9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act.*
>
> *10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."*

94. In the case titled as **State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696,** the Apex Court has discussed the expression 'just'. It is apt to reproduce para 7 of the judgment herein:

> *"7. It has to be kept in view that the Tribunal constituted under the Act as provided in S. 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; nor a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just. (See Helen C. Rebello v. Maharashtra State Road Transport Corporation (AIR 1998 SC 3191)."*

95. The same view has been taken by the Apex Court in a case titled as **The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another,** reported in **AIR 2003 Supreme Court 4172**.

96. The Apex Court in a case titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** held that the Appellate Court was within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

97. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** laid down the same principle while discussing, in para 27 of the judgment, the ratio laid down in the judgments rendered in the cases titled as *Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. versus Zora Singh and Others (2005) 6 SCC 776; A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621.*

98. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."*

99. The Apex Court in a latest judgment in a case titled **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** has specifically held that compensation can be enhanced while deciding the appeal, even though prayer for enhancing the compensation is not made by way of appeal or cross appeal/objections. It is apt to reproduce para 9 of the judgment herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the*

deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."

100. The Apex Court in a latest judgment in the case titled as **Smt. Savita versus Bindar Singh & others,** reported in **2014 AIR SCW 2053,** has laid down the same proposition of law and held that the Tribunal as well as the Appellate Court can ignore the claim made by the claimant in the application for compensation. It is apt to reproduce para 6 of the judgment herein:

"6. After considering the decisions of this Court in Santosh Devi as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."

101. I have discussed hereinabove, what is the just and appropriate compensation, which is to be awarded to the claimant-injured in the instant case.

102. Having glance of the above discussions, the impugned award is set aside, the claim petition is granted and the claimant is held entitled to compensation to the tune of Rs.14,88,000/- (i.e. Rs. 6,48,000/- + Rs.1,00,000/- + Rs.1,00,000/- + Rs.1,00,000/- + Rs.3,00,000/- + Rs.1,00,000/- + Rs.30,000/- + Rs.10,000/- + Rs. 1,00,000/-) with interest @ 7.5 % per annum from the date of the claim petition on Rs. 3,40,000/- {i.e. medical expenditure already incurred + transportation charges + attendant charges} and on remaining amount, from the date of the impugned award till its realization. The insurer-respondent No. 3 is saddled with liability and is directed to deposit the same within six weeks before the Registry.

103. On deposition, Registry is directed to release 50% of the awarded amount in favour of the claimant-injured through payee's account cheque on proper identification and the remaining 50% is to be deposited in fixed deposits for a period of six years.

104. Viewed thus, the appeal is allowed, the impugned award is set aside and the claim petition is granted, as indicated hereinabove.

105. Send down the record after placing copy of the judgment on Tribunal's file.

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

FAOs No. 140, 146, 194 & 195 of 2008
Date of decision: 15.05.2015

1. **FAO No. 140 of 2008**
Oriental Insurance Company Ltd. ...Appellant
Versus
Geeta Devi & others ..Respondents

2. **FAO No. 146 of 2008**
Oriental Insurance Company Ltd. ...Appellant
Versus
Raj Kumar & others ..Respondents

3. **FAO No. 194 of 2008**
Jaiwanti Devi ...Appellant
Versus
Smt. Geeta Devi & others ..Respondents

4. **FAO No. 195 of 2008**
Jaiwanti Devi ...Appellant
Versus
Sh. Raj Kumar & others ..Respondents

Motor Vehicle Act, 1988- Section 149- Petitioner pleaded that deceased had gone to attend the marriage but on return, the vehicle met with an accident- held, that in view of averments made in the petition, injured and deceased were travelling as gratuitous passengers- insurer was rightly directed to satisfy the awards with a right to recovery. (Para-12 to 15)

FAOs No. 140 & 146 of 2008
For the appellant(s): Nemo
For the respondents: Mr. Surinder Saklani, Advocate, for respondent No. 1.
Mr. Lovneesh Kanwar, Advocate, for respondents No. 2 & 3.

FAOs No. 194 & 195 of 2008
For the appellant(s): Mr. Lovneesh Kanwar, Advocate.
For the respondents: Mr. Surinder Saklani, Advocate, for respondent No. 1.
Mr. Dhruv Shaunak, Advocate, vice Mr. Vikram Thakur, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

By this judgment and order, all the appeals are being disposed of together because they are outcome of a motor vehicular accident, which was caused by driver, namely, Kali Dass @ Ramesh Kumar, while driving Swaraj Mazda bearing registration No. HP-28-1666, rashly and negligently.

2. In **FAOs No. 140 & 146 of 2008,** the insurer-Oriental Insurance Company Limited has questioned the awards passed in Claim Petition No. 67 of 2004 titled as Smt. Geeta Devi versus Jaiwanti Devi & others and Claim Petition No. 68 of 2004, titled as Raj Kumar versus Jaiwanti Devi & others, dated 4th January, 2008, hereinafter referred to as 'the impugned awards', on grounds taken in the memo of appeals.

3. By the medium of **FAOs No. 194 & 195 of 2008,** the owner has questioned the aforesaid impugned awards, on the grounds taken in the memo of appeals.

Brief Facts:

4. The claimants being victims of the motor vehicular accident had filed claim petitions before the Tribunal for grant of compensation, as per the break-ups given in the respective claim petitions. It is averred in the claim petitions that on 08.02.2004, Parvej Kumar and Raj Kumar had boarded Swaraj Mazda bearing registration No. HP-28-1666 to attend a marriage ceremony at village Gharwalhri, Tehsil Sadar, District Mandi, H.P., and while returning back, the vehicle met with an accident, at about 5.30 p.m., near the aforesaid village, which was being driven by driver, namely, Kali Dass @ Ramesh Kumar, rashly and negligently and Parvej Kumar and Raj Kumar sustained injuries and Parvej Kumar succumbed to the injuries.

5. The respondents resisted the claim petitions on the grounds taken in the respective memo of objections.

6. The Tribunal, on the pleadings of the parties, framed common issues in both the claim petitions. It is apt to reproduce the issues framed in Claim Petition No. 67 of 2004:-

1. *Whether respondent No. 2 was driving the Swaraj Mazda HP-28-1666 on 7.2.2004, at 5.30 p.m., at Village Gharwalhi, in rash and negligent manner, resulting in death of Parvej Kumar, as alleged? ….OPP*

2. *If issue No. 1 is proved, to what amount and from whom the petitioner is entitled? …OPP*

3. *Whether the driver of the vehicle HP-28-1666 at the time of accident was not holding a effective and valid driving licence and was driving the vehicle in violation of the terms and conditions of the insurance policy, as alleged? ….OPR-3*

4. *Whether the petitioner alongwith other passenger was traveling as gratuitous passenger in vehicle HP-28-1666, as alleged? If so, its effect? ….OPR-3*

5. Relief."

7. The parties led evidence in both the claim petitions. The Tribunal, after scanning the evidence, oral as well as documentary, passed the impugned awards, whereby the insurer-Insurance Company was asked to satisfy the impugned awards, with right of recovery.

8. The claimants and the driver have not questioned the impugned awards, on any count. Thus, it has attained finality, so far as it relates to them.

9. The insurer-Oriental Insurance Company has questioned both the impugned awards, by the medium of FAOs No. 140 & 146 of 2008, on the ground that the Tribunal has fallen in error in directing it to satisfy the impugned awards.

10. The owner-insured has also questioned both the impugned awards, by the medium of FAOs No. 194 & 195 of 2008, on the ground that the Tribunal has fallen in error in granting right of recovery to the insurer.

11. The only dispute in these appeals is-whether the Tribunal has rightly granted right of recovery to the insurer. The answer is in the affirmative.

12. The claimants have specifically averred in the claim petitions that claimant Raj Kumar and Parvej Kumar were traveling in the offending vehicle after attending the marriage at Village Gharwalhri, the vehicle met with an accident and they sustained injuries and Parvej Kumar succumbed to the injuries.

13. It is apt to reproduce para 24(i) of Claim Petition No. 67 of 2004 herein:-

> ***"(i) That on the unfortunate and fateful day of 8-2-2004, deceased alongwith his father Raj Kumar has gone alongwith other persons of village to attend the marriage at village Gharwalhi, Tehsil Sadar, District Mandi, H.P. and while returning from the above marriage in the ill-fated vehicle i.e. Swaraj Mazda bearing No. HP-28-1666, owned by respondent No. 1, which was being driven by respondent No. 2 in very high speed and in very rash and negligent manner and at about 5.30 PM near about 20 mts. ahead from village Gharwalhi on Mandi-Dharampur road, respondent No. 2 lost control over the vehicle and as a result of which the vehicle met with an accident and fell downwards from the road. Due to the above accident, the deceased son of petitioner sustained various injuries on different parts of body which proved fatal, as deceased was removed to Zonal Hospital Mandi where declared dead, as he had succumbed to injuries in way to Hospital."***

14. Keeping in view the pleadings in the claim petitions, it can safely be held that the injured and deceased were traveling in the offending vehicle as gratuitous passengers.

15. In terms of the mandate contained in Chapter-XI, Sections 146, 147 and 149 of the Motor Vehicles Act, 1988 read with the fact that claimants are the third party, the Tribunal has rightly directed the insurer to satisfy the impugned award, at the first instance, with right of recovery.

16. Accordingly, the impugned awards are upheld and the appeals are dismissed.

17. The Registry is directed to release the entire compensation amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned awards.

18. Send down the records after placing a copy of the judgment on each file of the claim petitions.

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

Rakesh Kumar son of Shri Sohan Lal ....Petitioner
Versus
State of H.P. ....Non-petitioner

Cr.MP(M) No. 484 of 2015
Order Reserved on 8th May, 2015
Date of Order 15th May, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 376(D) and 506 of IPC- it was pleaded that challan has been filed before the Court- statement of eye-witnesses have been recorded and the disposal of the case will take some time- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behaviour of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- mere fact that petitioner is in judicial custody and there will be delay in the conclusion of the trial is not sufficient to grant bail- petitioner is facing trial of heinous and grave offence of gang rape – release of the petitioner on bail would affect the trial adversely- bail declined but direction issued to trial Court to dispose of the case expeditiously. (Para-6 to 9)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the Petitioner: Mr. Ashok Kumar Thakur, Advocate
For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with FIR No. 79 of 2014 dated 16.5.2014 registered under Section 376(D) and 506 IPC at P.S. Baleauganj District Shimla (H.P.)

2. It is pleaded that petitioner did not commit any offence. It is further pleaded that petitioner is innocent and he is government employee and working in education

department. It is pleaded that challan already stood filed in the Court and statements of five witnesses also stood recorded by learned trial Court. It is pleaded that trial will take long time to conclude. It is also pleaded that petitioner will comply all terms and conditions imposed by the Court in bail order. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. As per police report, co-accused Rakesh Kumar and Ram Parsad @ Ramu were already familiar with each other. There is recital in police report that co-accused Rakesh Kumar is posted as peon in education department. There is further recital in police report that on dated 16.5.2014 co-accused Rakesh Kumar was sent to SBI Kalibari in connection with bank draft and thereafter co-accused Rakesh Kumar did not come back. There is also recital in police report that co-accused Rakesh Kumar at 11 AM went to place i.e. 103 tunnel Shimla and co-accused Ram Parsad @ Ramu met him at tunnel 103 Shimla and thereafter both accused went towards railway track in Summer Hill forest. There is further recital in police report that prosecutrix and her companion Manish Attri met accused persons upon the railway track. There is also recital in police report that thereafter both accused persons afraid prosecutrix and her friend and told the prosecutrix and her friend that police raid was effected and police officials would also caught the prosecutrix and her friend. There is further recital in police report that after creating fear in the mind of prosecutrix and her friend accused persons took the prosecutrix and her friend in forest and thereafter accused persons separated the prosecutrix and her friend upon different path. There is further recital in police report that thereafter both accused persons namely Rakesh Kumar and Ram Parsad @ Ramu committed gang rape upon prosecutrix in forest and threatened the prosecutrix that they would kill her in case she would narrate the incident to anybody. There is further recital in police report that challan already stood filed in Court on dated 11.8.2014 which is pending before learned Additional Sessions Judge, Court No.1, Shimla. There is recital in police report that statements of seven witnesses already stood recorded and case is listed for further prosecution evidence. Prayer for dismissal of bail petition sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail petition:-

1. Whether bail petition filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail petition?

2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that petitioner is in judicial custody since ten months and there will be delay in conclusion of trial and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner is facing the trial of heinous

and grave offence of sexual assault mentioned under Section 376(D) IPC i.e. gang rape. The direction would be issued to learned trial Court to dispose of the case expeditiously.

8. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and on this ground bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case petitioner is facing trial under heinous and grave criminal offence punishable under Section 376(D) of IPC. Court is of the opinion that if petitioner is released on bail at this stage then trial of case will be adversely affected and interest of State and general public will also be adversely affected.

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if petitioner is released on bail at this stage then petitioner will induce and threat the prosecution witnesses is accepted for the reasons mentioned hereinafter. There is apprehension in the mind of Court that if petitioner is released on bail at this stage then petitioner will threat and induce the prosecution witnesses which would adversely effect the case. In view of gravity of offence punishable under Section 376(D) IPC it is not expedient in the ends of justice to release the petitioner on bail. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final order)

10. In view of my findings on point No.1 bail petition filed by petitioner under Section 439 Cr.P.C. is rejected. However learned trial Court is directed to dispose of the case expeditiously. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail petition filed under Section 439 of Code of Criminal Procedure 1973. Pending petition(s) if any also disposed of. Petition filed under Section 439 of Code of Criminal Procedure is disposed of. Pending petition(s) if any also disposed of.

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

Ravi Kumar @ Chimnu son of Sh. Waryam Singh ....Petitioner
Versus
State of H.P. ....Non-petitioner

Cr.MP(M) No. 485 of 2015
Order Reserved on 8th May, 2015
Date of Order 15th May, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 366, 376, 354, 506 and 511 read with Section 34 of IPC- it is pleaded that trial will take a long time- prosecution

witnesses did not support the prosecution version- original culprits were not apprehended and the petitioners were falsely implicated- held, that contradictions in the statements of the witnesses will be seen by the trial Court at the time of disposal of the case - merely because, there will be delay in the conclusion of trial is no ground for granting bail- petitioner is facing trial for heinous offence of sexual assault, such offences are increasing – every women has a right to reside in the society with honour and dignity- releasing the petitioner on bail will affect the trial adversely- hence, bail declined but direction issued to the trial Court to conclude the trial expeditiously. (Para-6 to 14)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the Petitioner:	Mr. Suresh Kumar Thakur, Advocate
For the Non-petitioner:	Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with FIR No. 162 of 2013 dated 31.5.2013 registered under Section 366, 376, 511, 354, 506 read with Section 34 IPC at P.S. Nurpur District Kangra (H.P.)

2. It is pleaded that bail petition be allowed because there is difference in statement recorded under Section 154 Cr.P.C. and tatima statement. It is further pleaded that bail petition be allowed because trial will take long time to conclude. It is also pleaded that witnesses have not supported the prosecution story as alleged by prosecution and on this ground bail application be allowed. It is pleaded that police officials did not catch the original culprits and implicate the petitioner falsely in present case. It is pleaded that false case is filed because hot altercation took place between co-accused Rakesh Kumar alias Mahashu and police and due to anger Rakesh Kumar @ Mahashu slapped on the face of police officials. It is further pleaded that there is no call detail on record and on this ground bail petition be allowed. It is pleaded that statement of prosecutrix and other material witnesses already stood recorded by learned trial Court. It is pleaded that any condition imposed by Court will be binding upon the petitioner. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. As per police report, on dated 31.5.2013 prosecutrix was going to sewing work and when she reached at Makodjaman at 9.40 AM then a Scorpio vehicle white in colour came from behind and same was stopped. There is recital in police report that in vehicle four boys were sitting out of whom two boys came down from vehicle and one of them gagged mouth of prosecutrix while other boy caught the prosecutrix from her hairs and under duress they pushed the prosecutrix inside the vehicle and took the prosecutrix inside the vehicle. There is further recital in police report that thereafter the vehicle was took towards Rehan via Nurpur. There is further recital in police report that prosecutrix tried her best to save herself from the clutches of accused persons but all accused persons threatened the prosecutrix with dire consequences. There is recital

in police report that one of co-accused picked up a knife and told the prosecutrix that in case she makes hue and cry then she would be killed. There is further recital in police report that in the meanwhile all four boys started molesting the prosecutrix. There is also recital in police report that one boy put off the clothes of prosecutrix and tried to rape the prosecutrix. There is further recital in police report that when prosecutrix restricted about act of sexual assault then clothes of prosecutrix were given back to her. There is further recital in police report that thereafter the vehicle was stopped at village Kehar and two of boys went outside the vehicle to take the water and thereafter prosecutrix came out of vehicle and cried loudly upon which all four boys took away the vehicle and went away. There is further recital in police report that challan stood filed in the court of learned Additional Sessions Judge Dharamshala on dated 29.7.2013. Prayer for dismissal of bail petition sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail petition:-

1. Whether bail petition filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail petition?

2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that there is contradiction in statement recorded under Section 154 Cr.P.C. and in statements recorded by learned trial Court and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that trial is under process and some of prosecution witnesses are still to be examined by learned trial Court. Court is of the opinion that if there is any material contradiction in testimonies of prosecution witnesses same would be appreciated by learned trial Court at the time of final disposal of case. Court is of the opinion that at this stage it is not expedient in the ends of justice to appreciate the evidence recorded by learned trial Court as same would prejudice the merits of case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that witnesses have not supported the prosecution story and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that fact whether there are major contradictions in testimonies of prosecution witnesses or not will be examined by learned trial Court when case would be disposed of on merits. At this stage it is not expedient in the ends of justice to give any finding upon merits of case when criminal case is under process of prosecution evidence.

8. Another submission of learned Advocate appearing on behalf of the petitioner that there will be delay in conclusion of trial and on this ground bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that direction will be given to learned trial Court to dispose of the case expeditiously because petitioner is in judicial custody and criminal case requires expeditious disposal.

9. Another submission of learned Advocate appearing on behalf of the petitioner that hot altercation took place between co-accused Rakesh Kumar and police officials and

due to anger co-accused Rakesh Kumar @ Mahashu had slapped on face of police officials and due to above stated facts false case was planted against accused persons and on this ground bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that in bail matters it is not expedient in the ends of justice to give any finding on the merits of the case. Entire plea of accused persons will be considered by learned trial Court at the time of final disposal of criminal case on merits in accordance with law.

10. Another submission of learned Advocate appearing on behalf of petitioner that there is no call detail on record and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is not expedient in the ends of justice to give any findings on merits. Court is of the opinion that if any finding is given at this stage on merits the same will prejudice the fair trial of case because prosecution has not closed its evidence and case is under the process of examination of prosecution witnesses at this stage.

11. Another submission of learned Advocate appearing on behalf of petitioner that if bail is not granted to petitioner then whole future of petitioner will be spoiled because age of petitioner is 28 years and petitioner is behind the bars for last 23-24 months and on this ground bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that no one is above the law and it is well settled law that majesty of law always prevails. It is well settled law that criminal cases are decided upon proved oral as well as documentary facts placed on record. It is also well settled law that criminal cases are not disposed of upon any sentimental feelings. It is well settled law that all criminal Courts are under legal obligation to dispose of the cases in accordance with law.

12. Another submission of learned Advocate appearing on behalf of petitioner that any condition imposed by Court will be binding upon the petitioner and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force. Petitioner is facing the trial of heinous offence of sexual assault punishable under Section 366, 376, 511, 354, 506 read with Section 34 IPC. Sexual assaults are increasing in the society day by day. Every woman has legal right to reside in society with honour and dignity. No one can be allowed to sexually assault the woman in barbarous manner. Courts are under legal obligation to protect the life and liberty of women in the society in accordance with law. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.***

13. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if petitioner is released on bail at this stage then trial of case will be adversely effected is accepted for the reasons hereinafter mentioned. In present case trial is under process and Court is of the opinion that if petitioner is released on bail at this stage then trial of case will be adversely effected. Court is of the opinion that if petitioner is released at this stage then interest of State and interest of general public will also be adversely effected. In view of above stated facts, point No.1 is answered in negative.

Point No.2 (Final order)

14. In view of my findings on point No.1 bail petition filed by petitioner under Section 439 Cr.P.C. is rejected. However learned trial Court is directed to dispose of the case expeditiously because petitioner is in judicial custody and case requires expeditious disposal. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail petition filed under Section 439 of Code of Criminal Procedure 1973. Petition filed under Section 439 of Code of Criminal Procedure is disposed of. Pending petition(s) if any also disposed of.

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

Sheel Darshan Sood and another. ....Applicants/Plaintiffs.
Versus
Manju Sood and others. ....Non-applicants/Defendants.

OMP No.4026 of 2013 in
Civil Suit No. 16 of 2013.
Order reserved upon OMP on: 7.5.2012.
Date of Interim Order upon OMP: May 15 ,2015

Code of Civil Procedure, 1908- Order 5 Rule 20- An application for substituted service was filed on the ground that defendants No. 4, 7 and 8 had left Shimla long time ago and their whereabouts were not known- contesting defendant pleaded that defendants No. 4 and 8 had died and instead of bringing on record their legal representatives, present application has been filed- held, that there was no satisfactory proof of death and the factum of the death was disputed – report of process server was contradictory and did not establish the death of the defendants - therefore, an issue framed to determine, whether defendant No. 4 and 8 had died and parties ordered to lead evidence. (Para-5 to 7)

For the applicants: Mr. Bhupinder Gupta, Sr. Advocate with Mr.Neeraj Gupta, Advocate.
For non-applicants Mr.R.L.Sood, Sr.Advocate No.1to 3 with Mr. Sanjeev Kumar, Advocate.
For non-applicants No.9 to 18. Mr.Ashok Sood, Advocate and Mr. Dhreeja Vashisht, Advocate

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Interim Order Upon OMP No. 4026 of 2013 filed under Order 5 Rule 20 CPC:

Plaintiffs Sheel Darshan Sood and others filed civil suit for declaration, specific performance, partition by metes and bound and rendition of accounts relating to three storey building situated at 22 The Mall Shimla HP. In civil suit No. 16 of 2013 present application filed by plaintiffs under Order 5 Rule 20 read with Section 151 CPC for serving defendants No.4,7 & 8 by way of substituted service. It is pleaded that co-defendants No.4,7 and 8 namely Shamsher C/o 22 The Mall Shimla 171001, Sh Vijay Kumar Sood son of Sh

Balak Ram Sood resident of 27/2 Upper Flat Lower Bazar Shimla-171001 and Sh Jagar Nath C/o 22 The Mall Shimla-171001 have left Shimla long time ago and their whereabouts are not known. It is pleaded that report was submitted by process server that co-defendants No.4 and 8 have either left Shimla or have died. It is further pleaded that present address or legal heirs of co-defendants No. 4 and 8 not mentioned in the report by process server. It is further pleaded that plaintiffs have no reason to believe that c o-defendants No.4 and 8 have died because they have left Shimla in connection with their business long time ago. It is further pleaded that service upon co-defendants No. 4,7 and 8 be effected under Order 5 Rule 20 of the Code of Civil Procedure 1908 by way of publication in daily News Paper circulated in Himachal Pradesh.

2. Per contra reply filed on behalf of contesting defendants No.1,3,9 to 18 pleaded therein that application under Order 5 Rule 20 read with Section 151 CPC is not maintainable. It is pleaded that defendants No. 4 and 8 have died and in order to avoid to bring on record their legal representatives present application has been filed by plaintiffs. It is further pleaded that both Shamsher and Jagar Nath co-defendants No.4 and 8 have left Shimla long time ago to carry on business in the upper regions of Shimla and their whereabouts are not known since more than 40 years. It is pleaded that plaintiffs have themselves admitted in the plaint that co-defendants namely Shamsher and Jagar Nath have left Shimla long time ago. It is further pleaded that co-defendants No.4 and 8 would be legally presumed to be dead as per Section 108 of the Indian Evidence Act 1872. It is further pleaded that as per report of process server placed on record co-defendants No.4 and 8 have died. It is further pleaded that Additional Registrar (Judicial) on dated 3.4.2013 directed plaintiffs to take steps for bringing on record legal representatives of co-defendants No. 4 and 8. It is further pleaded that present Civil Suit has been filed by plaintiffs against dead persons. It is further pleaded that present application filed by plaintiffs for service of dead persons is not permissible under law. Prayer for dismissal of application filed under Order 5 Rule 20 CPC sought.

3. Court heard learned Advocate appearing on behalf of the applicants/plaintiffs and learned Advocate appearing on behalf of non-applicants/defendants and also perused entire records carefully.

4. Following points arise for determination in the present application.

1. Whether framing of issues are essential in the ends of justice in view of material proposition of fact affirmed by one party and denied by other party upon application filed under Order 5 Rule 20 CPC?.

2. Final Order.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of non-applicants/defendants that death certificates of co-defendants No.4 and 8 are already placed on record and on this ground application filed under Order 5 Rule 20 CPC be dismissed is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that death certificates are not per se admissible and contents of death certificates of Shamsher Chand and Jagar Nath are disputed by the plaintiffs. It is well settled law that documents should be proved by way of primary evidence or by way of secondary evidence as per Indian Evidence Act 1872. Even Photostat copy of death certificate of Jagar Nath placed on record and primary document of death certificate of Jagar Nath not placed on record as

required under Section 61 of Indian Evidence Act 1872. Even permission to prove death of Jagar Nath by way of secondary evidence not sought as required under Indian Evidence Act 1872.

6. Another submission of learned Advocate appearing on behalf of non-applicants/defendants that in view of the report of process server placed on record relating to co-defendants Shamsher Chand and Jagar Nath application filed under Order 5 Rule 20 CPC be dismissed is also rejected for the reason hereinafter mentioned. Court has carefully perused the report of process server. It is proved on record that the report of process server is written in two different inks with two contradictory reports. In one pen ink process server has submitted report that co-defendant No.4 Shamsher and co-defendant No.8 Jagar Nath are not residing at C/o 22, The Mall Shimla HP and in another pen ink process server has submitted report that or co-defendants No.4 and 8 have died long ago. At this stage it is not expedient in the ends of justice to rely upon two contradictory report of process server written with two pen inks. Admittedly the suit property is situated in Urban area number 22 The Mall Shimla process server while submitting his service report relating to service of co-defendants No.4 and 8 relied upon oral statement of Sh Gautam Sood son of contesting co-defendant No.3 Ajay Kumar Sood. Process server did not verify the fact of death of co-defendant No.4 and 8 from ward Commissioner or from any independent person. It is well settled law that issues are to be framed when material proposition of fact is affirmed by one party and denied by other party. See AIR 1994 HP 27 titled Dr.Om Prakash Rawal Vs. Mr.Justice Amrit Lal Bahri. It is well settled law that dead person cannot be served under Order 5 Rule 20 CPC. It is well settled law that only alive person can be served under Order 5 Rule 20 CPC. It is held that framing of issue is essential in the present case in order to decide present application properly and effectively and to impart substantial justice inter se parties in view of fact that material proposition of fact is affirmed by one party and denied by other party. Hence following issues are framed upon application filed under Order 5 Rule 20 CPC.

1. Whether co-defendants No.4 and 8 who are not heard for more than seven years are alive as alleged under Section 108 of Indian Evidence Act 1872?.

....Onus placed upon applicants/plaintiffs.

2. Whether applicants/plaintiffs have no cause of action to file application under Order 5 Rule 20 CPC against co-defendants No.4 and 8 who are dead as alleged?.

...Onus placed upon non-applicants/defendants.

3. Relief.

Point No.2 (Final Order):

7. In view of findings upon point No.1 case be listed for applicants/plaintiffs evidence upon application filed under Order 5 Rule 20 CPC. The date for recording of applicants/plaintiffs evidence upon application filed under Order 5 Rule 20 CPC will be fixed by Additional Registrar Judicial. It is further ordered that statement of process server who has submitted service report relating to service of co-defendants No. 4 and 8 will also be recorded in the ends of justice. It is further ordered that process server will be examined under Order 5 Rule 19 CPC on oath touching his proceedings in the ends of justice. It is further ordered that till recording of entire evidence of both parties application filed under

Order 5 Rule 20 CPC shall remain in abeyance and after recording of entire evidence of both parties same will be disposed of in accordance with law. Ordered accordingly.

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

Bishan Singh alias Bishnoo .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 444 of 2012
Reserved on: May 15, 2015.
Decided on: May 16, 2015.

Indian Penal Code, 1860- Sections 302 and 201 read with Section 34- Deceased had engaged the services of 'B' and other Gorkhas- wife of the deceased told that deceased had not reached his home, although, he had told his mason or labrourers that he was going to his house- a missing report was lodged subsequently- accused got the dead body, a stick, wooden plank with which the dead body was tied and rope recovered – he also gave Nishandehi of the place where he had killed the deceased- Medical Officer stated that it was not possible to opine about the exact cause of death but the possibility of the head injury could not be ruled out- no material was placed on record to show that there was any dispute regarding the payment- there was discrepancy regarding the person who had recorded the statement of the accused under Section 27 of the Indian Evidence Act- danda, wooden plank or rope were not sent for analysis to FSL- no entry was made at the time of taking out the case property for production before the Court- held, that in these circumstances, prosecution version was not proved. (Para-17 to 23)

For the appellant: Mr. Bhupinder Ahuja, Advocate.
For the respondent: Mr. Anup Rattan and Mr. M.A.Khan, Addl. AGs, with Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 24/25.7.2012, rendered by the learned Sessions Judge, Kinnaur at Rampur, H.P. in Sessions Trial No. 01 of 2011, whereby the appellant-accused Bishan Singh (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 302, 201 and 34 IPC alongwith other co-accused namely, Geeta Ram and Bir Bahadur for offences punishable under Section 201 read with Section 34 IPC, has been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- under Section 302 IPC and in default to further undergo simple imprisonment for one year. He was further sentenced to undergo rigorous imprisonment for four years under Section 201 IPC read with section 34 IPC and to pay a fine of Rs. 3000/- and in default to undergo simple imprisonment for six months. Accused Geeta Ram and Bir Bahadur were sentenced to undergo rigorous

imprisonment for four years each and to pay fine of Rs. 3000/- each under Section 201/34 IPC and in default to further undergo simple imprisonment for six months each.

2. The case of the prosecution, in a nut shell, is that Maghu Ram (hereinafter referred to as the deceased), cousin of the complainant had taken the construction work of the house of one Sh. Ganga Dev (PW-4), in village Urni, on contract basis. The deceased had engaged the services of Bishan Singh as mason and other Gorkhas. On 11.8.2010, Sh. Ganga Dev, telephonically informed Smt. Hira Devi, wife of the deceased that Maghu Ram had not reached his house despite the fact that he had told his mason and labourers that he was coming to his house. They started searching him but to no avail. They searched him at Urni where he had taken the work on contract. Even there, neither the deceased was found nor his labourers. Thus, on 26.8.2010, Sh. Shyam Dass, brother of the deceased lodged a missing report at Police Post Tapri. Thereafter, FIR was lodged on 2.9.2010. During investigation, accused Bishan Dass made a disclosure statement under Section 27 of the Evidence Act that he had concealed the dead body of the deceased in a cave and that in this regard he alongwith the co-accused had knowledge. He also gave Nishandehi of the Dogri of one Sh. Anand Singh, situated at village GTalgale where on 11.8.2010, he had allegedly killed the deceased. The site plan was prepared. Thereafter, he took the police to Makhim jungle from where, he got recovered the dead body, concealed in a cave behind bushes. The dead body was identified by Sh. Shiv Ram (complainant) and one Sh. Rattan Dass from the clothes. The photographs of the place of recovery were taken. Inquest papers were prepared. The dead body was subjected to post mortem examination. The dead body was sent to PHC, Urni and from there it was referred to IGMC, Shimla. On 5.9.2010, accused Bishan Dass also made a disclosure statement under Section 27 of the Evidence Act regarding a Danda which he had kept behind his Dera at place Galgale and also to get the same recovered. On the basis of the statement given Nishandehi of the place situated on the backside of the cowshed of Anand Singh and got recovered a Danda. The sketch map was prepared on the spot before sealing it. Fard Nishandehi and site plan of recovery were prepared. Accused Geeta Ram also made a disclosure statement under Section 27 of the Evidence Act that he could get recovered the bali/wooden plank, used in lifting the dead body to the forest which was kept concealed on the lower side of the cowshed of Sh. Anand Singh, of which he alongwith the co-accused had the knowledge. Upon Nishandehi of the place, bali/wooden plank was got recovered. Fard Nishandehi and site plan of recovery were prepared. Bali was taken into possession. Similarly, accused Bir Bahadur made a disclosure statement under Section 27 of the Evidence Act regarding a rope which had been used to tie the dead body with the Bali and that he could get the same recovered from the Dogri of the house of Sh. Jitender in which accused Bir Bahadur was living. he got recovered the rope and in this regard Fard Nishandehi and site plan of recovery were prepared. The blood samplesof the parents of the deceased were also taken for DNA profiling and sent to FSL, Junga alongwith the teeth and bones, preserved during the post mortem examination of the deceased. On completion of the investigation, challan was put up after completing all the codal formalities. Accused Bishan Dass was tried for offences punishable under Section 302, 201 and 34 IPC whereas accused Geeta Ram and Bir Bahadur were tried for offences punishable under Sections 201/34 IPC.

3. The prosecution, in order to prove its case, has examined as many as 13 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution version and pleaded innocence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Bhupinder Ahuja, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 24/25.7.2012.

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

6. PW-1 Shiv Ram, testified that on 11.8.2010, Ganga Dev had informed Hira Devi wife of Maghu Ram deceased that the deceased has not been coming at the site of construction work. Hira Devi told Ganga Dev that he has not come home. Thereafter, they searched Maghu Ram in the relations and other places but his whereabouts were not known. On 26.8.2010, Shyam Dass, brother of the deceased lodged missing report at Police Post Tapri. On 2.9.2010, they came to know that accused Bishan Dass along with other co-accused had killed him. His statement Ext. PW-1/A was recorded by the police. The accused were arrested. The dead body of the deceased was got recovered by the accused from Markami jungle. He identified the dead body. In his cross-examination, he admitted that ASI Ganga Dev had told telephonically to his sister-in-law that Maghu Ram has performed second marriage and has gone to Kinnaur.

7. PW-2 Smt. Hira Devi, is the wife of the deceased. She testified that on 11.9.2010, Ganga Dev informed her that her husband was not attending the construction work of his house. She told him that he has not visited the house. Thereafter, she made a telephonic call to Bishan Singh accused and he told her that Maghu Ram has performed second marriage and has left the place. She searched her husband with her relations and other places but he was not found anywhere. On 26.8.2010, Shyam Dass lodged missing report at P.P. Tapri.

8. PW-3 Surender Singh, deposed that the accused Bishan Singh made disclosure statement under Section 27 of the Indian Evidence Act that he has killed Sh. Maghu Ram and has concealed his body in Makhim forest about which only he, Geeta Ram and Bir bahadur have the knowledge. The statement to this effect was recorded vide Ext. PW-3/A. He signed the same along with Rattan Dass and accused Bishan Singh appended his thumb impression on the same. Thereafter, accused Bishan Singh led the police party to the spot where he had killed Maghu Ram and concealed his dead body for three days in the cow shed. In this regard memo Ext. PW-3/B was prepared. Accused Bishan Singh told that on 14.8.2010, at mid night, he alongwith co-accused Bir Bahadur and Geta Ram had taken the dead body of Maghu Ram from the cow shed and had concealed the same in the cave in Mukami forest. Thereafter, accused Bishan Singh led the police party to the place where he had concealed the dead body of Maghu Ram in the cave and get the same recovered which was identified by Shiv Ram, the relative of deceased. Recovery memo Ext. PW-1/B was prepared. In his cross-examination, he deposed that he went to the Police Post Tapri. 5-6 persons were already present there. The statement of accused Bishan Singh under section 27 of the Evidence Act was recorded by the SHO under the supervision of the Superintendent of Police.

9. PW-4 Ganga Dev, deposed that he had given contract of construction work of his house to Maghu Ram. In April, 2010, he started the construction work of his Dogri/house. Accused Bishan Singh was working as mason and co-accused Geeta Ram and Bir Bahadur as labourers. In the month of August, 2010, when deceased Maghu Ram did

not attend the construction work, he informed his wife that Maghu Ram was not attending the work and asked her as to whether he was at home or not. The accused persons were arrested on 5.9.2010. He was associated in the investigation by the police. During investigation, accused Bishan Singh made disclosure statement that he has killed Maghu Ram with a danda and has concealed the danda about which only he has the knowledge and he can get recovered the same. Statement to this effect was recorded vide Ext. PW-4/A. Accused led the police party to the place where he had kept concealed the danda at place Galgale. He got recovered danda from behind the Dogari of Anand Singh. Sketch was prepared vide memo Ext. PW-4/B. The danda was taken into possession vide memo Ext. PW-4/C. It was put in parcel of cloth and sealed with seal "K". Accused Geeta Ram also made disclosure statement that the plank used for lifting the dead body of deceased by him and Bir Bahadur and Bishan Singh was concealed by him and only he has the knowledge of the same and can get recovered the same. Memo Ext. PW-4/D was prepared to this effect. Thereafter, accused Geeta Ram led the police party to the place where he had concealed the plank/bali and got recovered the same from fencing. It was taken into possession vide memo Ext. PW-4/E. Thereafter, accused Bir Bahadur also made disclosure statement that he has concealed the rope used for tying the dead body in the house of Jitender. The statement was recorded vide memo Ext. PW-4/F. Accused Bir Bahadur led the police party to the place where he had concealed the rope. It was got recovered. Danda Ext. P-2, Wood Ext. P-3, rope Ext. P-4 were produced in the Court during the recording of the statement of PW-4 Ganga Dev. He admitted in his cross-examination that he was receiving complaints that Maghu Ram used to consume liquor. Maghu Ram used to disclose that he has no issue and wanted to perform second marriage.

10. PW-5 Yash Pal, deposed that on 5.9.2010, SHO got deposited with him the case property in case No. 71/2010 dated 2.9.2010. He made the necessary entries in the malkhana register. On 10.9.2010, HC Sandeep Kumar had deposited the long bone of deceased Maghu Ram along with the clothes of deceased which he brought from IGMC, Shimla. The case property was also entered in the malkhana register on 23.9.2010. The SHO PS, deposited two envelopes and the blood samples of deceased Maghu Ram for DNA profiling which were sealed with seal impression "T" and sent to FSL Junga through Const. Chander Mohan.

11. PW-6 Const. Chander Mohan testified that he has carried the case property to FSL, Junga on 23.9.2010.

12. PW-10 Dr. Piyush Kapila, has conducted the post mortem of the dead body and issued post mortem report Ext. PW-10/B. According to him, from the available remains, it was not possible to opine about the exact cause of death by keeping in view the ante mortem fracture of the head. The possibility of the head injury could not be ruled out.

13. PW-11 S.P. Ashok Kumar, testified that the accused were apprehended and brought before him for interrogation. While in custody, accused Bishan Singh made a disclosure statement vide Ext. PW-3/A. The accused Bishan Singh alongwith co-accused took them to the place where he alongwith the co-accused had killed the deceased Maghu Ram and also the place where his dead body was concealed. Spot map was prepared. Dead body was found hidden beneath stones in jungle Makhim. According to him, the house where the deceased was allegedly killed was three storeyed, including the ground floor.

14. PW-12 Dr. Rajeev Sandal, deposed that the body of the deceased maghu Ram was identified by Shiv Ram son of late Sh. Segi Ram. According to him, it was suspected case of murder. The dead body was found in the shape of Skelton. It was referred to the department of Forensic medicines, IGMC, Shimla for expert opinion. The post mortem report is Ext. PW-12/A.

15. PW-13 ASI Ishwar Singh, deposed that he has taken photographs of the spot and also prepared the CD of the spot from where the dead body was got recovered. In his cross-examination, he deposed that the house where the deceased was killed was double sotreyed.

16. PW-15 SI Tejender Kumar, has carried out the investigation. According to him, FIR Ext. PW-15/A was registered on the basis of Ext. PW-1/A. The dead body was recovered on the basis of the disclosure statement made by the accused Bishan Singh. He also got recovered the danda. Accused Geeta Ram also made the disclosure statement that he could get the bali recovered. He got the same recovered. Accused Bir Bahadur also made the disclosure statement that he had concealed the rope in the house of Tejender. He also got the same recovered. He prepared the spot map of the recovery of danda Ext. PW-15/B, Balli Ext. PW-15/C, rope Ext. PW-15/D. In his cross-examination, he deposed that he was present with the Superintendent of Police when statement under Section 27 of the Evidence Act were recorded. The statement of Bishan Singh was recorded by the Superintendent of Police himself. He visited the spot and there was three storeyed house on the spot.

17. The entire case of the prosecution is based on circumstantial evidence. The case of the prosecution, precisely, is that PW-4 Ganga Dev had engaged deceased Maghu Ram as contractor. He did not come for work. PW-4 Ganga Dev made inquiries from the wife of Maghu Ram. She told that he has not come home. Thereafter, the inquiries were made on 11.8.2010. The missing report was lodged by one Shyam Dass on 16.8.2010. Thereafter, the FIR was registered on 2.9.2010.

18. The FIR has to be registered promptly. It is also settled law that the registration of FIR belatedly would not affect the case of the prosecution if the delay has been satisfactorily explained. However, in this case, the deceased Maghu Ram has gone missing from 11.8.2010. The only statement made by PW-1 Shiv Ram and PW-2 Smt. Hira Devi is that inquiries were made from the relatives and other places. The missing report was lodged after about 15 days on 26.8.2010 by brother of deceased Sh. Shyam Dass. The FIR was registered on 2.9.2010. The delay in lodging the FIR has not been explained satisfactorily.

19. According to PW-10 Dr. Piyush Kapila and PW-12 Dr. Rajeev Sandal, the body was in the shape of Skelton. According to PW-10 Dr. Piyush Kapila, from the available remains, it was not possible to opine about the exact cause of death by keeping in view the ante mortem fracture of the head. According to him, the possibility of head injury could not be ruled out. The police has taken the blood samples of the parents of the deceased. These were sent for DNA profiling and the report is Ext. PX. Sh. Leba Ram and Smt. Lacchi Devi were found to be the biological parents of the deceased.

20. The prosecution has not attributed any motive to the accused Bishan Singh. Accused Bishan Singh was employed as mason. There is no material placed on the record by the prosecution that there was any dispute regarding payment or any such issue. Mr.

M.A. Khan, learned Addl. Advocate General, for the State has placed strong reliance upon the disclosure statement made by accused Bishan Singh vide Ext. PW-3/A, whereby the accused has disclosed that he has concealed the dead body in the forest. PW-3 Surinder Singh has stated in his cross-examination that the statement of the accused Bishan Singh under Section 27 of the Indian Evidence Act was recorded by the SHO under the supervision of the Superintendent of Police. However, PW-15 SI Tejender Kumar stated that he was present with the Superintendent of Police when statement under Section 27 of the Evidence Act was recorded. The statement of accused Bishan Singh was recorded by the Superintendent of Police himself. There is variance in the statements of PW-3 Surender Singh and PW-15 SI Tejender Kumar, as to who has recorded the statement of accused Bishan Singh under Section 27 of the Evidence Act.

21. Mr. M.K.Khan, learned Addl. Advocate General for the State has then argued that on the basis of the disclosure statement made by the accused, the danda, bali and rope were recovered. Neither danda or bali nor rope were sent for FSL examination. These were produced at the time of recording the statement of PW-4 Ganga Dev, vide Ext. P-2, P-3 and P-4. There is entry in the malkhana register when these were deposited in the malkhana register, however, there is no entry when danda, bali and rope Ext. P-2, P-3 and P-4, respectively, were taken out for production before the Court. The case property is required to be deposited in the malkhana and the entry is required to be made when it is taken out and re-deposited in the malkhana.

22. According to PW-11 Ashok Kumar and PW-15 SI Tejender Kumar the house where deceased was allegedly killed was three storeyed. However, according to PW-13 ASI Ishwar Singh, who has taken photographs of the house, it was double storeyed only. There is variance in the statement of PW-11 Ashok Kumar, PW-13 ASI Ishwar Singh and PW-15 SI Tejender Kumar, whereby the house was double storeyed or three storeyed. It casts doubt whether it is the same house where the deceased was allegedly killed. Moreover, the statements under Section 27 of the Evidence Act made by the accused are dated 2.9.2010 but according to PW-4 Ganga Dev, the accused were arrested on 5.9.2010. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

23. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 24/25.7.2012, rendered by the learned Sessions Judge, Kinnaur at Rampur, H.P., in Sessions trial No. 01 of 2011, under Sections 302/201/34 IPC is set aside. The accused is acquitted of the charge framed under Section 302/201/34 IPC, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

24. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

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